

Mortgage Agreement as Collateral in Mudharabah Contract Based On The Perspective Of Legal Certainty In Indonesia

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ABSTRACT: This study investigates how the agreement on mortgage rights as collateral in mudharabah contracts from the perspective of legal certainty in Indonesia. The type of research approach used is normative juridical. This study shows that there is a mismatch between the concept of mortgage rights as stated in Law Number 4 of 1996 on mudharabah contracts. The discrepancy states that a mudharabah contract is a profit-sharing cooperation agreement, while a mortgage is a security agreement to pay off certain debts. Therefore, a mortgage agreement as collateral for a mudharabah contract cannot be said to have legal certainty. This is reinforced in Article 10, which states that a debt agreement must precede mortgage rights. Meanwhile, the mudharabah contract is not a debt agreement but a capital cooperation agreement to obtain profit

KEYWORDS: *Collateral, Legal Certainty, Mudharabah, Mortgage Agreement, Perspective*

I. INTRODUCTION

Amendment to Law Number 7 of 1992 on Banking, a bank is a business entity that collects funds from the public in the form of deposits. It distributes them to the public to improve the lives of the people (1). As a financial intermediary, banks have the function of collecting funds from parties with surplus funds. In this case, collecting funds from the public and public trust to save their funds in the bank is the main capital of the bank (2). In Indonesia, there are 2 (two) banking systems, namely Conventional Banks, which are regulated by Law Number 10 of 1998 concerning Amendments to Law Number 7 of 1992 concerning Banking and Islamic Banks, which are regulated by Law Number 21 of 2008 concerning Islamic Banking. The activities of conventional banks and Islamic banks have the same goal, namely, to make a profit. What distinguishes them is the basic concept of their operations in order to make these profits.

In the context of the previous understanding, the role of the community is significant in banking operations. Because banks in their activities, always try to collect as much funds as possible from the community to be managed and redistribute them to the community in the form of loans or what is more commonly referred to as credit distribution. The definition of credit is the ability to carry out a purchase or make a loan with a promise that payment will be made within an agreed period (3).

The expansive distribution of credit on the one hand is indeed very beneficial to the community. Because it will be able to quickly obtain funds (in the form of credit or bank loans) without having to be accompanied by complicated and troublesome conditions (4). However, the practice of granting credit by banks is always accompanied by the submission of collateral by the debtor. In implementation it is carried out at the time of binding the collateral, namely at the time of the credit contract.

One of the collateral objects that continues to have an increasing value every year is land. Therefore, land is an object that is considered the most profitable in the event of execution as one of the fulfillment of the debtor's debt when a default occurs. Suppose a debtor obtains credit from the bank. The land is used as a collateral object, and physically, the land remains in the possession of the debtor while the ownership remains with the original owner. However, because it is used as debt collateral by entering into a Mortgage Rights agreement. Hence, the authority to grant Mortgage Rights to carry out legal actions with third parties or other actions that result in a decrease in the value of the collateral is limited by the Mortgage Rights owned by the bank as the holder of the Mortgage Rights (5).

Budi Harso explained how to control land rights. It contains the authority for creditors to do something about the land that is used as collateral. However, it is not to be physically controlled and used but rather to sell if one day the debtor breaks his promise (*wanprestasi*) and will take the proceeds from the sale, either in whole or in part, as a full payment of the debtor's debt to the bank (6).

In Article 1 point 1 of the Law on Mortgage Rights, in the future, it will be abbreviated as UUHT. The definition of Mortgage Rights is a security right imposed on land rights as referred to in Law Number 5 of 1960 concerning Basic Regulations on Agrarian Principles, including or excluding other objects that are an integral part of the land, for the repayment of certain debts, which gives priority to certain creditors against other creditors (7).

According to Law Number 10 of 1998 concerning amendments to Law Number 7 of 1992 concerning General Banking. When entering into a credit agreement, banks are obliged to carry out banking principles clearly and firmly, especially the principle of prudence. It must follow the central credit policies in order to maintain the security, integrity, and professionalism of the bank's work.

The implementation of the prudential principle is that in carrying out a bank credit agreement, the bank must conduct an in-depth analysis of the character, ability, capital, collateral, and business prospects of a prospective debtor. One of these assessments is the presence of *collateral*. Meanwhile, the guarantee that banks often use is Mortgage Rights. Meanwhile, the collateral often used by banks is Mortgage Rights. When granting mortgage rights, it must be preceded by making a Deed of Mortgage Rights, abbreviated as APHT, which is made before a Land Deed Official after this, abbreviated as PPAT, which is a deed to transfer land rights to become collateral for the bank (8). The presence of Mortgage Rights is passed through two stages of activity, namely the granting of Mortgage Rights by making APHT by PPAT which contains promises and obligations which of course beforehand there is a principal agreement, namely a debt and credit agreement between two parties. The debt in question is any debt, whether it comes from a debt agreement or from another agreement, the debt in question is a debt that already exists when the mortgage rights are bound (9). The registration of the Mortgage Rights by the Land Office is the next stage, as a sign of the birth of the Mortgage Rights and the issuance of a certificate of Mortgage Rights as evidence of the encumbrance of the Mortgage Rights (10). Thus, it is certain that the granting of mortgage rights must be an *accessoir* agreement of a principal agreement. It is an agreement that gives rise to a debt and credit relationship that is pledged as repayment (11).

In credit agreements in conventional banking, the making of APHT as a guarantee of debt repayment is not a problem because the concept of conventional banking operations is debt (*loan*) from credit facilities, namely the Bank as a creditor or party who owes while the customer as a debtor or party who owes. However, this is the concept of Islamic banking which has a *non-lending* principle. These include *mudharabah* financing activities, which place fund borrowers as business partners. *Mudharabah* is a business cooperation contract between the owner of the capital (*malik/shahib al-mal*) who provides all the capital and the manager (*amil/mudharib*) and the business profits are divided between them according to the ratio agreed in the contract (12). Therefore, *Mudharabah* can be said to be an activity of economic cooperation agreement between two parties that has several provisions that must be fulfilled to bind the cooperation in a legal framework (13). According to Article 20 Paragraph (4) of the Compilation of Sharia Economic Law, a *mudharabah* agreement is a cooperation between the owner of funds and the management of capital to carry out certain businesses with profit sharing based on a ratio. The ratio referred to here is the reward that both parties in the *mudharabah* contract are entitled to receive (14). In the Fiqh science *mudharabah* is an agreement between two people with the provision of capital from one party, while the business of generating profits by the other party, and the profit is divided among of them (15).

In terms of the contract, *mudharabah* consists of two parties. If there is a profit in the management of the money, the profit is divided by the agreed percentage. Because they share in the profits, *mudharabah* is also called *shirkah* (16). According to Salim, a *mudharabah* contract is a business cooperation contract between the first party (*malik, shahibulmaal*, or Islamic bank) who provides all the capital and the second party (*amil, mudharib*, or customer) who acts as a fund manager as stated in the contract, while the Islamic bank fully bears the loss unless the second party commits willful misconduct, negligence or violates the agreement (8). Meanwhile, Zainuddin argues that if there is a loss in running the business, it will be borne together, namely the owner of the capital will bear the loss of his capital and the entrepreneur or the one running the business will bear the loss of his energy only and is not burdened with other losses (17).

As an implementation of a cooperation agreement, the *mudharabah* contract, whose main concept is profit sharing. As a consequence, all losses in the financed business will be borne by the bank as *shahibul mal*. Except for the losses caused by the negligence of *mudharib* as the manager of capital or has violated the agreement. Therefore, it is appropriate for *shahibul mal* and *mudharib* to work together to overcome problems (17).

Suppose it is seen from the above opinion. In that case, the *mudharabah* contract is not a debt and credit agreement but a cooperation agreement where there are two parties to the agreement in cooperation agreement, namely between *shahibul mal* and *mudharib* (18). In a *mudharabah* contract, trust is the most important element in the transaction, namely the trust of *shahibul mal* to *mudharib*, trust is said to be the most important element because in *mudharabah* transactions, *shahibul mal* may not participate in asking for collateral or collateral from *mudharib*, unless the guarantee is intended to guard if *shahibul mal* is worried that there will be a misappropriation of capital by *mudharib* (19). The *shahibul mal* must also not interfere in the management of the project or business which is financed with the *shahibul mal* funds. Thus, the *mudharib*, manages and runs the business or project without interference from the *shahibul mal* (18).

Based on the aforementioned opinion, *mudharabah* is not a debt and credit agreement, while mortgage rights are preceded by a debt and credit agreement as explained in the general explanation of Law Number 4 of 1996 concerning Mortgage Rights, namely security rights over land to guarantee the repayment of certain debts (10). Here it can be said that mortgage rights are a debt repayment agreement, with the right to give priority and precedence to other creditors (20). This study will discuss how the regulation of *Mortgage Rights* in Indonesian Security law, and how the concept of Mortgage Rights on *mudharabah* contracts to the perfection of legal certainty in Indonesia.

II. METHODOLOGY

This study is a type of normative juridical research that examines Mortgage Rights as collateral in *Mudharabah* Agreements in preparation for legal certainty in Indonesia. To answer the issues in this study, legal and conceptual approaches were used. This study uses primary legal materials, namely binding legal materials that include laws and regulations related to the problem, and secondary legal materials, which are legal materials that further explain and provide information about primary legal materials. Literature, in the form of books and legal journals, is used as secondary legal materials. Some articles from the internet were also used in this research as tertiary legal materials. The literature study technique was used to collect primary and secondary legal materials to record quotations from the implementation of the literature study. The method of analysis used in this research is analytical and uses deductive logic. It means the technique of drawing specific conclusions from general statements.

III. FINDING AND DISCUSSION

A. Mortgage Rights Arrangement in Indonesia

Article 1131 of the Civil Code (KUHPer) lays down the general principle of the rights of a creditor against his debtor, in which it is determined that: "All property of the debtor, whether movable or immovable, whether existing or future, shall be liable for all personal liability"(21). Such security is granted to every creditor and is therefore called general security. Every creditor enjoys such general security rights.

Then Article 1132 of the Civil Code (KUHPer) provides an exception, namely in the case of a creditor who has a better position than other creditors in the repayment of his debt. These special and general security rights do not provide a guarantee that the bill will be repaid. Instead, they only give the creditor a better position in the collection or more assurance in the fulfillment of the bill(22).

One type of guarantee is a property guarantee. A property guarantee is collateral in the form of an absolute right to an object, which has the characteristics of having a direct relationship to a particular object of the debtor, can be defended against anyone, always follows the object, and can be transferred (for example: mortgages, mortgage liens, etc).

Property collateral can be in the form of collateral for movable objects and immovable objects. Movable objects are objects that by their nature can move or be moved or because the law is considered a movable object, such as rights attached to movable objects.

Movable objects are further divided into tangible or bodily objects. Securing tangible movable objects with pawn or fiduciary, while securing intangible movable objects with pawn, *cessie*, and *account receivable*. As for material guarantees in Indonesia are *assesoir* of the main agreement or in other words only "additional guarantees". addition to the main guarantee in the form of collateral for the goods financed by the credit (23). One form of property security in Indonesia is Mortgage Rights on land and objects above it. The existence of this mortgage right is very helpful for banks in fulfilling the principle of prudence in channeling capital to their customers.

The birth of Law Number 4 of 1996 concerning Mortgage Rights certainly brought fresh air to the banking world because it made it easier for the debtor to execute in the event of default. Since the birth of this mortgage law, the binding of collateral for debt in the form of land or objects related to the land by giving priority or precedence to the holder of the mortgage right. Therefore, the creditor as the holder of the mortgage right has the right to take precedence over other creditors to receive payment for receivables from the sale or auction of the collateral object agreed upon by granting the mortgage right(24). The characteristics of this mortgage law include giving priority rights to the holder of the mortgage, and following the security object on whom the security object is located, this aims to fulfill one of the principles in security law, namely the principle of specialty and publicity. Therefore the mortgage agreement can bind third parties and provide legal certainty and facilitate interested parties in the execution of the mortgage object(25).

Article 10 of Law No. 4 of 1996 concerning mortgage rights over land and objects thereon states that the granting of a mortgage right is preceded by a promise to grant a mortgage right as security for the repayment of certain debts, which is stated in and is an inseparable part of the relevant debt agreement or other agreement that gives rise to the debt(7). Meanwhile, to carry out a Mortgage Rights granting agreement must be carried out by making a Deed of Granting Mortgage Rights (APHT) by a Land Deed Official (PPAT) by applicable laws and regulations, which then no later than 7 (seven) working days after the parties sign the APHT, the PPAT must submit the APHT made by him along with other necessary documents to the land office where the land object is used as collateral in the context of registering the Mortgage Rights. Then, the Land Office makes a land book and records the land rights that become the object of the mortgage right and issues a certificate of mortgage right as authentic evidence.

B. Mortgage Agreement as Collateral in Mudharabah Agreements

There is no word *Mudharabah* found directly in the Qur'an, but the word *darb* is found in many places (26). Based on this word *darb*, the scholars argue that the term *mudharabah* comes from the word *daraba fil-ardl* which later developed into the term *mudharabah*.

According to the Hanafi *mazhab*, the term *mudharabah* is an agreement with the aim of conducting a partnership in order to gain profit with capital from one party as *shahibulmaal* and the other party the party who is trying or also called the term *mudharib*(26). While the Maliki school of thought defines the term *mudharabah* as the transfer of a specified amount of money from the owner of the capital to someone to carry out a business with that money by giving a portion of the profit in return. Then according to the Shafi'i *mazhab*, the definition of *mudharabah* is that the owner of the capital gives money to someone to be used as capital for a trading business with the agreement that the profit from the business is jointly owned. Furthermore, the Hambalimahzab is of the view that *mudharabah* is the provision of an item or similar with a clear amount of provisions to the person who runs the business by giving a portion of the profit from the business.

From the four *mazhabs* mentioned earlier, the author can conclude that *mudharabah* is a cooperation agreement where one party is the owner of the capital and the other party is the one who runs the business from the capital with the provision of profit sharing at the end of the cooperation. However, the four *mazhabs* above only state that they share the profits from the capital that has been given. However, in a business activity it should not only talk about profit issues, certainly every business should also be possible that there will be a risk of loss from a business.

According to Moh. Mufid, *mudharabah* is a cooperation agreement between *Shahibul Mal* who provides all the capital to *mudharib* as a capital manager. The agreement is that the profit will be divided based on an agreement that has been determined in the agreement and if there is a loss. It will be borne by *Shahibul Mal* as long as the loss is not the result of *Mudharib's* negligence (25). This means that if there is a risk of loss that is not based on *Mudharib's* negligence, the loss will be borne jointly between *Shahibul Mal* and *mudharib*.

In conducting a *mudharabah* contract, several elements must be fulfilled including:

1. *Ijab and Qabul* are between the two parties or are statements of will made by the parties. The statement of will here is certainly a statement of similarity of will, or what is more often called an agreement or agreement to make a *mudharabah* contract.
2. *Capable legal subjects*, namely the parties to the *mudharabah* contract.
3. Clear capital is both the amount and the type of capital.
4. Halal business, the business in question is not only a trading business, but any business is allowed as long as it is halal.

In a *mudharabah* contract, there are at least two parties who carry out cooperation, namely *shahibul mal*, which is the party that provides its capital to *mudharib* based on trust and gives full trust to *mudharib* to carry out agreed business activities. Trust is the most important element in a *mudharabah* contract, because in a *mudharabah* contract *Shahibul mal* does not interfere in running the *mudharib*'s business. If in running the business the *mudharib* manages to get a profit, then *shahibul mal* will certainly get a profit based on the agreement, but on the contrary. If the *mudharib* fails to run his business, then all losses will be borne by *Shahibul Mal*.

Furthermore, Moh. Mufid said, *mudharabah* is a cooperation agreement between *shahibul mal* who provides all the capital to *mudharib* as a capital manager, with the agreement that the profit will be divided based on the agreement specified in the agreement and if there is a loss, it will be borne by *shahibul mal* as long as the loss is not the result of *mudharib*'s negligence (25). Therefore, it is not appropriate in a *mudharabah* contract followed by an agreement to grant Mortgage Rights, even some scholars think that *shahibul mal* is not allowed to ask for collateral in the form of anything from *mudharib* to return his capital, if terms and conditions are asking for collateral in the *mudharabah* contract, the *mudharabah* contract becomes void (18). In fact, such a contract may be invalid if these prohibited characteristics contradict the basic character of the contract and its legal consequences (27). The reason is because *mudharabah* is a cooperation contract in other words, *shahibul mal* bears the capital and *mudharib* bears the work, and in a *mudharabah* contract is a contract of mutual trust, therefore if there is a loss, all parties share the loss (28).

The reality is that agreements with *mudharabah* contracts are still followed by collateral agreements for Mortgage Rights, to bind the parties so that they do not deviate, even though a property law has a closed system, while the law of agreements adheres to an open system. This means that the kinds of rights to objects are limited and the regulations regarding the rights of objects are coercive, while the law of agreements gives the widest possible freedom to the community to enter into agreements containing anything, as long as it does not violate public order and decency. The open system in the Civil Code Article 1338 paragraph (1) "All agreements made legally shall apply as a law to those who make them". The article seems to contain a statement to the public that it is permissible to make agreements in the form and content of anything and that the agreement will bind the parties who make it like a law. Regarding whether an agreement is valid or not, it has been regulated in Article 1320 of the Civil Code, namely the existence of an agreement, the ability to agree (act), the existence of a certain thing, the requirement for a halal cause.

The validity of an agreement must fulfill the four conditions referred to in Article 1320 of the Civil Code, which are absolute conditions that must be met for an agreement to be considered valid. Even though there is an agreement or compatibility between the parties to the agreement, the creation of a mortgage agreement that is dependent on the *Mudharabah* contract has violated the provisions of Article 1 of Law Number 4 of 1996 concerning Mortgage Rights on Land and Objects Related to Land, which requires that a mortgage agreement is a security right over land along with or without other objects that form an integral part of the land, for the repayment of certain debts, which gives priority to certain creditors against other creditors.

Then Article 3 states that the debt secured by a Mortgage Right can be an existing debt or one that has been promised with a certain amount or an amount that at the time the application for execution of the Mortgage Right is submitted can be determined based on a debt and credit agreement or other agreements that give rise to the debt and credit relationship concerned. In addition, this also violates the provisions of Article 10 of the UUHT which requires that the granting of a Mortgage Right is preceded by a promise to grant a Mortgage Right as security for the repayment of a certain debt, which is set forth in and forms an inseparable part of the relevant debt agreement or other agreement giving rise to the debt, and Article 11 paragraph (1) letter C which states that the clear designation of the debt or debts guaranteed as referred to in Article 3 and Article 10 paragraph (1).

Thus, the mortgage agreement made based on the *mudharabah* contract agreement is an agreement that only fulfills the three conditions specified in Article 1320 of the Civil Code, namely the existence of an agreement. The ability to act to make an agreement and the existence of a certain thing, but does not fulfill the fourth condition, namely the existence of a halal cause. Because for the binding of certain objects, there are already formal requirements that have been regulated in separate laws.

IV. CONCLUSION

Based on finding discussed previously, it can be concluded that Mortgage Rights are security rights that are imposed on land rights along with or without other objects that are an integral part of the land. To repay certain debts and give priority to certain creditors against other creditors. Article 10 of the UUHT states that the granting of Mortgage Rights must be preceded by an agreement to grant Mortgage Rights as security for the repayment of certain debts, which is written in an agreement that is inseparable from the debt and credit agreement. Meanwhile, *Mudharabah* is not a debt and credit agreement, but a *Mudharabah* agreement is a cooperation agreement between *shahibul mal*, who provides capital, and *mudharib* as the party who manages or manages the capital. The Mortgage agreement that is hung on the *mudharabah* contract does not meet the perspective of legal certainty in Indonesia. It occurs as a result of contradicting the laws and regulations in Indonesia, especially Article 10 of Law Number 4 of 1996 concerning Mortgage Rights.

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