



Implementation of Halal Causation Against the Sale and Purchase of Collateral Objects without the Approval of Creditors

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Abstract

The sale and purchase is known as novation as long as the sale and purchase is carried out by the debtor with written approval from the bank as the creditor, but in practice the sale and purchase of collateral objects by the debtor to a third party without the approval of the bank as the creditor sometimes also occurs and causes problems in the future. This study aims to provide a prescription regarding the implementation of a lawful cause for the legality of the deed of sale and purchase of land by the debtor without the approval of the creditor. This research method is a normative legal research, using a statutory approach, a conceptual approach, and a case comparison approach, the case used in this research is the District Court Decision Number 7/Pdt.G/2019/PN.Rhl which is confirmed by the Court's Decision Pekanbaru High Court with Case Number 85/PDT/2020/PT PBR was further reaffirmed by the Supreme Court of the Republic of Indonesia with Decision Number: 1600 K/Pdt/2021 so that it has permanent legal force or *inkracht*. "The results of the study can be concluded that the deed of sale and purchase agreement on the land negates the point of lawful cause as one of the fundamental requirements in contract law, b. the deed of sale and purchase of land is contrary to the Mortgage Law, c. the decision was in accordance with the principles of formal justice.

Introduction

Regarding business dynamics, it can be seen that not all business people have strong capital in carrying out their business activities as well as at the diversification level. There are many business people who need banking services as financial service providers. Financial services are very synonymous with financial institutions played by banks, banking financial institutions are at a certain point very useful but in practice sometimes because of the difficulty of getting debtors, what happens is that existing debtors are given additional loans, known as 'enlarge and extend loans' (Andriyono, 2019). With the emergence of the escalating need for financial institutions to support the business or business world, various types of financial or capital institutions, both in the form of banks and non-banks, have begun to be felt in the community, especially those who provide services in the form of loans with credit payment systems or term installments. The emergence of these various financial services then becomes one of the indications of increasing consumption of goods and services (Satrio, 1993).

As an institution that provides funding or financial strengthening services, banks issue a credit loan system aimed at a number of customers. To ensure good cash flow and optimal use of credit by debtors, banks then carry out a number of assessments or assessments of potential debtors. The most common type of assessment carried out by banks is the availability of a guarantee facility for credit disbursement. The existence of guarantees in providing loans is an important aspect for banks to decide the size of the possibility of borrowing from debtors,

because guarantees have a close relationship with potential long-term returns and provide banks with strong legal certainty. Thus, collateral has become one of the main requirements that must be met by debtors in borrowing or applying for capital loans to banks on the basis of security (Kasmir, 2004). Thus, it can be stated that the loan guarantee itself can be defined as a valuable ownership owned by the debtor, which is used as a basis for trust in the creditor and can be valued in the form of money, to increase confidence in the potential fulfillment of payment obligations, as a result of the engagement or agreement (Salim, 2004).

It can be said that there is a small, even almost no possibility that a loan institution or financial institution has a strong incentive to provide funds without a strong loan from the debtor to the creditor because collateral has become a general condition in the loan disbursement process. The implementation of a guarantee system in the process of funding in the form of money certainly poses a big risk for creditors, due to uncertainty in the future, especially those related to potential returns (Arba & Mulada, 2020). Therefore, the uncertainty that gives rise to these risks must be minimized by ensuring that debt repayment can be made by selling or auctioning the collateral provided in order to cover the debts that arise from lending activities (Sukmaya, Abubakar, & Handayani, 2020). This itself is indirectly permitted based on (Law of the Republic of Indonesia Number 10 of 1998 concerning Amendments to Law Number 7 of 1992 concerning Banking) Article 2 where in Article 2 of the Banking Law it is stated that "Indonesian banking in carrying out its business is based on economic democracy. using the precautionary principle.

This is the basis in the banking world, where the bank as a creditor to reduce the risk of the possibility of the debtor not being able to return the credit according to the agreed time, before accepting the credit proposed by the debtor, the creditor conducts a careful assessment of the character, ability, willingness, guarantee. and the debtor's business prospects as a form of application of the precautionary principle (Djumhana, 2000).

To provide certainty in the process of paying off debt in the event of a default, the guarantee provided must have a nature that makes it easier for creditors and contains a practical element to make it easier for creditors to withdraw the collateral provided. In addition, creditors must also be placed as parties whose position is prioritized over other parties (Djumhana, 2000). Therefore, the guarantee provided by the debtor should have an equivalent value or even better if it can be of higher value than the value of the funding provided by the creditor to the debtor (Sulastri, 2015).

The guarantee given from the debtor to the creditor will be made a guarantee agreement that arises as a consequence of the existence of the debt or financing agreement. However, this guarantee agreement is required to be positioned under a funding agreement, and only applies as a consequence of a default. Thus, a guarantee agreement is an agreement that is independent or cannot stand alone and will be deleted if the agreement that is principal on it has been completed. Because of Him, this guarantee agreement is an assessor or also called an *accessoir* agreement, where this agreement is intended to provide a sense of security or minimize risks that may arise on the creditor due to the potential inability to repay the funding loan that has been given to creditors (Hasan, 2006).

In credit agreements, the more widely used material guarantees are mortgages or mortgages, fiduciary guarantees, and liens. The mortgage guarantee is implemented when the object that is guaranteed is an immovable object such as property. Meanwhile, when the guarantee given is a movable object, the engagement used is generally in the form of a pledge or fiduciary guarantee. Meanwhile, mortgage rights are only found if the collateral provided is in the form of land property.

The banking world indeed considers land with mortgage guarantees to be the most effective guarantee institution. This is based on the ease of identifying the object of the Mortgage, clear and definite execution, in addition to the debt guaranteed by the Mortgage must be paid first from other bills with the money from the auction of the land which is the object of the Mortgage (Sutantio, 1999), What cannot be ignored in a credit agreement is legal protection for creditors when the debtor defaults, especially if the debtor experiences a delay in payment. Utilization of the Mortgage Execution Agency is thus a way of accelerating the repayment of receivables so that the funds that have been issued can immediately return to the creditor (Bank), and these funds can be used in the rotation of the economy (Ariz Purnomo, 2014).

Utilization of mortgage rights by debtors is generally found as an effort to increase business capacity. In addition, to provide a strong guarantee, the debtor generally submits more than one object of collateral to the creditor in one Mortgage as a single entity. The goal is to increase the possibility of disbursing the loan amount in accordance with the application (Utomo, 2011). In addition, Mortgage Rights must be submitted in one unit as stipulated in Article 2 of the UUHT (Daniel, 2016). Granting Mortgage must be done in full, as well as if the payment has been made. This means that the debtor will have to return all objects in the Mortgage without exception (Suwandi, 2018)."

in cases where the debtor is only able to pay off part of his obligations, the release of the Mortgage Rights can be done partially according to the value of the settlement made by the debtor to the creditor. However, this partial release must be written in the initial agreement and cannot be done conditionally. This partial release is referred to as *Roya* as stipulated in Article 2 of the UUHT (Doly, 2011)." It is not uncommon for debtors to sell mortgage guarantees to third parties, even the parties realize that the object of the sale and purchase is a bank guarantee with the approval of the bank as a creditor following (Hasan, 2006). In practice, the approval for the transfer of the debtor is sometimes approved as long as there is a companion guarantee requested by the bank, which is called a novation. In the context of novation, the old engagement is changed into a new engagement (Widjaja, 2010). However, for one reason or another, it is not uncommon for the approval of the transfer of the debtor by the bank as the creditor not to be found, but the sale and purchase of collateral is still carried out. In carrying out legal relations or legal actions for every citizen, including for business people, it is still guided by applicable legal norms, while the highest legal norm is the 1945 Constitution as the state constitution.

The reason the author is interested in writing about this research is because in practice there is a sale and purchase of objects with the status of bank guarantees (both fiduciary guarantees and mortgages) without first obtaining written approval from the bank as creditors, or commonly known as 'transfer of mortgage objects without notification to creditors'. There are several cases that have occurred and have permanent legal force, where one of the authors is directly involved in handling the case. In the context of writing this law the author describes the case of a dispute between Mr. S initially entered into a joint operation of a gas station with Mr. K, with the passage of time, the sale and purchase of the gas station object was finally carried out between Mr. S and Mr. K, even though the gas station is still related to guarantees at a bank and Mr. S still has debt obligations to the bank, but because Mr. S is in financial difficulty because of the offer from Mr. K is Mr. S finally signed a sale and purchase agreement in front of Notary K, even though there was never a written agreement on the joint operation or sale and purchase of the gas station from the Bank. As a result, problems arise when Mr. S is almost paid off at the bank and will change the name of the certificate at the Land Agency Office, Mr. S is not willing to reverse the name of the certificate on behalf of Mr. K because the sale and purchase price has not been paid off by Mr. S while Mr. K felt that he had paid more, so that finally there was

a dispute and Mr. K sued Mr. S went to court because he felt as a buyer that he felt entitled to the gas station.

The dispute which was included in the jurisdiction of the Rokan Hilir District Court was then, through District Court Decision Number 7/Pdt.G/2019/PN.Rhl, was decided in a trial open to the public on Thursday, December 19, 2019 and was declared to have no legal force, because the object of sale and purchase in the form of a gas station is still in a position as a guarantee from the Bank. The decision of the Rokan Hilir District Court was then upheld by the Pekanbaru High Court Decision with Case Number 85/PDT/2020/PT PBR" and also confirmed by the Supreme Court through its decision Number 1600 K/Pdt/2021.

In practice, it is often found that many debtors transfer the object of the mortgage guarantee to a third party without written approval from the creditor as in several cases that the author described earlier (Latuihamallo, 2014). This is what is meant by non-halal causes, where the transfer of objects of mortgage guarantees other than supplies to third parties or other parties without written approval from creditors is a prohibition as regulated in Article 36 (Law of the Republic of Indonesia Number 42 of 1999 concerning Fiduciary Guarantees), also based on Article 15 Paragraph 1 letter a (Law Number 4 of 1996 concerning Mortgage Rights on Land and Objects Related to Land).

The question is, what about the legality of the practice of buying and selling collateral objects by the debtor without the creditor's approval in the view of legal science that the author is trying to find and set out in writing this article. The results of previous studies such as those examined by (Sidabariba, 2018), entitled "Legal Protection of Parties in the Implementation of Mortgage Execution Auctions". "This research shows or concludes that a review and reassessment should be carried out on the policy of carrying out execution auctions according to the Law on Mortgage No. 4 of 1996 which has accommodated auctions based on mortgages and credit bands. In addition, the review and re-examination of these policies needs to be followed up by compiling and recommending the implementation of maximum, fair, easy, fast, simple, good faith execution auctions, guaranteeing legal certainty and providing legal protection to the parties.

Other than that research conducted by (Subagiyo, 2018) regarding "The Nature of the Debtor's Legal Position While Mastering Fiduciary Guarantee Objects." In this study, the legal position of the debtor regarding the control of fiduciary guarantees according to law is still recognized as long as the object used as collateral is used by the debtor indicating the nature of the debtor's legal position in controlling the collateral object. the. This last comparison of research has the character of philosophical legal research (Subagiyo, 2018).

Based on the background of the problem above, and to clarify the direction of this research, the formulation of the problem in this study is how to implement a lawful cause for the deed of sale and purchase of land by the debtor without the creditor's approval. The objectives to be achieved in this study are to find out the implementation of a lawful cause for the object of buying and selling collateral without creditor approval.

Methods

In line with problem identification, this research uses a normative juridical approach (Soerjono Soekanto, 1986). The normative juridical approach is used because this research is based on and uses primary data, namely, secondary data in an effort to inventory positive legal rules, discover legal principles and the philosophical basis of positive law to find out how the actual legal behavior of the perpetrators in legal relations and normative order regarding the legality of the Sale and Purchase Agreement Deed. The specifications of this study are not only

descriptive but also prescriptive so that they can imagine in the future how the law can change a society's habits. The type of data used is qualitative data and specifically for normative legal research, the data source is secondary data, with data collection techniques by conducting library research. "The analysis of legal materials in this study begins with an inventory of primary legal materials which include various laws and regulations and international agreements relating to the protection of legal guarantees (both fiduciary and mortgage rights).

Results and Discussion

Discussion of the permissible reasons, also known as *halal causes*, under the regime of treaty law, which have not yet been completed or assigned a standard definition in the discourse of legal science. However, the concept of a permissible cause, also known as a *halal cause*, under a conventional contract law regime may be observed in Article 1337 of the Civil Code, which states that "an unlawful cause is when it is banned by law, contrary to the ethical system." and "and order." Therefore does not give rise to legal force and which renders the agreement unlawful and invalid (Manan, 2013).

In this part of the study, the author is attempting to determine whether or not the norm that includes the definition of "*halal cause (halal cause)*" in numerous judges' judgments has been implemented in the same way that the author outlined at the beginning of this research. Specifically, District Court Decision Number 7/Pdt.G/2019/PN.Rhl, which was strengthened by the Pekanbaru High Court Decision with Case Number 85/PDT/2020/PT PBR and further strengthened by the Supreme Court of the Republic of Indonesia with Decision Number 1600 K/Pdt /2021 so that it has permanent legal force or *inkracht*, and the Decision of the Kisaran District Court Number 05/Pdt.G/2013/PN related to the sale of the

Although talking about legal norms and other norms share similarities in terms of serving as a guide to behavior, legal norms have their own characteristics that set them apart from other existing norms. Other norms serve as a guide to behavior in the same way that legal norms do, but legal norms are governed by the law. The essence of legal norms is heteronomous, which means that the law is imposed from outside on a person who is subject to coercion from without, and legal norms, unlike other norms, may be followed by the imposition of criminal penalties or bodily coercive punishments. For instance, under the norms of criminal law, there exist criminal punishments, and the implementation of these sanctions is carried out by state authorities, who are distinct from other norms that originate from both the individual and the society (Prayogo, 2016). A legal norm or rule, which is German for "*rechtsregel*," has a substance that is much more solid and may be implemented immediately.

In contrast to the rule of law, which acts indirectly (indirectly), in the sense that it exerts influence on how the rule of law should be interpreted, the principle of law works directly. Not only do legal norms and standards have more tangible meaning and are capable of being enforced immediately, but on top of that, they are either all in or none at all (*alles of niets* character). in contrast to the legal concept, which does not take an all-or-nothing approach to its application of the law. In the process of writing new laws, lawmakers often base their deliberations on a variety of preexisting legal principles. This leads to the establishment of legal norms, which eventually take the shape of real legal regulations. According to Maria Farida, when a legal principle or the principle of the formation of legislation is used as a legal norm, it will result in sanctions if these principles are not fulfilled or not implemented. This is because using a legal principle as a legal norm is the same as using a legal principle as a legal norm (Soeprapto, 2007).

In other words, the purpose of normalization in the form of a product of laws and regulations is to offer clarity in the legal system of the country with respect to the rights and duties of the

community, a circumstance in which the standard, in the ideal form in which it is implemented, must be followed by either the general public, officials of the state, or institutions that have been granted the power to do so. According to Fullan, implementation is the process of putting a new plan, activity schedule, or set of ideas into action with the expectation that others will adopt them and make necessary adjustments (Alfons, 2017).

Meanwhile, Abdul Wahab argues that the process of implementing the policy does not only concern the behavior of the administrative bodies responsible for implementing the program and creating obedience to the target group, but also involves the network of political, economic, social forces that directly or indirectly affect the target group. can indirectly affect the behavior of all parties involved and have an impact on both expected and unexpected impacts (Alfons, 2017).

In the context of implementing the lawful causation norm as referred to in Article 1337 of the Civil Code, in the Decision of the Rokan Hilir District Court Number 7/Pdt.G/2019/PN.Rhl, which was strengthened by the Pekanbaru High Court Decision with Case Number 85/PDT/2020/PT PBR and further confirmed by the Supreme Court of the Republic of Indonesia with Decision Number 1600 K/Pdt/2021 so that it has permanent legal force or *inkracht*, and the Decision of the Kisaran District Court Number 05/Pdt.G/2013/PN related to the sale of collateral objects by debtors without the knowledge of and creditor approval. If seriously examined and considered in one of the considerations of the judge stating that the deed of sale and purchase of the mortgage object guarantee by the debtor without the creditor's approval in the Sale Purchase Agreement Deed No. 73/2012 dated 17 February 2012 containing the sale and purchase of the disputed object declared illegal according to law.

In one of its legal considerations, the court stated that: 1) "Considering, that the fourth condition is in the form of a lawful or non-prohibited cause (including objective conditions) which means that the agreement must not be based on something illegal, contrary to the principles of propriety, decency or public order or contrary to the law, after the panel of judges examined and studied the Deed of Sale and Purchase Agreement dated February 17, 2012, Number: 73/2012"; 2) "Based on the agreement to open credit between Bank BRI Bagansiapiapi and Defendant I as referred to in the evidence of letters TI-9, TII-4 and TII-7, there is a clause that says as long as this agreement is still in progress, it will not authorize to sell or transfer, to renting out, handing over the use, what is pledged as collateral to other parties, without prior written approval from the Bank"; 3) "Considering, whereas Defendant II in his answer expressly stated that Defendant II was not aware of the existence of the Deed of Sale and Purchase Agreement dated February 17, 2012, Number: 73/2012, between the Plaintiffs and Defendant I and was not a party to the sale-purchase agreement. the"; 4) "Considering, that in essence the Deed of Sale and Purchase Agreement dated February 17, 2012, Number: 73/2012 contains the sale and purchase event between the Plaintiffs and Defendant I against the object of dispute which has been declared invalid according to law, so that the party most entitled to on the object of dispute whose rights are protected in the future, it is appropriate that other deeds related to the rights and obligations of the Parties as stated in the Deed of Power of Attorney dated February 17, 2012, Number: 74/2012 jo. Deed of Sale and Purchase of Shares Dated February 17, 2012, Number: 75/2012 jo. Deed of Collective Agreement Dated July 5, 2013, Number: 06/2013 jo. Deed of Statement of Meeting Resolutions of PT. Bumi Alam Riau, April 15 2015, Number: 19/2015, as long as it is related to the object of the dispute, it must also be declared invalid according to law and has no binding power to the parties in the deeds"; 5) "Thus against the Deed of Sale and Purchase Agreement No. 73/2012 February 17, 2012 jo. Deed of Power of Attorney Number: 74/2012 Dated February 17, 2012 jo. Deed of Sale and Purchase of Shares Number: 75/2012 Dated February 17, 2012 jo. Deed of Statement of

Meeting Resolutions of PT. Bumi Alam Riau Number: 19/2015, dated 15 April 2015 is legally invalid and should be canceled by law”.

Similarly, the consideration of the panel of judges at the appeal level which stated that: Considering, that due to the approval of the BRI Bagan Prepare-api branch bank as required in the Deed of Sale and Purchase Agreement Number 73/2012 dated 17 February 2012, there was no such deed of Sale Agreement. The Purchase Number 73/2012 dated February 17, 2012 was declared invalid and must be cancelled."

Furthermore, the Supreme Court also held the same opinion which basically stated in its consideration: "That in the credit agreement between Defendants I and II there is a clause that the object of collateral may not be transferred" That it is not proven that there is a permit by Defendant II to transfer the object of dispute to the certificate of Property Rights Number 906, thus the agreements between Defendant I and the Plaintiff are invalid and null and void due to unlawful causes or causes, therefore the Defendants cannot be prosecuted for breaches of contract. based on an invalid agreement”

According to the judge's considerations, it is well known that the implementation of a lawful cause (halal cause) in the sale and purchase agreement, is a credit opening clause from the Lending Institution (bank). In this particular instance, the lending institution is the Bank Rakyat Indonesia (BRI) Branch office Bagan Siapi-api, which in the contents of the agreement states that the mortgage in the form of land is "as long as the agreement is still in progress, it will not authorize the debtor to

This means that, within the context of the Rokan Hilir District Court Decision Number 7/Pdt.G/2019/PN.Rhl, which was strengthened by the Pekanbaru High Court Decision Number: 85/PDT/2020/PT PBR and further strengthened by the Supreme Court of the Republic of Indonesia with Decision Number 1600 K/Pdt/2021 so that it has permanent legal force or *inkracht*, halal causes are interpreted as things that are not allowed or prohibited to be done within an agreement When making a judgment, a judge may use the existence of a legitimate reason that serves as an objective requirement for the validity of an agreement as the basis for his evaluation of whether or not to cancel the agreement.

Even though the object of collateral is a mortgage, which is regulated in Law Number 4 of 1996 Concerning Mortgage on Land and Objects Related to Land (UU Mortgage Rights), the person giving the mortgage (the debtor) is prohibited from committing "deeds of other law than imposing Mortgage Rights. This norm itself is regulated in Article 15 Paragraph 1 letter an of the Mortgage Law. It is stated in the explanation of the article that the following is what is meant by not containing the power to carry out other legal actions in this provision: "What is meant by not containing the power to carry out other legal actions in this provision, for example, does not contain the power to sell, lease the object of Mortgage, or extend land rights."

Therefore, from the provisions of these norms, while still respecting the Decision of the Rokan Hilir District Court with the Number 7/Pdt.G/2019/PN.Rhl, which was strengthened by the Pekanbaru High Court Decision Number: 85/PDT/2020/PT PBR and further strengthened also by the Supreme Court of the Republic of Indonesia with Decision Number 1600 K/Pdt/2021, so that it has permanent legal force or *inkracht*. In point of fact, "everything is banned by law" is included in both the interpretation and application of law in relation to a legal reason, also known as a halal cause.

Conclusion

Implementation of a lawful cause in the deed of sale and purchase of collateral object dated February 17, 2012, Number: 73/2012 which was carried out by the debtor to a third party without written approval from the creditor in the context of the Rokan Hilir District Court Decision Number 7/Pdt.G/2019/PN.Rhl, which was strengthened by the Pekanbaru High Court Decision Number: 85/PDT/2020/PT PBR and also strengthened by the Supreme Court of the Republic of Indonesia with Decision Number 1600 K/Pdt/2021 so that it has permanent legal force or *inkracht*. The deed is not allowed or prohibited to be carried out in an agreement so that it is null and void by law. Indeed, the meaning and application of law regarding lawful causes (*halal causes*), is also included "whatever is prohibited by law". The implications of the deed of sale and purchase of collateral object dated February 17, 2012, Number: 73/2012 indicates that there are at least 3 (three) rational reasons that make the deed of sale and purchase of land object of collateral not valid or legal, including: a. Deed of Sale and Purchase of Land dated February 17, 2012, Number: 73/2012 has ignored the point of cause that is lawful as one of the fundamental requirements in contract law; b. the deed of sale and purchase of land is contrary to the Mortgage Law; c. The decision of the Rokan Hilir District Court Number 7/Pdt.G/2019/PN.Rhl, which was strengthened by the Pekanbaru High Court's Decision Number: 85/PDT/2020/PT PBR and also upheld by the Supreme Court of the Republic of Indonesia with Decision Number 1600 K/Pdt/ 2021 has been in accordance with the principles of justice.

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