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Execution of Fiduciary Guarantee by Auction Way

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Abstract

The execution of fiduciary guarantee objects in the event of a debtor in default can be carried out in several ways, one of which is by auction. This study aims to determine and analyze the implementation of the auction in the execution of fiduciary guarantee objects and legal protection for the parties. This study uses the socio-legal method with library research to obtain secondary data related to auctions and field research to obtain primary data with the implementation and legal protection of the parties in the auction of fiduciary guarantees. The concepts and theories used are the concept of auction, fiduciary guarantee, execution, legal protection. The results of the study indicate that the auction of fiduciary guarantee objects is used by creditors in the event that the debtor is in default. Legal protection for the parties is carried out both preventively and repressively.

Keywords: Auction, Fiduciary Guarantee, Execution, Legal Protection

1. Introduction

In various human activities almost always need funds. These funds are needed for productive and consumptive activities. The funds were obtained internally and externally. Funds obtained externally are from other parties, one of which is through loans. In this case, the legal relationship between the parties is based on a loan agreement. In the loan agreement the creditor has a high risk. In financing the collateral becomes a very decisive factor (Fan & Yao, 2017). Therefore the guarantee is very important in the agreement (Calomiris et al., 2017). One of the steps to secure creditors' receivables is to require collateral. (Rona-Tas & Guseva, 2013) Guarantee is an *accessoir* agreement, which is an additional agreement that is agreed to back up the certainty of counter-achievement that was agreed upon in the main agreement. Because the guarantee is *dwingen recht*, the guarantee law that regulates the main points of the *accessoir* agreement must be able to provide certainty for the realization of the counter-achievement (Heriawanto, 2019).

One of the guarantees that are widely used in people's lives is fiduciary guarantees. (Paparang, 2014) "Fiducia is the transfer of ownership rights to an object on the basis of trust provided that the object whose ownership rights are transferred remains in the control of the owner of the object" (Article 1 point 1 of Law No. 42 of 1999 concerning Fiduciary Guarantees (Fiduciary Guarantee Law)).

Article 1 number 2 of the Fiduciary Guarantee Law states that:

Fiduciary security is a security right on movable objects, both tangible and intangible and immovable objects, especially buildings that cannot be encumbered with mortgage rights as referred to in Law no. 4 of 1999 concerning Mortgage which remains in the control of the Fiduciary Giver, as collateral for the repayment of the debt, which gives priority to the Fiduciary Recipient over other creditors."

From the above understanding, it can be seen that the fiduciary guarantee is a guarantee right. Therefore, its function is to ensure the security of creditors' receivables. Fiduciary guarantees provide great benefits for the parties. For creditors, fiduciary guarantees can guarantee the security of their receivables. For debtors, with fiduciary guarantees, they can obtain funds from financial institutions while retaining control of the collateral object. Thus the object can still be used for daily purposes (Badriyah, 2015).

One of the main characteristics of fiduciary guarantees is the ease and certainty of their execution. This is because the fiduciary guarantee is collateral. In the event that the debtor defaults, the creditor can sell the object of the fiduciary guarantee without filing a lawsuit to the court. In Article 29 Paragraph (1) of the Fiduciary Guarantee Law it is stated that "If the debtor or Fiduciary Provider is in breach of contract, the execution of the Fiduciary Guarantee object can be carried out by: a. implementation of the executorial title contained in the Fiduciary Guarantee Certificate. b. the sale of the object of the Fiduciary Guarantee under the authority of the Fiduciary Recipient through a public auction as well as taking the settlement of his receivables from the proceeds of the sale; c. underhand sales made based on an agreement between the Giver and the Fiduciary Recipient if in this way the highest price can be obtained that benefits the parties."

The first and second methods are carried out by auction, while the third method is carried out by selling under the hand. Thus, the auction of the object of a fiduciary guarantee can be carried out in the event that the debtor is in default. In Article 1 Number 1 of the Regulation of the Minister of Finance of the Republic of Indonesia Number 213/PMK.06/2020 concerning Instructions for Implementation of Auctions, it is stated that "An auction is a sale of goods that are open to the public with a written and/or verbal price offer that is increasing or decreasing to reach a price. highest, preceded by the Announcement of the Auction." In the auction as an effort to execute fiduciary guarantees in the event that the debtor defaults, there is a risk for the auction winner. Legal protection is needed for the parties, one of which is the auction winner.

2. Research Problem

Based on the description above, in this study several issues were raised as follows:

1. Why is the object of fiduciary guarantee executed through an auction?
2. How is the legal protection for the winner of the fiduciary guarantee execution auction?

3. Material and Method

3.1. Material

There are two kinds of guarantees, namely general guarantees and special guarantees (Articles 1131 and 1132 of the Civil Code). Special guarantees consist of personal guarantees and material guarantees. Fiduciary guarantee is one of the material guarantees. (Suharto et al., 2020)

From the understanding contained in Article 1 of the Fiduciary Guarantee Act, it can be seen that there are several elements contained in the fiduciary guarantee, namely as follows:

1. Fiduciary guarantee is a guarantee right.
2. In a fiduciary guarantee, there is a *constitutum possessorium* surrender, namely submission by continuing to control the object
3. Fiduciary guarantees are based on the principle of trust
4. In a fiduciary guarantee, there is a transfer of ownership rights to objects from the fiduciary giver to the fiduciary recipient
5. Fiduciary guarantees give priority to creditors.

As collateral, if the debtor defaults, the creditor can execute the object of the fiduciary guarantee. One of them is by auction. As mentioned in the introduction, the sale of fiduciary guarantee objects is regulated in Article 29 of the Fiduciary Guarantee Law. One way to execute the object of a fiduciary guarantee is by auction. Auctions are carried out in the sale of fiduciary guarantee objects based on the executorial title that exists in fiduciary guarantees as well as sales of fiduciary guarantee objects based on the power of the fiduciary recipient to sell fiduciary guarantee objects.

In the context of executing the Fiduciary Guarantee, the Fiduciary Giver is obliged to submit the object which is the object of the Fiduciary Guarantee (Article 30 of the Fiduciary Guarantee Law).

The Fiduciary Guarantee Execution Auction is one of the execution auctions as referred to in Article 3 letter I of the Regulation of the Minister of Finance concerning Auction Implementation Guidelines.

4. Research Method

The research method used is socio legal. In this case, literature research and field research will be carried out to find out and analyze the execution of fiduciary guarantees through auctions as well as legal protection for buyers of fiduciary guarantee objects in execution through auctions. Literature research was conducted to obtain secondary data using literature study techniques. Field research was conducted to obtain primary data. Interviews were conducted with informants, namely the Ministry of Law and Human Rights and the National Legal Development Agency. Data testing is done by triangulation technique.

5. Discussion

5.1. Background Execution of Fiduciary Guarantee Objects by Auction

In a loan agreement to obtain funds from other parties, it will lead to an agreement between the borrower and the party lending the funds. In this engagement, the debtor must repay the loan in accordance with the agreement. If the agreement is carried out as agreed, it will not cause problems for the parties. Conversely, if the debtor does not carry out his obligations, it will cause problems. In the event that the borrower's obligations are not fulfilled, a default will occur.

In order for creditors' receivables to be safe, creditors generally need collateral. Collateral can prevent a high risk of default on the borrower (Zhang et al., 2022). Article 1131 of the Civil Code states that "all debtor assets become collateral for all debtor engagements to creditors." From these provisions, it can be seen that all debtor engagements are guaranteed by general guarantees, namely all property belonging to the debtor. In this case, the creditor's position as a concurrent creditor, so that he does not get legal protection. Therefore, creditors usually ask for special guarantees. One of them is collateral in the form of fiduciary guarantees. The position of the creditor in this case is the preferred creditor. In Article 1132 of the Civil Code it is stated that "all property belonging to the debtor as stated in Article 1131 of the Civil Code is a mutual guarantee for creditors and the distribution is balanced according to the size of their respective receivables, unless there is a reason to prioritize one receivable over another.

In an agreement guaranteed by a fiduciary guarantee, if the debtor defaults, then the creditor does not need to file a lawsuit to the court, but can sell the object of the guarantee. In the event that there is a fiduciary guarantee, the creditor's position is also different, not as a concurrent creditor but as a preferred creditor (Achmad Yusuf Sutarjo, 2018).

As a consequence of the existence of collateral, if the debtor defaults, the creditor can sell the object of the guarantee. Likewise, in an agreement that is guaranteed by a fiduciary guarantee, in the event of a debtor's default, the creditor can sell the object of the fiduciary guarantee to pay off the creditor's receivables.

Based on Article 29 of the Fiduciary Guarantee Law, the sale of the object of the Fiduciary Guarantee can be carried out in the following ways:

- a. execution of the executorial title by the Fiduciary Recipient;
- b. sale of Objects that become the object of Fiduciary Guarantee on the authority of the Fiduciary Recipient himself through a public auction and take the settlement of his receivables from the proceeds of the sale;
- c. underhand sales made based on an agreement between the Giver and the Fiduciary Recipient if in this way the highest price can be obtained that benefits the parties.

Thus, the sale of the object of a fiduciary guarantee in the event the debtor is in default can be carried out by auction or by selling under the hands. The execution of the fiduciary guarantee is based on the executorial title as well as on the authority of the fiduciary recipient to sell the object of the fiduciary guarantee if the debtor defaults through an auction.

The results of the study indicate that the default settlement process carried out by financial institutions generally uses several methods, namely through: 1) a direct approach; 2) Giving warning letters; 3) Novation; and 4) confiscation and auction of collateral objects (Fajri, 2021). Execution of the object of fiduciary security through auction is usually carried out as the last alternative for settlement of default after other efforts have failed.

5.2. Legal Protection for Buyers of Fiduciary Guarantee Objects in Execution by Auction

The Bidder who has been ratified as a Buyer is fully responsible for the settlement of the obligation to pay the auction and other official fees based on the laws and regulations, even though in the bidding he acts as the proxy of a person, company, or legal entity/business entity. The buyer who does not fulfill the obligation to pay the auction in accordance with the provisions/default, then on the next working day his ratification as a Buyer is canceled in writing by the Auction Officer, without regard to the provisions as referred to in Article 1266 and Article 1267 of the Civil Code and can be sued for compensation by the Seller.

The buyer is not allowed to take the goods he bought before fulfilling the auction payment obligations. If the Buyer violates this provision, it is considered to have committed a crime that can be prosecuted by the authorities. The goods that have been sold at this auction are the rights and responsibilities of the Buyer and must immediately take care of the goods. The buyer will be given a Minutes of Auction Quotation for the purpose of renaming after showing a receipt for payment of auction payment.

The legal protection of the buyer of the object of the fiduciary guarantee in the context of carrying out the execution is carried out in a preventive or repressive manner. Preventively, by arranging the auction of the execution of fiduciary guarantees in the event that the debtor defaults, namely in Articles 29-34 of the Fiduciary Guarantee Law as well as in the regulation of the Minister of Finance regarding Auction Implementation Guidelines.

Article 29 of the Fiduciary Guarantee Law gives the fiduciary recipient the right to execute the fiduciary guarantee if the debtor defaults. One way is by auction. Furthermore, in Article 30 of the Fiduciary Guarantee Law, it is expressly stated that "in the context of carrying out the execution of fiduciary guarantees, the fiduciary giver is obliged to submit the object of the fiduciary guarantee." If the fiduciary provider does not want to submit voluntarily, the creditor can ask for help from the authorities. This is because the object of the fiduciary guarantee is in the control of the fiduciary giver. By submitting the object of the fiduciary guarantee in the execution, the buyer of the object of the fiduciary guarantee object will obtain legal protection.

Article 31 of the Fiduciary Guarantee Law states that "In the event that the object that is the object of the Fiduciary Guarantee consists of trading objects or securities that can be sold on the market or on the stock exchange, the sale can be made at those places in accordance with the applicable laws and regulations." Furthermore, in Article 32 of the Fiduciary Guarantee Law it is stated that "Any promise to carry out the execution of the object that is the object of the Fiduciary Guarantee in a manner that is contrary to the provisions as referred to in Article 29 and Article 31, is null and void by law." Article 33 Any promise that authorizes the

Fiduciary Giver to own the object which is the object of the Fiduciary Guarantee if the debtor is in breach of contract, is null and void by law. This is to provide legal protection to the fiduciary giver, because there is a possibility that the value of the object of the fiduciary guarantee object is much higher than the debtor's debt. In this regard, Article 34 Paragraph (1) of the Fiduciary Guarantee Law states that "In the event that the result of the execution exceeds the value of the guarantee, the Fiduciary Recipient is obliged to return the excess to the Fiduciary Giver." On the other hand, to protect fiduciary creditors, Article 34 Paragraph (2) stipulates that "If the results of the execution are not sufficient to pay off the debt, the debtor is still responsible for the outstanding debt." In this case, even though the debt has not been paid off, with the execution of the fiduciary guarantee, the fiduciary guarantee has ended. This is a form of legal protection for buyers of fiduciary guarantee objects through the execution of fiduciary guarantees. One of the executions is through the auction of fiduciary guarantee objects.

Repressive legal protection is legal protection against risks that arise after the auction, auction buyers can take legal action against *verzet*, *deden verzet* and file a claim for compensation for the auction buyer to the seller or creditor to the Court.

6. Conclusion

1. The execution of the object of fiduciary security through auction is carried out in the event that the debtor is in default. This auction is carried out in terms of the execution of the fiduciary guarantee object by basing the executorial title on the fiduciary guarantee certificate or based on the power of the fiduciary recipient to sell the fiduciary guarantee object.
2. There are two kinds of legal protection for buyers of fiduciary guarantee objects in the execution of fiduciary guarantees, namely preventive and repressive legal protection.

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