



Implications of the Constitutional Court Decree regarding Fiduciary Guarantee on the Authority of Creditors of Financing Institutions in A Muslim country

Irawati, Faculty of Law, Diponegoro University, Semarang, Indonesia

Paramita Prananingtyas, Faculty of Law, Diponegoro University, Semarang, Indonesia

Novira Maharani Sukma, Faculty of Law, Diponegoro University, Semarang, Indonesia

Abstract:

Financing is an important factor in helping economy people, including in Indonesia as one of the most democratic Muslim countries. Provision of financing facilities is followed by binding fiduciary objects to collateral objects. There is a Constitutional Court Decision No. 18/PUU-XVII/2019 has changed the meaning of the phrases "executive power" and "default of promise" which so far have led to multiple interpretations in Article 15 of the Law on Fiduciary Security, thus implicating the authority of Financing Institution creditors as fiduciary recipients of collateral. This article uses a juridical empirical approach with analytical descriptive research specifications, with secondary data analyzed qualitatively. With the Constitutional Court Decision, it has an impact on the creditor is authority not to be able to withdraw fiduciary collateral from the debtor's hand if the debtor does not voluntarily recognize his negligence which has breached the promise and performs the delivery of the collateral object. If the debtor objects to surrender the collateral object to the creditor, the execution of the collateral object can be carried out by a court decision which has permanent legal force.

Keywords: fiduciary guarantee, creditor authority, financial institution

I. INTRODUCTION

The imposition of objects with fiduciary security is made by means of a notary deed in Indonesian which then registers the fiduciary deed at the fiduciary registration office. Fiduciary registration functions so that everyone can know that the object is collateral so that it cannot be used as collateral for other debts (Sriono, 2019). The Fiduciary Registration Office will issue and submit a fiduciary guarantee certificate to the fiduciary recipient (creditor). The fiduciary guarantee certificate has executorial power which is equivalent to a court decision having permanent legal force, meaning that this fiduciary guarantee certificate can be immediately executed or executed without going through a trial and examination process. through the court, and is final and binding on the parties to implement the decision (Sriono, 2019). So that the financing institution as the creditor, in this case referred to as the recipient of the fiduciary, has the executorial rights.

Currently, financial institutions are one of the non-bank financial institutions that are in great demand by the public and business people because they are able to provide various facilities to meet all their needs compared to bank financial institutions, including in economic giants in the Middle East countries with their Islamic economy characteristics. These conveniences have caused financial institutions to experience rapid development in Indonesia (Arthesa & Handiman, 2006). Financing institutions are business entities that carry out financing activities in the form of provision of funds or capital goods without withdrawing funds directly from the public. Financing institutions include leasing, venture capital, factoring, credit card business, project financing, and consumer financing (Sunaryo, 2004).

In the previous financing institution business transaction, an agreement was made between the financing institution and the consumer (Handayani & Sanusi, 2019). The agreement is stated in the form of a written agreement so that the parties, both debtors and creditors, do not default. In providing financing facilities, requires the existence of an object as collateral that must be fulfilled by the debtor. The guarantee is intended to provide assurance and security for the creditor in terms of minimizing the risk that may occur if the debtor defaults. Furthermore, with the collateral object, the fiduciary object is bound. The imposition of objects with fiduciary guarantees is preceded by the making of a principal agreement, namely a credit agreement, drawing up a fiduciary guarantee deed and registering a fiduciary guarantee.

At the beginning of the year, to be precise on January 6, 2019, the Constitutional Court issued a decision related to the review of Legislation, namely Law Number 42 of 1999 concerning Fiduciary Guarantee, namely the Decision of the Constitutional Court No. 18/PUU-XVII/2019. The decision of the Constitutional Court emphasizes the meaning of the phrase "executorial", "the same as a court decision having permanent legal force" and "breach of promise" as stated in Article 15 Paragraph (2) and (3). Whereas so

far there have often been multiple interpretations of the word "executorial power" and defaults on the implementation of fiduciary guarantees, so that many debtors' negligence in carrying out their obligations to creditors has been resolved by forcibly withdrawing by creditors through a third party (debt collector) without there is an agreement from the debtor and without a decision from the court. This of course can be considered as a weak legal protection for debtors for arbitrary actions of creditors.

Article 15 of Law no. 42/1999 concerning Fiduciary stipulates that the fiduciary guarantee certificate has the same executorial power as a court decision that has permanent legal force. According to Samdyara(2020) this article raises problems, because the position of the debtor who objected to surrendering the fiduciary guarantee object was weaker because creditors can execute it without a court execution mechanism. This article aims to implications of the Constitutional Court Decision on Fiduciary Guarantee on the Authority of Financing Institutions Creditors" with several formulations of the problems to be studied, namely How the impact of the Decision of the Constitutional Court No.18/PUU-XVII/2019 on business continuity. creditors of Financing Institutions in Indonesia as well as execution authority for creditors of financing institutions on the object of fiduciary collateral, against debtors deemed "default".

II. RESEARCH METHODS

The approach method used in this research is the empirical juridical approach method with descriptive analytical research specifications. Analytical descriptive is describing the problem which then analyzes the existing problem through the data that has been collected and then processed and compiled based on the theories and concepts used. Sources and types of data used include secondary data consisting of primary legal materials in the form of all applicable laws and regulations relating to this article, secondary legal materials include text books, legal dictionaries, legal journals and commentaries. comments on court decisions, as well as conducting interviews with sources who are creditors of financial institutions, as well as tertiary legal materials. The data analysis method in this article is conducted in a qualitative descriptive manner, that data analysis is guided by efforts to discover new principles and information derived from data in the form of words, pictures, and not numbers (Lexy, 2005)

Implementation of Fiduciary Agreements by Financing Institutions

Currently, many finance institutions and banks (commercial and credit banks) provide consumer finance, leasing, factoring. They generally use an agreement procedure that includes a fiduciary guarantee for objects of fiduciary collateral (Sushanty, 2020).

The word fiduciary originally comes from the word "fides" which means belief. In accordance with the meaning or meaning of the word, the legal relationship between the debtor (fiduciary) and creditor (fiduciary recipient) is a relationship based on trust (Dinata, 2020). The fiduciary also get many attention in previous literature in its link with Islamic economy (El-Hassan; 1985; Chapra, 1996; Anjum, 2014; Setiawan, 2014; Suhel, et al., 2018; Wijayanti & Vanni, 2019).

Based on Article 1 paragraph (1) what is meant by fiduciary is the transfer of ownership rights to an object based on trust provided that the object whose ownership right is transferred remains under the control of the owner of the object. tangible and immovable objects, especially buildings that cannot be encumbered with mortgage rights as referred to in Law Number 4 of 1996 concerning Mortgage Rights which remain under the control of the Fiduciary, as collateral for the payment of certain money, which gives priority to the Fiduciary. other creditors. Fiduciary guarantees allow the debtor as a guarantor to continue to take advantage of the economic value of a material that is used as a fiduciary object (Dinata, 2020).

The subjects of the fiduciary guarantee are the giver and recipient of fiduciary. The Fiduciary Giver includes individuals or corporations who own objects that are the object of fiduciary security, either the debtor (the debtor) or the third party. Meanwhile, the recipient of Fiduciary is an individual or corporation whose payment receivables are guaranteed by fiduciary security or can be referred to as Creditors.

The credit guarantee against the debtor has been regulated by law. In the guarantee law, there are 2 general principles regarding guarantee (Adil, 2016). First, in Article 1131 of the Civil Code, which states that all assets of the debtor, whether in the form of movable objects or permanent objects, both existing and existing ones, become collateral or collateral for all engagements made by the debtor with creditors. Second, in Article 1132 of the Civil Code, it states that if the debtor is in default, then the proceeds from the sale of all assets of the debtor without exception, are a source of debt repayment. Because fiduciary security is a special guarantee for material like other special guarantees for other materials such as pawns, mortgages and mortgages, the fiduciary recipient (creditor) has special rights granted by law compared to concurrent creditors as general security holders.

Authority of Creditors of Financing Institutions with Fiduciary Guarantee

Financing companies (leasing) that carry out consumer financing for motorized vehicles with the imposition of fiduciary guarantees are required to register the guarantee at the fiduciary registration office in accordance with the law governing fiduciary security (Article 1 PMK No.130/PMK.010/2012) (Sushanty, 2020). By registering fiduciary, a fiduciary certificate will be issued. A fiduciary certificate has the same executorial power as a court decision which has obtained permanent legal power according to Article 15 of Law Number 42 of 1999 concerning Fiduciary Security. So that if the debtor is negligent of what has been agreed upon, the fiduciary recipient (creditor) has the right to sell the object which is the object of the fiduciary guarantee on his own power.

Implications of the Constitutional Court Decision Number 18/PUU-XVII/2019 for the business continuity of creditors of Financing Institutions in Indonesia

Capital for a Financing Institution as a business actor is the most important thing for business continuity. If in the process of financing with a fiduciary agreement, there is a state of stopping paying from the debtor, it will hamper the profit gain for the creditor, because profit is one of the creditors' rights to further increase their financing capital (Brockman& Unlu, 2009).

The Constitutional Court Decision Number 18/PUU-XVII/2019 has provided a new interpretation of the a quo Article. Of course this has had a significant impact on the parties, both debtors and creditors. This relates to the creditor's authority over the collateral object if later the debtor is negligent in carrying out his obligations to perform as agreed upon. The decision of the Constitutional Court was filed by a husband and wife as the fiduciary who suffered losses due to the object of the fiduciary collateral in the form of a car that was withdrawn by the creditor. The fiduciary guarantee is an institution of guarantee and that the transfer of ownership rights is intended solely to provide collateral with precedence over the fiduciary recipient (Suari& Gorda, 2020). So that with the emergence of the Constitutional Court Decision Number 18/PUU-XVII/2019, the creditor's rights are limited to the object of the fiduciary guarantee which is in the control of the debtor. Meanwhile, it is known that the debtor has defaulted. The emergence of the Constitutional Court Decision needs to be followed by improvements to the regulations concerning fiduciary security, in order to achieve legal certainty for both debtors and creditors. This also includes the business continuity of the Creditors of the Financing Institutions.

Fiduciary security with financing risk is closely related to Financing Institutions such as leasing and consumer financing. Between the collateral object and the risk of financing for creditors of financing institutions can have a positive impact but can also have a negative impact if there is a bottleneck in fulfilling the creditor's rights from the debtor (Berger et al., 2016).

This weakening of the creditor's authority can certainly have an impact on capital turnover and increase profits for creditors of financing institutions, especially consumer financing and leasing. Not only that, the weakening of the creditor's authority for direct execution of fiduciary collateral objects is a major concern for the Financing Institution, to provide facilities for property ownership with fiduciary guarantees to prospective debtors. To anticipate the risk of loss that can be experienced by creditors, leasing as a creditor of the financing institution is very careful and implements fairly strict conditions in providing fiduciary guarantee facilities to prospective borrowers. This has led to a decline in the level of financing by leasing and consumer finance companies during the last six months in Indonesia.

So it can be said that it is necessary to protect the rights of creditors, including receiving achievements from the debtor in accordance with what has been agreed, then there is a need for a legal system through laws and regulations that support the rights of creditors of Financing Institutions in Indonesia. The very large and increasing need for the business world for the supply of funds, it needs to be balanced with the existence of clear and complete legal provisions governing financial institutions (Sushanty, 2020). Gustav Radbruch argues that legal certainty is not enough, the observation of the settlement of bad credit must still consider the value of fairness in each substance in the provisions of the rules which in turn have benefits in society (Suari& Gorda, 2020). In several developing countries and developed countries in Europe have implemented a legal system that accommodates and protects the rights of higher creditors, so that creditors are able to have a higher rating of financing facilities and increase capital turnover against companies (Gu et al., 2018).

Authority of Creditors of the Financing Institution over the Object of the Fiduciary Guarantee against debtors who are in default

The Law on Fiduciary Security has allowed creditors to self-execute the object of fiduciary security if the debtor is negligent in carrying out the payment obligations in accordance with the agreement. However, since the issuance of the Constitutional Court Decision, creditors are no longer authorized to carry out

executions, creditors must first submit an application to the District Court (PN). This is as stated in the Constitutional Court Decision that:

Article 15 paragraph (2) of the Fiduciary Law insofar as the phrase "executorial power" and the phrase "equal to a court decision having permanent legal force" contradicts the 1945 Constitution and does not have binding legal force as long as it is not interpreted "against fiduciary guarantees where there is no agreement on injury. the promise (default) and the debtor objecting to voluntarily hand over the object which is the fiduciary guarantee, then all legal mechanisms and procedures in the execution of the Fiduciary Guarantee Certificate must be carried out and apply the same as the execution of court decisions which have permanent legal force".

Meanwhile, Article 15 Paragraph (2) of the Fiduciary Guarantee Law states that the fiduciary certificate has granted executorial rights which may be aimed at providing convenience for parties in solving problems in financing with a fiduciary guarantee. However, it turns out that in its implementation it creates multiple interpretations that can harm the debtor. This means that protection for debtors is still not maximally provided by the Law on Fiduciary Security in providing protection for financing institution debtors, because they are still unable to accommodate the provisions in Article 28 G (1) of the 1945 Constitution. Other countries such as China are also continuing to make improvements. in terms of the necessary regulations related to supervision, management, handling of complaints for consumers, code of ethics of financial institutions, and protection of debtors as consumers of the Financing Institution (Consumer Finance) to improve economic stability (Liu, 2020).

After the Constitutional Court Decision Number 18/PUU-XVII/2019 there was a change in the meaning of several phrases which resulted in a change in creditor authority. So that with the decision of the constitutional court, so that creditors can still withdraw the object of the fiduciary guarantee in good faith from the debtor's hand if the debtor has defaulted, it is necessary to compile an appropriate clause in the financing agreement followed by a fiduciary guarantee. It is necessary to prepare an agreement document with a fiduciary guarantee that contains equal rights between the fiduciary and recipient, in this case the debtor and creditor. As regulated in Article 1320 of the Civil Code regarding the terms of the validity of the agreement which includes both the subject element and the object element. It needs to be clearly stated in the agreement regarding the rights and obligations of the parties in the fiduciary agreement.

In the event that there is a Constitutional Court Decision Number 18/PUU-XVII/2019 which impacts the authority of the Financing Institution creditors on the object of the fiduciary guarantee, it should be necessary to clearly stipulate it in the Fiduciary Agreement Deed made in Notarial so that if in the future the debtor has defaulted for a period of time. In certain conditions, the debtor as the fiduciary must voluntarily submit the object of the fiduciary security to the creditor as the fiduciary to carry out the execution in accordance with the provisions of the Fiduciary Security Law. With the existence of clear provisions contained in the Fiduciary Agreement Deed regarding the rights and obligations of the recipient and the giver of fiduciary, it is hoped that there will be no withdrawal action by the creditor as the fiduciary recipient of the fiduciary guarantee from the control of the debtor with bad faith. Likewise, debtors are required to voluntarily submit the object of fiduciary security to the creditor if proven to have been in default. This needs to be clearly stated at the beginning of the agreement so as not to harm creditors in increasing the turnover of business capital and still protecting debtors with good intentions.

III. CONCLUSION

The Decision of the Constitutional Court Number 18/PUU-XVII/2019 is a Decision on the Case for Judging Legislation, namely Law Number 42 of 1999 concerning Fiduciary Guarantee (Fiduciary Law) against the 1945 Constitution of the Republic of Indonesia (UUD 1945). The decision then changed the meaning of the phrase "executorial power" and "breach of promise" in Article 15 of the Law on Fiduciary Security. With the Constitutional Court Decision, the creditors of the Financing Institution cannot execute collateral objects that are under the control of the debtor without prior Court Decisions. In addition, Creditors can only withdraw fiduciary collateral against injured debtors. promise "or default if the debtor voluntarily submits it to the creditor.

Of course, this has implications for the sustainability of the creditor's business in which capital turnover is obtained, one of which is the execution of fiduciary collateral if there is a debtor who "fails to promise". If the creditor has difficulty executing the collateral object, it will have an impact on the business of the Financing Institution Creditor. Financing institutions that run their business by providing financing facilities with fiduciary guarantees such as leasing or consumer financing will further tighten the provision of financing facilities to debtors with the principle of prudence, and this can certainly result in lower levels of financing for people in Indonesia. However, it does provide better protection for debtors with good faith. So that Creditors cannot immediately make a forced withdrawal in bad faith against

fiduciary collateral without any legal force, namely Court Decisions or the volunteerism of the debtor to hand them over.

REFERENCES

1. Adil, H. U. (2016). Dasar-Dasar Hukum Bisnis edisi 2. *Mitra Wacana Media Jakarta*.
2. Anjum, S. (2014). Quantification of fiduciary risks: Islamic sources of funds, neo-institutionalism and SARWAR bank. *Journal of Islamic Banking and Finance*, 2(1), 31-57.
3. Arthesa, A., & Handiman, E. (2006). Bank dan lembaga keuangan bukan Bank. *Jakarta, PT Indeks Kelompok Gramedia*.
4. Berger, A. N., Frame, W. S., & Ioannidou, V. (2016). Reexamining the empirical relation between loan risk and collateral: The roles of collateral liquidity and types. *Journal of Financial Intermediation*, 26, 28-46.
5. Brockman, P., & Unlu, E. (2009). Dividend policy, creditor rights, and the agency costs of debt. *Journal of Financial Economics*, 92(2), 276-299.
6. Chapra, M. U. (1996). Monetary management in an Islamic economy. *Islamic economic studies*, 4(1).
7. Dinata, A. W. (2020). Lembaga Jaminan Fidusia: Pasca Putusan Mahkamah Konstitusi Nomor 18/PUU-XVII/2019. *Nagari Law Review*, 3(2), 84-99.
8. El-Hassan, A. E. W. A. (1985). The doctrine of duress (ikrah) in Sharia, Sudan and English law. *Arab Law Quarterly*, 1(2), 231-236.
9. Gu, X., Kadiyala, P., & Mahaney-Walter, X. W. (2018). How creditor rights affect the issuance of public debt: The role of credit ratings. *Journal of Financial Stability*, 39, 133-143.
10. Handayani, T. K., & Sanusi, D. (2019). Ketepatan Waktu Notaris dalam Pendaftaran Jaminan Fidusia Secara Elektronik Pada Lembaga Pembiayaan. *Jurnal Magister Hukum Udayana (Udayana Master Law Journal)*, 8(2), 220-236.
11. Lexy, J. (2005). Moleong, Metode Penelitian Kualitatif.
12. Liu, K. (2020). Chinese consumer finance: a primer. *Frontiers of Business Research in China*, 14, 1-22.
13. Prasetya, A. C. (2020). Putusan Mahkamah Konstitusi Nomor 18PuuXvii2019. Apa Implikasinya Bagi Proses Bisnis Lelang.
14. Samdyara, S. (2020). Putusan MK : Eksekusi Jaminan Fidusia Harus Ikuti Prosedur Pengadilan. *Bisnis.Com*.
15. Schmit, M. (2004). Credit risk in the leasing industry. *Journal of banking & finance*, 28(4), 811-833.
16. Setiawan, I. (2014). Determination Methodology of the Fiduciary Law and Critic Towards Sharia Fiduciary Institutional Dualism and its Legislation. *International Journal of Nusantara Islam*, 2(2), 89-100.
17. Sriono, S. (2019). Tanggung jawab pemberi fidusia terhadap benda jaminan fidusia dalam perjanjian kredit. *Jurnal Ilmiah Advokasi*, 7(2), 149-159.
18. Suari, D. A. A., & Gorda, A. N. S. R. (2020). Penyelesaian Kredit Macet Dengan Jaminan Fidusia di Bank Rakyat Indonesia Cabang Renon. *Soumatara Law Review*, 3(1), 73-80.
19. Suhel, S., Asngari, I., Mardalena, M., & Andaiyani, S. (2018). The Economic Scale of Small-Medium Enterprises Financing in Sharia Banking. *International Journal of Economics and Financial Issues*, 8(3), 112.
20. Sunaryo, O. (2004). Hukum Lembaga Pembiayaan.
21. Sushanty, V. R. (2020). Tinjauan Yuridis Terhadap Debt Collector Dan Leasing Pasca Putusan Mahkamah Konstitusi Nomor 18/PUU-XVII/2019. *Gorontalo Law Review*, 3(1), 59-75.
22. Tran, Q. T. (2019). Creditors and dividend policy: Reputation building versus debt covenant. *European Research on Management and Business Economics*, 25(3), 114-121.
23. Wijayanti, R., & Vanni, K. M. (2019). Fiduciary Dispute Settlement of Murabaha Contract in PT. Al-Ijarah Indonesia Finance. *Journal of Islamic Economic Laws*, 2(2), 178-192.