

## LEGAL EFFORTS OF BANKS AND BUYERS ON DISCHARGING THE COLLATERAL OBJECT FOR AUCTION THAT IS STILL OCCUPIED

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### Abstract

Credit is the banking service that would require the collateral agreement of pledge assets to give the creditor a sense of security in case the debtor would not be able to pay the loan based on the agreement. After it is proven that the debtor could not pay the amount agreed on the agreement, then the pledge assets will go for a public auction by the creditor. The profit of the auction then will be used to pay off the amount of money that the debtor owed to the creditor. For instance, the debtor would need to walk away from the pledge assets including their house and other assets in connection to the loan but more often than not, the debtor choose to stay in the buildings they signed as the pledge assets for the amount of money they owe and refuse to walk away from it. Though legally, the buildings that are being written as the pledge assets are essentially forfeitable for the auction to be bought by the buyer for the profit of the creditor. Once they are sold on the auction, they are the property of the buyers instead of the owner who owed the creditor. Thus, this paper questions about the legal steps that can be taken by the creditor and buyers on the emptying of the buildings as the object of collateral based on legal facts, literature, and the law. The paper aims to give a solution on how the object collateral dispute can be solved and the buyers can get what they bought on the public auction.

### Keywords

Breach of contract, legal steps, object collateral

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## Introduction

Credit is the loan that is given by a bank to the people. It starts with the credit process that begins with the credit agreement, which is done to ensure that the money lent to the people will be used how it is supposed to be and will be paid based on the agreement. Thus, the agreement is written to make sure that the debtor will pay the amount of money they need to pay (Sutedi, 2012). The aim of credit grant itself is to make push the national development in all sectors for the realization of a equitable and propereous society based on Pancasila and Uud 1945 (Raharjo, 2010).

The admission of collateral object is based on the collateral law which states that the collateral objects are accepted by the bank from the debtor are one of the object that is related to the bank's interest. Bank acts as the creditor or the owner of the mortgage rights while the debtor acts as the one who give the mortgage rights. The collateral objects that are written on the credit agreement should be trusted as the best and valuable to fulfill its functions (Bahsan, 2007).

The functions of the collateral objects are the collateral objects' function as the security bound for the debtor to pay off the debt the one which they can't do it the way it has been agreed, then the bank has the right to take over the collateral objects to be sold. The function of collateral objects as the security bound over the credit repayment that is related to the banks' interest that distribute the funding to the debtors with the collateral objects that are controlled and bounded based on the agreement, the function will be done when the debtor break the agreement (Bahsan, 2007). That is because the beginning of the unpaid debt is the breach of contract where the debtor break the agreement by not willing or able to fulfill the agreements that they have made with the banks in the credit agreement (Hariyani, 2010).

To create and securitise credit that has been distributed by the banks to the debtors, the collateral objects should be able to be executed easily to repay the debt of the debtor. That is why one of the components of the pledge assets should be the immoveable assets. Therefore the government have formed and applied a law which is Law No 4 1996 about The Mortgage Rights upon Land along with Things related to the Land that are mentioned in Article 1 Paragraph 1 UUHT (Law of Mortgage Rights) that defines mortgage rights upon the land and thing related to it as written in Law No 5 1960 about Basic Agrarian Regulation, the following are things that are related and non related to a land, to repay certain type of debts, that gives the preffered positions to a debtor to other debtors.

In this case, it includes one of the special characteristics and characteristics of the mortgage right, namely giving the Mortgage Holder a creditor the right to take precedence over other creditors to obtain payment of his receivables from the sale of the credit collateral object tied to the Mortgage. The position of the creditor who has

the right to take precedence over other creditors will be very beneficial to the parties concerned in obtaining repayment of the loan money that was given to the debtor with breach of promise (Purnamasari, 2011).

The additional value of collateral objects and mortgage rights will be done when a customer or debtor gets a credit from a bank and puts the land and things related or non related to the land (like buildings, plants, statues, etc) as collateral objects without them physically giving the collateral objects to the creditor or the bank (Sutedi, 2012). Based on Article 1131 of Indonesian Civil Code, it is said that "moveable and immovable assets, those that have been or will be available in the future, can be collateral assets for all of the debts."

With the mortgage rights agreement, if the debtor is unable to repay the debt to the bank as the creditor, the first, second to third warning letter is sent to the debtor, if the warning letter is ignored by the debtor and the debtor has absolutely no intention both to respond to the warning letter that has been posted by the creditor and not immediately make payment of the debt, which in other words they are breaking the agreement, the bank as the creditor can carry out the mortgage rights or the collateral objects, in this case, to the execution that is carried out by the bank, one of which can be through auctions. Auction is the sale of goods open to the public with a written and / or verbal price tag that is increasing or decreasing to reach the highest price, which is preceded by the Announcement of the Auction. Furthermore, in a banking credit agreement using the Mortgage Rights Institution as collateral for the credit, the bank as the creditor only holds the Mortgage certificate which has been registered and issued by the notary office. While the credit recipient as the debtor continues to hold or occupy the object of the Mortgage.

In this case it is known that the credit recipient (debtor) who has been properly unable to repay his debt or break a promise to the creditor (creditor) then based on the provisions based on the UUHT, the creditor has the right to conduct an auction at his own power and generally after the sale is made, and the new debtor has been determined as the winner of the auction, then the old debtor has no right to own and occupy the object of collateral that has actually been auctioned.

But in practice many cases of debtors who still survive to occupy the sold collateral object. There is a real case of credit between Banks and RA (debtors) with mortgage rights collateral in the form of ownership rights to land. But during the repayment process the debtor could not meet the agreements that were set the BPR Bank has given a warning to the debtor for 3 (three) times in a row, so that the debtor immediately repay his debt obligations, but the debtor does not also meet obligations, this shows the debtor has clearly reached the breach of promise on what as agreed in the Credit Agreement, the BPR Bank has also informed the plaintiff about the day and date of auction at the State Assets and Auction Services Office (KPNKL) where the auction announcement has been announced in the daily Merapi publication.

The auction request submitted by the BPR Bank has fulfilled the requirements for the auction, then the auction request from the Bank by the KPNKL had been determined the auction schedule in the auction sale process has set MM (buyer or auction winner) but the debtor still controls and occupies the object of the auction illegally because supposedly the land and houses that have been sold in the auction belong to MM and the debtor deliberately stalling for time by not giving up to MM voluntarily and instead the debtor sued MM and considered MM to be an illegal buyer. Therefore, there are often problems arising from the emptying of the collateral object for auction due to bad credit between banks and customers. Further legal efforts are needed to resolve legal issues that will put the buyers with the good intention of helping the debtors to get free from the debt.

### Research Methods

This research is a normative research based on legal facts, literature, and the law. This study aims to provide solutions to certain legal problems. The legal approach is used to address the problem of the need for legal solutions against debtors who are reluctant to leave the collateral object for the auction which results in losses especially for the buyer.

### Discussion

#### 1. The Rights and Obligations That Must Be Fulfilled by The Buyers and Debtors

Based on Article 1 number 22 of the Regulation of Ministry of Finance No. 106 / PMK.06 / 2013, the auction winner is the buyer of a person or legal / business actor that submits the highest bid and is approved as the auction winner by the Bidding Officer. Winners in the auction of execution of mortgage rights are endorsed by the Auction Officer and published in the Auction Report. Auction of execution of mortgage rights as a legal action raises the rights and obligations of the auction winner. According to Purnama Tioria Sianturi, S.H., M.Hum. auction winners have rights and obligations, which are as follows:

- 1) Related to the Transition of Objects that in Article 42 Vendor Reglement, the winner of the auction is entitled to obtain a copy or quotation of the authenticated report or what is currently called an auction treatise quote. The excerpt from this auction report will later be used as a sale and purchase deed for the purpose of transferring the name of the auction object (Article 86 paragraph (2) part A of the Ministry of Finance Regulation Number 93 / PMK.06 / 2010);
- 2) Related to the Submission of Ownership Documents, the winning goods are entitled to obtain ownership documents of the original auction object;
- 3) Related to Object Ownership that after the auction, winner carries out his obligations for auction payment and other legal taxes / levies in accordance with the specified time period, the auction winner has the right to physically control the auction object. If the goods that have been auctioned are not

voluntarily submitted to the auction buyer, the auction buyer can submit an application to the District Court so that the District Court empties the objects that have been auctioned. Whereas the buyer's obligations are based on Article 22 Vendu Regulation and Article 71 paragraph (1) of the Minister of Finance Regulation Number 106 / PMK.06 / 2013, the auction winner as a legitimate buyer has obligations related to payment of the auction and other legal taxes / levies according to the period of time has been determined (Sianturi, 2013).

Regarding the rights and obligations of the debtor, that in the Report of Auction it is stated that prior to the auction, the debtor has the right to be notified that the collateral object will be auctioned due to the debtor failure to fulfill his obligations to the creditor through the auction notice. While the debtor's obligation is that after the auction is conducted, the debtor must leave the object that has been auctioned. In this case, according to the agreement stated in the Mortgage Rights Administration Deed (APHT), which is a promise that the Mortgage Rights provider will leave the Mortgage Rights object at the time of execution of the Mortgage Right as referred to in Article 11 paragraph (2) letter j of the Mortgage Rights Law.

## **2. Mortgage Rights Execution as Credit Collateral**

In principle, execution as a forced act of doing a court decision that has permanent legal force is only a legal choice if the losing party does not want to carry out or fulfill the contents of the decision voluntarily. If the losing party is willing to obey and fulfill the decision voluntarily, the act of execution must be removed. Therefore it must be distinguished between carrying out the decision voluntarily and by execution.

Execution of Mortgage Rights is done when the debtor fails to fulfill the agreement. The first mortgage right holder has the right to sell the object of the mortgage right on his own power through a public auction and to repay the debt from the profit of the sale. This clause is known as the execution of mortgage rights based on the existence of contractual obligations of the debtor on the credit agreement that is borne by the mortgage right (Widiyono, 2009).

According to Article 20 paragraph (1) of the Indonesian Law there are two possibilities that a creditor can do to the Mortgage Rights if the debtor fails to do as agreed on the credit agreement, namely:

- 1) The right of the first Mortgage Holder to sell the Mortgage Right object based on the authority and promises referred to in Article 6 of the Mortgage Rights Act, that if the debtor do breach of promise, the Mortgage Holder holds his own power through public auctions and takes the payment of the credit from the profit of the sale. This means that the first Mortgage Holder does not need to seek prior approval from the Mortgage Holder and does not need to ask for a determination from the Chair of the local District Court to carry out

the execution. So it is sufficient if the first Mortgage holder submits an application to the Head of the local State Auction Office for the implementation of a public tender in the context of executing the Mortgage object. Because the authority of the first Mortgage Holder is an authority given by the Law, meaning that the authority is decided by law. Therefore, the Head of the State Auction Office must respect and comply with this authority, whereby the creditor has the right to his own authority to sell collateral for debt repayment, also called parate execution. Subekti is of the opinion that parate executies are self-administering or taking their own rights, in the sense of being without the mediation of judges, aimed at collateral items to subsequently sell the goods themselves (Herowati, 2007);

- 2) Parate execution of Mortgage Rights is an alternative settlement of problem loans which are widely used by financial institutions in Indonesia, especially by banks;
- 3) The Executive Title contained in the Mortgage Right Certificate as referred to in Article 14 paragraph (2) of the Mortgage Rights Act, the Mortgage Right certificate as a sign or evidence of the existence of the Mortgage Right, which contains a code that reads "FOR THE SAKE OF JUSTICE UNDER THE ALMIGHTY GOD ". With these promises, the Mortgage Right certificate has the same executive power as a court decision that has permanent legal force. This means that the execution of the Mortgage Right can be carried out or carried out without passing a court decision.

According to Sudikno Mertokusumo in Salim HS there are four types of executions namely:

- 1) Execution of the Payment of Amount of Money is the execution which punishes the losing party to pay a sum of money (article 196 HIR, article 208 RBg). Execution that is only carried out by auction first, this is because the value to be executed is worth money. The source of the disputed legal relationship in the execution of the payment of a sum of money is very limited, that is solely based solely on the dispute of the debt and receivable agreement based on the breach of contract, and can only be expanded based on article 225 HIR, by paying the value of some money if the defendant do not want to carry out an act that is punished within a certain time limit;
- 2) Execution To Do An Act, This is regulated in article 225 HIR. People cannot be forced to fulfill achievements in the form of deeds. However, the winning party can ask the Judge that the interests to be obtained are valued in money;
- 3) Parate Execution, namely an implementation of the agreement without going through a lawsuit or without going through the Court. This parate executie occurs when a creditor sells certain items belonging to the debtor without having an executorial title (Article 1155, Article 1175 paragraph (2) Civil Code);



- 4) Real Execution, According to the provisions of Article 1033 RV, the meaning of real execution is the implementation of a judge's ruling ordering the emptying of immovable property, which can be in the form of emptying land (rice fields), gardens, residential land, and so on, or emptying of buildings (warehouses, residential homes, offices, etc). Basically, theoretically the real execution is very easy and simple, no formality of procedures and difficult formalities is required. That is why real execution is not regulated in detail in the Law (Salim, 2011).

Although they have the right to their own power to sell collateral, the method of selling must still be carried out in a public auction in the manner specified in the legislation by giving the right to take precedence over other creditors in accordance with Article 20 paragraph (1) of the UUHT. The sale of goods which are made as objects of mortgage with its own power means that the sale of collateral goods does not need to request a decision from the court or so-called fiat execution as in Article 224 HIR.

Article 1 number 1 of the Regulation of the Ministry of Finance of the Republic of Indonesia Number 27 / PMK.06 / 2016 Regarding Amendments to the Regulation of the Ministry of Finance Number: 106 / PMK.06 / 2013 Regarding the Auction Implementation Guidelines, which states that: "Auction is the sale of goods open to the public with a written and / or verbal price tag that is increasing or decreasing to reach the highest price, which is preceded by an auction announcement".

In connection with the execution of mortgage rights as a credit collateral, the execution as a legal action that can be carried out based on the legal regulations that govern it or by a court decision to the losing party in a case, this is a continuous action and the entire process of civil procedural law in which the execution law regulates the methods and conditions used by the State's instruments to help interested parties to implement the rules set out in the legislation and / or judge's decision if the losing party is not willing to voluntarily fulfill what has become their obligation, there will be a process henceforth that can be legally pursued by someone who gets a loss.

Execution is the implementation of judges decisions and not all judges' decisions can be requested for execution, except those that have permanent legal force that are impossible to challenge with *verzet* law, appeal or cassation legal solutions. In principle, only decisions that have permanent legal force can be carried out, namely court decisions that are condemnatory because the decisions have permanent legal force, which contains a permanent and definite legal relationship between the parties that litigate. According to M. Yahya Harahap Decisions that can be executed are decisions that are condemnatory, this decision contains a punishment. Condemnatory decisions can be in the form of punishment for:

- 1) Give up an item;
- 2) Vacate a piece of land;
- 3) Perform a certain deed;

- 4) Stop a situation / deed;
- 5) Pay some money.

Of the five forms of condemnatoir decisions, from number 1 to number 4 are punishments in the form of real execution, while number 5 is the execution of payment of a sum of money. Looking at number 1 (surrendering an item), the real execution, punishing the debtor to hand over the goods (Harahap, 2005) sued to the prosecutor. If the debtor is reluctant to surrender the items voluntarily, then the delivery of the goods is carried out by force through execution. Likewise with the punishment of emptying a piece of land is a form of real execution. Obviously and immediately the land must be emptied and abandoned by the defendant, in order to be occupied and controlled by the buyer. Or the punishment for doing an action is the actual action of the defendant directly carrying out the act.

According to M. Yahya Harahap real execution is a legal solution that follows a dispute over ownership or a legal relationship dispute based on a purchase agreement, a lease, or an agreement to carry out an act. Real Execution Procedures:

- 1) The execution begins with a reprimand and ends with the auction of the land which is burdened with Mortgage Rights;
- 2) After auctioning the land which is burdened with Mortgage Rights and money resulting from the auction will be handed over to the creditor, the Mortgage Right which will burden the land will be roya and the land will be handed over to the auction buyer cleanly and free of all expenses;
- 3) If the Debtor does not want to submit the object that has been auctioned, then the provisions contained in Article 200 (11) of the HIR;
- 4) Furthermore, based on Article 200 paragraph (11) of the HIR, the auction buyer can request the Chair of the District Court to carry out the emptying of the auction object that he has bought from the occupants of the Executing Debtor / Respondent or whoever has the right from it and the goods there inside it;
- 5) Furthermore, the Chairperson of the District Court issues the stipulation of *aanmaning* / warning to the respondent party to implement the content of the decision which has permanent legal force within 8 (eight) days after the requested party is called to be reprimanded (8 days is the maximum limit) (Article 196 HIR or Article 207 RBg). made *aanmaning* minutes;
- 6) If the Respondent, after being reprimanded, refuses to carry out the decision, the Chairperson of the District Court issues an order for execution according to the provisions of the decision, where the order to execute the execution is directed to the Bailiff and in its implementation, if necessary, can request the assistance of the general public. Minutes shall be made for the implementation of the contents of the award (Harahap, 2005).

For immovable goods, the real execution is carried out by the auction buyer, by requesting the actual delivery of the requested execution / debtor who controls the



object of the auction. If they decided to voluntarily surrender, then the execution cannot be carried out. Article 200 paragraph (11) HIR or Article 218 paragraph (2) RBg determines that, "If the party executed (the person whose goods are sold for auction) is reluctant to leave the immovable goods, the Chairperson of the Court issues a warrant to the official authorized to carry out the bailiff's letter, so that with the help of the Bailiff the District Court orders the execution and his family to leave and empty the goods that have been sold, if necessary with the help of the police".

The legal solutions are also regulated in the Supreme Court Letter (SEMA) No. 4 of 2014, that for auctioning mortgage rights by the creditor himself through the auction office, if the debtor does not want to empty the auction object, the execution of the discharge can be directly submitted to the head of the District Court without going through a lawsuit.

Real execution or discharging is the part of the auction, according to the principle of real execution in the sale of the auction is an inseparable unit in the execution of payment of a sum of money, meaning that after the auction sale is completed with the determination of a legitimate auction buyer, the owner (executable) does not leave and empty the land and house, the Law authorizes the Chief of the Court to order the real execution in the form of an emptying order and if necessary with the help of the police, so that the real execution order (emptying) is a follow-up that is not separate from the execution of auction sales. A real execution order does not require a lawsuit.

The seller is responsible for some losses arising from his mistake not to make efforts to prevent the occurrence of losses, because the seller's obligation in the conception of the Civil Code is

- 1) Article 1474 Civil Code: "The seller has two main obligations, namely to **surrender his goods** and guarantee it".
- 2) Article 1491 Civil Code: "Mortgage which is the obligation of the seller to the buyer, is to guarantee two things, namely: first, control of the goods sold safely and securely; second, there are **no hidden defects in the goods**, or in such a way as to cause a reason for canceling the purchase".

The seller is responsible for the validity of the goods and the validity of the tender requirements document in accordance with Article 7 of the Ministry of Finance Regulation Number: 40 / PMK.07 / 2006 concerning Bidding Implementation Regulations which regulate the seller / owner of the goods responsible for the validity of the goods and the tender requirements document. Regarding this responsibility, it has been better arranged, because Article 7 paragraph (2) Regulation of the Ministry of Finance Number: 40 / PMK.07 / 2006 concerning Bidding Implementation Regulations regulates the seller's responsibility for compensation claims for losses arising from the invalidity of goods and documents auction requirements. This arrangement has reflected that in the auction not only emphasizes the prudential factors of auction buyers at the time of purchase of goods, but also the prudential factor is the

responsibility of the seller, the responsibility is set firmly to the provision of compensation for losses arising from invalidation goods and tender requirements documents.

In the event that the collateral object is successfully sold by auction, but it turns out the object is still occupied by the old debtor, then for the implementation of the evacuation is connected as regulated in Article 11 paragraph (2) letter U of UUHT which gives the possibility to the mortgage right holder to pledge from the beginning that the giver of the Mortgage Right will empty the Mortgage Right object at the time the execution of the Mortgage Right is carried out.

According to Sutan Remy, the power that is owned and the efforts that can be made by the mortgage rights holder if the mortgage right insist to refuse to vacate the object of mortgage right at the time the execution of the mortgage rights is carried out even though there is an emptying agreement, the mortgage right holder or the Auction Office may request the determination of the Chairperson District Court to order the evacuation in question and force the residents to empty the area with the help of the police if the occupants are not willing to carry out the evacuation voluntarily (Sjahdeini, 1999).

## Conclusion

Legal step that can be undertaken by the Bank is that the Bank may request the determination of the Chairperson of the local District Court to order the vacant object of the auction guarantee to comply with the statutory regulatory procedure by not making a forced effort that could lead to vigilanteism. Legal step that can be undertaken by the buyer can be to request the Chair of the District Court to carry out the emptying of the auction object that has been bought from the resident of the debtor who is still residing, this is based on Article 200 paragraph (11) HIR or Article 218 paragraph (2) RBg, Legal remedies are also regulated in the Supreme Court Letter (SEMA) No. 4 of 2014. With this legal effort, it will be easier for the buyer to master the object of collateral that is his right, in this case so as not to cause legal problems and losses for the buyer, in the future the Creditor must also provide certainty by fulfilling Article 1474 of the Civil Code Juncto Article 1491 of the Civil Code by means of before selling the object of mortgage rights through a public auction should make efforts to leave, so that later the buyer can obtain their rights without any difficulty in controlling the object mortgage rights that have been bought.

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