



The Function of the Power of Attorney Imposes Mortgage Rights in Terms of the provisions of Article 15 of Law Number 4 of 1996

Mira Novana Ardani

Hukum

Universitas Bangka Belitung, Jl. Kampus Terpadu Balunijuk, Kecamatan Merawang, Kabupaten Bangka, Provinsi Bangka Belitung 33172, Indonesia

Email : miranovana@yahoo.com

Abstract

The granting of credit guarantees should be done directly by the grantor of the mortgage, for something because it can not be present itself, it must appoint the other party as its proxy, with SKMHT in the form of an authentic deed. This research uses empirical / sociological juridical approach. To carry out the SKMHT function, actually any credit agreement is not always made SKMHT. There are legal consequences if after making SKMHT not followed by making APHT

Keywords: Credit; SKMHT; APHT.

A. Introduction

Indonesia is a country rich in natural resources. In addition, the population in Indonesia experienced very rapid growth. In order to provide prosperity for the people of Indonesia in particular, then of course the Government must make an effort. One such effort is to carry out development in various fields. Development carried out as in the economic field. One way to improve living standards is to develop the economy and trade. To develop the economy, funds are needed that are not small. Today the obstacles and difficulties that arise precisely with respect to the procurement of capital.¹

There is a capital needed that requires it in a very large amount, so that the supply does not have to always be provided by who needs it for development, but can be assisted by other parties. One of the institutions that have businesses in the economy, such as providing credit, is a bank. The definition of a bank according to Law Number 10 of 1998 concerning Amendment to Law Number 7 of 1992 concerning Banking in Article 1 states that a bank is a business entity that collects funds from the public in the form of deposits and distributes them to the public in the form of credit or other forms in order to improve the lives of many people.

One of the ways banks help provide capital is by credit. Credit as explained in Article 1 of Law Number 10 of 1998 concerning Amendment to Law Number 7 of 1992 concerning banking, namely the provision of money or bills which can be likened to it, based on approval or a loan agreement between the bank and another party that requires the borrower to repay the debt after a certain period of time with interest. For the sake of legal certainty and in order to get legal protection, the loan

¹ 1 Eugenia Liliawati Muljono, Amin Widjaja Tunggal, *Eksekusi Grosse Akta Hipotek Oleh Bank*, Jakarta: Rineka Cipta, 1996, hlm.v

application is written in the form of a written agreement. This agreement according to Article 1867 of the Civil Code can be done authentically or underhanded. In general, which is used by banking institutions to bind the credit agreement in the form of an authentic deed. The authentic deed described in Article 1868 of the Civil Code has the meaning of a deed which is in the form determined by the law, which is made by or in front of public officials in power for that at the place where the certificate is made.

Likewise for banks in making their credit agreements before an authorized official, namely a notary. Notary is a public official who is authorized to make an authentic deed and has other authority as referred to in the notary position law or based on other laws. This is stated in Article 1 of Law Number 2 of 2014. Notary authority as contained in Article 15 of Law Number 2 of 2014 such as making authentic deeds regarding all deeds, agreements and stipulations required by statutory regulations and or that is desired by the parties concerned to be stated in an authentic deed. In addition, the notary is also authorized to record underhanded documents by registering in a special book.

In the activities of financial institutions that provide credit facilities, the existence of goods to guarantee the payment of debtor debt is a very important element (although not the most important thing). Because a credit that does not have sufficient collateral contains a great danger. The debtor's financial situation may unexpectedly fall into a serious situation, so that the debtor can no longer afford to pay his debts. If that happens, then the collateral must be sold. If the sale proceeds are not enough to pay off the debtor's debt, then the creditor is disadvantaged.²

Land is one of the immovable property which is in high demand by various parties in terms of investment. Likewise for the provision of debt collateral goods. The reason why land is in great demand by many people, one of them is financial institutions, because land has a high economic value, land prices continue to increase, and rights can be transferred to other parties. Not all soils have these characteristics or conditions. Land that is difficult to sell, prices continue to decline, is easily obscured, does not have proof of rights and cannot be encumbered with mortgage rights. That is, usually not accepted by creditors as collateral for debt payments. If it is accepted, then usually only as an additional guarantee³

In order for land as a credit guarantee to fulfill the will of the creditor, the land must be burdened with collateral rights. The guarantee rights that burden the land according to Law Number 5 of 1960 concerning the Basic Agrarian Law are called mortgage rights⁴The debt guarantee institution for land, namely the mortgage, is regulated in Law Number 4 of 1996 concerning mortgage rights and objects related to land. If someone is going to apply for a loan with a land guarantee, and use a mortgage security guarantee institution, then they have to go through what is called the encumbrance stage. The encumbrance stage consists of two stages, namely the granting phase, which is carried out in the presence of a Land Deed Making Officer or

² Effendi Perangin, *Praktek Penggunaan Tanah Sebagai Jaminan Kredit*, Jakarta:Rajawali Pers,1987,hlm.x

³ *Ibid*, hlm.IX

⁴ *Ibid*, hlm.X

abbreviated as PPAT, and the registration stage carried out by the Head of the Land Office. 5⁵

At the stage of its granting, the principle that must be obeyed is that it must be attended and carried out by the person who gives the mortgage right as the party authorized to carry out legal actions to charge the mortgage of the object being used as collateral. Only if absolutely necessary and unable, his presence to provide mortgage rights and sign the deed granting mortgage rights can be authorized to other parties.⁶ If the creditor cannot be present during the granting of the mortgage right, then the granting of the power of attorney must be done before a notary or PPAT, with an authentic deed called a power of attorney imposing the security right.⁷ This is regulated in the provision of Article 15 paragraph 1 of Law Number 4 of 1996 concerning dependents on land along with objects related to land. Starting from this, the problems that arise in this paper include, is each credit agreement always made a power of attorney to charge mortgage rights? What are the legal consequences if after the power of attorney is made, the burden of the mortgage is not followed by the drafting of the mortgage?

B. Research Methods

This study uses an empirical or sociological juridical approach to law, which is to deepen and broaden the object under study, because in this study will be seen how the operation of law in society and how law interacts with society. In this research, it will be studied in theory (law in book), and also studied how it happens in the community (law in action). Law is not only seen as a normative entity that is independent or isoteric, but rather must be seen as a real part of the social system relating to other social variables,⁸ so that the function of the power of attorney imposes a mortgage right in terms of the provisions of article 15 of Law Number 14 of 1996, in addition to the need to be examined from its legal aspects as well as its empirical reality in society.

The specification of this study uses descriptive analytical research, which seeks to describe in detail how the implementation of regulations relating to the policy regarding the function of the power of attorney imposes a mortgage right in accordance with the provisions of article 15 of Law Number 4 of 1996, without making hypotheses and statistical calculations .

The type of data used is primary data, i.e. the data obtained in the field as the main data.⁹ In addition, the use of secondary data is also used, which is obtained through library research, documentary studies and legal rules in the legislation that serves to support the completeness of primary data.¹⁰

⁵ Boedi Harsono, *Hukum Agraria Indonesia, Sejarah Pembentukan Undang-Undang Pokok Agraria Isi Dan Pelaksanaannya*, Jakarta:Djambatan,2008,hlm.430

⁶ *Ibid*,hlm.441

⁷ *Ibid* Soerjono

⁸ Soekanto, *Pendekatan Sosiologi Terhadap Hukum*, Jakarta:Bina Aksara 1988, hlm.9

⁹ Ronny Hanitijo Soemitro, *Metodologi Penelitian Dan Jurimetri*, Ghalia, Jakarta, 1992, hal.52

¹⁰ *Op.Cit*,hlm.9

In the data collection method, secondary data in this study are in the form of primary legal materials which are binding legal materials, namely legislation, especially those relating to the SKMHT function in terms of the provisions of Article 15 of Law Number 4 of 1996, secondary legal materials that provide explanations regarding primary legal materials, including the opinions of scholars, land news magazines, books of scientific works of scholars, and research results that discuss matters relating to the subject of this research. In addition, tertiary legal materials are also used, namely legal materials that support and provide explanations for primary and secondary legal materials, such as dictionaries language Indonesia, enhanced spelling, and English dictionary.

After field research data and library research have been collected, then an analysis is carried out which is related to the existing problems and then conclusions can be drawn objectively. In connection with the stated research objectives, the quantitative and qualitative analysis attempts to relate the facts existing with various applicable regulations so that it is known how the function of SKMHT in terms of the provisions of Article 15 of Law Number 4 of 1996.

Research aims to reveal the truth systematically, methodologically, and consistently.¹¹ In research on the function of SKMHT in terms of Article 15 of Law Number 4 of 1996, the methodology used is the methodology of legal research, because the subject matter under study is a legal problem.

1. Theoretical framework

The power of attorney imposing a mortgage right can be used if at the stage of giving the mortgage right the giver of the mortgage cannot be present to provide the mortgage right and sign the APHT. In granting such power of attorney, it must be done in the presence of a notary or PPAT. If we look at the provisions contained in Article 15 paragraph 1 of the UUHT, it is said that SKMHT must be made by notarial deed or PPAT deed by fulfilling the requirements.

The type and form of deed that can be made by PPAT, one of which is to make a Power of Attorney Imposing Mortgage Rights or abbreviated as SKMHT, which is a deed of granting power of attorney that is used in making the Deed of Granting Mortgage Rights or abbreviated as APHT. This is described in Article 95 paragraph 2 of the Regulation of the Minister of Agrarian Affairs / Head of the National Land Agency Number 3 of 1997 concerning Provisions for Implementing Government Regulation Number 24 of 1997 concerning land registration.

The granting of power of attorney must be done by the creditor himself, while the deed of attorney must be made by a notary or PPAT in the form of SKMHT whose form is provided by the National Land Agency. In addition to the legality of SKMHT there are restrictions and requirements set forth in Article 15 paragraph 1 of the UUHT, which includes.¹²

- a. It is forbidden that SKMHT contains the power to carry out other legal actions rather than impose mortgage rights.
- b. Does not contain the power of substitution. Substitution is the replacement of a power of attorney through a transfer, until there is a new power of attorney. Not

¹¹ Soerjono Soekanto dan Sri Mamudji, *Penelitian Hukum Normatif Suatu Tinjauan Singkat*, Jakarta:Raja Grafindo Persada,2001, hlm.1

¹² *Op.cit.*, Boedi Harsono, hlm.442

a substitute, because there is no replacement of the authorized person, if the authorized person assigns another party on his behalf to carry out the power of attorney.

- c. Must clearly state the object of the mortgage, the amount of debt and the name and identity of the creditor, the name and identity of the debtor if the debtor is not the creditor.

Although there is a prohibition in the SKMHT containing the power to carry out other legal actions rather than imposing the mortgage right, but in Article 11 paragraph 2 of the UUHT, there are promises that are not prohibited from giving power of attorney.

In the explanation of Article 15 paragraph 1 of the UUHT, it is said that if these requirements are not fulfilled, the relevant SKMHT is null and void, which means that the power of attorney in question cannot be used as the basis for drafting the deed of mortgage. In addition, the PPAT is obliged to reject the request to make the deed of granting mortgages, if the SKMHT is not made by the grantor or does not fulfill the requirements.

The power to grant the mortgage is irrevocable and cannot be terminated by any reason whatsoever, even if the mortgagor dies. The authorization of course expires after it has been implemented or has expired. The existence of this provision in order to protect the interests of creditors, as the party who is generally given the power to charge the guaranteed dependents.¹³

In using SKMHT there is a time limit. Regarding the rules, we can find them in Article 15 paragraph 3 and paragraph 4 of the UUHT. Paragraph 3 contains the SKMHT regarding land rights that have been registered must be followed by making the granting of mortgage rights no later than one month after being granted.

It is different from what is contained in paragraph 4, namely SKMHT regarding land rights that have not been registered must be followed by making APHT no later than three months after being granted. The provisions apply to the object of mortgage rights in the form of land rights originating from the conversion of old rights that have fulfilled the requirements to be registered, but the registration has not been done, granting of mortgage rights is done in conjunction with the application for registration of the relevant land rights. This is explained in Article 10 paragraph 3 of the UUHT.

The time period is set longer because for the purposes of making the APHT, it is necessary to submit more documents to the PPAT, because to obtain these letters requires time. As explained in the explanation of Article 15 paragraph 4, for example a certificate of land history, a certificate from the Land Office that the land concerned has not been certified, and if the evidence of ownership of the land is still in the name of a deceased person, a letter of inheritance and letter of inheritance.

Another reason why it takes longer if the object of the mortgage rights in the form of land rights has not yet been registered, is that the application of APHT on unregistered land rights must be done together with the application for registration of the relevant land rights, which must first be completed.

¹³ *Ibid*, hlm.443

The provisions contained in Article 15 paragraph 4 of the UUHT also apply to land that has been certified, but has not been registered in the name of the creditor as the holder of the new land, that is, land that has not been registered for transfer of rights, the solution thereof, or a merger thereof. The determination of the three-month period is not intended to complete the registration of the relevant land rights, but to accelerate the realization of the APHT development. Completion of the registration of the right itself, which generally requires more than three months if the ownership rights of the former customary property rights are carried out after the APHT is made. So when the APHT of the former Customary Property Rights was made, there was no need for a certificate.¹⁴

C. Results and Discussion

1. Every Credit Agreement Is Always Made or Not Created Power of Attorney Imposing Mortgage Rights

Banks and other financial institutions function among other things to provide credit. Credit is a facility to obtain money loans. Loans cause debt to arise, which must be paid by the debtor according to the conditions set out in a loan agreement or an agreement to open a credit.¹⁵ Someone who wants to apply for credit to the bank for example, then he must meet the requirements submitted. Such requirements such as the amount of debt submitted with the existing collateral must be higher score the guarantee. The relation of the guarantee is in the form of land, so it also has its own criteria. Each the institution banks have various criteria. The criteria for land are used as collateral between banks onewith others not uniform. In determining the criteria for land used as collateral for debt, of course with the aim that if the debtor cannot repay his debt, the bank can auction off the object which is used as collateral for the debt without loss.

After assessing the collateral provided, adjusted for the amount of debt submitted, and the credit application has been approved, the bank will record it in the notary. Ideally, all debts whose collateral is in the form of land rights, then to ensure legal certainty is burdened with mortgage rights. Dependents were chosen because they have special features. The definition of mortgage rights contained in the UUHT is the right to guarantee land for paying off certain debts, which gives priority to certain creditors over other creditors. In a sense, that if the debtor fails to promise, the creditor holding the Underwriting Right has the right to sell through the public auction of land which is guaranteed as a condition according to the relevant laws and regulations, with prior rights over other creditors.

Based on the information submitted by the bank, the agreement made to record the occurrence of the debt receivable is the credit agreement. This is the main agreement before the next step, because there is a mortgage right after the debt. This is in line with the fact that mortgage rights are granted to guarantee the payment of creditors' receivables. It is said that, the security rights are the accessoir for a certain receivable. Birth, existence, transfer, execution and write-off of a mortgage are determined by the existence, transfer and deletion of guaranteed receivables. This is

¹⁴ *Ibid*, hlm.444

¹⁵ *Op.cit*, Effendi Perangin, hlm.IX

the essence of mortgage. Without a certain receivable that is clearly guaranteed repayment, according to the law there will be no mortgage.¹⁶

The granting of the mortgage right is preceded by a promise to provide the mortgage right as a guarantee of the promised loan repayment. The promise must be stated in and is an inseparable part of the loan agreement or other agreement. The agreement must be in written form, although it can also be a deed under the hand, it can also be authentic.¹⁷

After the credit agreement is made, according to the informant from the bank, PPAT will make the SKMHT. In this stage why SKMHT is made directly because in general the debtor is not present. Therefore, giving his power of attorney to the bank. At the stage of granting mortgages, SKMHT is often made just in case if the debtor is unable to attend legal action to impose mortgages on the object as collateral.

The provisions contained in the UUHT explanation, that in principle in providing mortgage rights, the mortgage right must be present before the PPAT. If for some reason it cannot be present on its own, it must appoint another party as its proxy, with SKMHT, in the form of an authentic deed. So, actually in the stage of granting mortgage rights, the SKMHT should not be made, because SKMHT is only made if the giver of the mortgage right cannot be present alone.

If SKMHT is still being made during the granting of the mortgage right, for example without confirmation to the mortgage right, this is of course not in accordance with the rules that have been enacted. In proper conditions, the debtor must still be given confirmation that his presence is required for the granting of mortgage rights at the PPAT. Then if the debtor declares unable to attend, a SKMHT is made. In making SKMHT, of course there are costs incurred for the services of officials who make them.

2. The Legal Consequences After the SKMHT was made was not followed by the making of Deed of Granting Mortgage Rights

SKMHT there is a time period that limits it. For land rights that have been registered must be followed by granting mortgages not later than one month, and for land rights that are not yet registered must be followed by making the deed of granting mortgages no later than three months after being granted. This is explained in Article 15 paragraphs 3 and 4 of the UUHT.

Explanation given in the UUHT, at the stage of granting mortgage rights by the mortgage right to the creditor, the mortgage right is not yet born. The mortgage is only born when it is recorded in the land book at the Land Office. Therefore, certainty regarding the registration of the mortgage is very important for creditors.

The certainty is said to be important for creditors, because the position of creditors will get privileges compared to other creditors, after the mortgage is born. In addition, certainty is very important for creditors because it will rank in relation to other creditors who are also holders of mortgage rights, with the same land as collateral.

It is necessary to pay attention to the period of time contained in the SKMHT, because if the time period has expired and in this case has not been followed by the

¹⁶ *Op.cit*, Boedi Harsono, hlm.420

¹⁷ *Ibid*, hlm.432

making of the APHT, then a new SKMHT must be made. The provision of the time limit for the validity of the SKMHT has the intention to prevent a protracted time of implementation of its power of attorney. This was stated in the explanation of Article 15 paragraph 6 of the UUHT. In practice, there are those who do SKMHT making not directly followed by making APHT. This is certainly very detrimental especially for the debtor, both in terms of the economy, and time.

The provisions contained in Article 13 UUHT paragraph 2, namely no later than seven working days after the signing of the APHT, the PPAT is required to send the APHT and other necessary markers to the Land Office. This is also strengthened by the provisions contained in the Regulation of the Minister of Agrarian Affairs / Head of the National Land Agency Number 3 of 1997 concerning the provisions of the implementation of Government Regulation Number 24 of 1997 concerning Land Registration, both in Article 114, Article 115, Article 117, for the registration of rights dependents whose objects are land rights or ownership rights to apartment units that have been registered in the name of the provider of mortgage rights, for registration of mortgage rights, the object of which is in the form of land rights or ownership rights in the unit of flats that have been registered but not yet in the name of the creditor and obtained by the creditor due to the transfer of rights through inheritance or transfer of rights, for registration of the mortgage rights, the object of which is rights to land that has not been registered, the PPAT that makes its APHT must not later than seven working days after signing the APHT submit to the Land Office the required documents. After that, Article 119 of the UUHT states that, within seven working days after the registration of the mortgage is made, the Kepala Land Office issues a certificate of mortgage. for registration of mortgage rights whose object is in the form of unregistered land rights, the PPAT which makes the APHT must be no later than seven working days after signing the APHT submitting to the Land Office the required documents. After that, Article 119 of the UUHT states that, within seven working days after the registration of the mortgage is made, the Kepala Land Office issues a certificate of mortgage. for registration of mortgage rights whose object is in the form of unregistered land rights, the PPAT which makes the APHT must be no later than seven working days after signing the APHT submitting to the Land Office the required documents. After that, Article 119 of the UUHT states that, within seven working days after the registration of the mortgage is made, the Kepala Land Office issues a certificate of mortgage.

If the SKMHT takes too long then the APHT is not made, then there are legal consequences. These provisions are regulated in Article 15 paragraph 6 of the UUHT, that SKMHT which is not followed by APHT within the stipulated time, is null and void by law. In fact, for the birth of mortgage rights must take place in addition to the encumbrance stage, as well as the registration stage at the Land Office. If from the stage of granting mortgage rights can not be followed by making APHT, then the next stage is registration at the Land Office can not be done. This will result in the status of the creditor to be a concurrent creditor, that is, he cannot have the privilege in terms of getting his debt paid off earlier than other creditors, and the distribution is even.¹⁸

¹⁸ *Ibid*, hlm.417

In the case of certain projects, namely types of small business credit, which are regulated in a Decree of the Board of Directors of Bank Indonesia dated May 29, 1993 Number 26/24 / KEP / Dir, other time limits are stipulated by the Regulation of the Minister of Agrarian Affairs / Head of the National Land Agency Number 4 of 1996 concerning setting deadlines for the use of power of attorney imposes mortgage rights to guarantee the repayment of certain credits. This regulation is to carry out what is mandated by Article 15 paragraph 5 of the UUHT, and is an exception to the provisions contained in Article 15 paragraphs 2 and 3 of the UUHT.

D. Conclusion

Based on the description above, it can be concluded as follows:

- a. In principle, in providing mortgage rights, the mortgage rights must be present before the PPAT. If for some reason it cannot be present alone, it must appoint another party as its proxy, with SKMHT, in the form of an authentic deed. So, actually in the stage of granting mortgage rights, the SKMHT should not be made, because SKMHT is only made if the giver of the mortgage right cannot be present alone.
- b. If during implementation at the granting of the mortgage rights the grantor cannot be present, and made for the SKMHT, but not followed by the making of the APHT, except as stipulated by the Regulation of the Minister of Agrarian Affairs / Head of the National Land Agency Number 4 of 1996 concerning the stipulation of the time limit for use the power of attorney imposes a mortgage to guarantee the repayment of certain credits, then it has legal consequences ie null and void. So this can result in debtor debt not using mortgage rights institutions. As a result, creditors do not have the privilege in terms of repayment of their receivables compared to other creditors.

Reference

Effendi Perangin, 1987, *Praktek Penggunaan Tanah Sebagai Jaminan Kredit*, Jakarta, Rajawali Pers
Hanitijo, Ronny, Soemitro, 1992, *Metodologi Penelitian Dan Jurimetri*, Jakarta, Ghalia
Harsono, Boedi, *Hukum Agraria Indonesia, 2008, Sejarah Pembentukan Undang-Undang Pokok Agraria Isi Dan Pelaksanaannya*, Jakarta, Djambatan
Liliawati, Eugenia, Muljono, dan Widjaja, Amin, Tunggal, 1996, *Eksekusi Grosse Akta Hipotek Oleh Bank*, Jakarta, Rineka Cipta
Soekanto, Soerjono, *Pendekatan Sosiologi Terhadap Hukum*, 1988, Jakarta, Bina Aksara
Soekanto, Soerjono dan Mamudji, Sri, 2001, *Penelitian Hukum Normatif Suatu Tinjauan Singkat*, Jakarta, Raja Grafindo Persada

Constitution

Undang-Undang Nomor 5 Tahun 1960 tentang Undang-Undang Pokok Agraria
Undang-Undang Nomor 4 Tahun 1996 tentang Hak Tanggungan Atas Tanah Beserta Benda-Benda yang Berkaitan Dengan Tanah
Undang-Undang Nomor 10 Tahun 1998 tentang Perubahan Atas Undang- Undang Nomor 7 Tahun 1992 tentang Perbankan
Undang-Undang Nomor 2 Tahun 2014 tentang Perubahan Atas Undang- Undang Nomor 30 Tahun 2004 tentang Jabatan Notaris

Ministerial regulation

Peraturan Menteri Negara Agraria/Kepala Badan Pertanahan Nasional Nomor 4 Tahun 1996 tentang Penetapan Batas waktu Penggunaan Surat Kuasa Membebaskan Hak Tanggungan Untuk Menjamin Pelunasan Kredit- Kredit Tertentu

Peraturan Menteri Negara Agraria/Kepala Badan Pertanahan Nasional Nomor 3 Tahun 1997 tentang Ketantuan Pelaksanaan Peraturan Pemerintah Nomor 24 Tahun 1997 tentang pendaftaran tanah

Peraturan Pemerintah Nomor 24 Tahun 2016 tentang Perubahan Atas Peraturan Pemerintah Nomor 37 Tahun 1998 tentang Peraturan Jabatan Pejabat Pembuat Akta Tanah
