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Legal position of personal guarantee in security law

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ABSTRACT

One of the essential elements of bank credit is the existence of a trust from the bank as a creditor to borrowers as debtors. This trust arises due to the fulfillment of all terms and conditions for obtaining bank credit by the debtor, including the clarity of the credit allocation, the existence of collateral or collateral. The object of collateral is an object or material right given by the debtor to the creditor to create confidence that the debtor will fulfill obligations that can be valued in money arising from an agreement. The research method in this writing is to use a normative legal approach, using a normative juridical approach, including reviews and variousanalysis legal materials and legal issues related to the problem being analyzed. The purpose of this research is to know the position of personal guarantee (personal guarantee) will appear, after the debtor does not fulfill the obligations in his engagement as appropriate (default). The results and conclusions of the research show that 1) Personal guarantees appear when the debtor defaults, replacing the debtor's position. 2) The creditor can ask the court for confiscation of property if the guarantor is uncooperative. 3) Articles 1831-1850 of the Civil Code link the guarantor and the debtor.

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1. INTRODUCTION

In the increasing needs of the community, in the field of finance, especially credit aspects (Aulianisa, 2020), then it can also be stated that the standard of living of the people has also increased. To be able to fulfill all their needs, the community is demanded and requires various means of providing funds or capital, one of which is by means of debt, namely through banking institutions, namely by providing credit facilities (Norawati et al., 2022; Nurhayati et al., 2019; Ramadhani, 2020; Thalib et al., 2021; Wahyuni, 2020). Legally, credit givers and recipients are given legal certainty through protection through a strong collateral rights institution and provide legal certainty for interested parties (Imanda, 2020)(Nugrohandhini & Mulyati, 2019).

One of the essential elements of bank credit is the existence of a trust from the bank as a creditor to borrowers as debtors (Kurniasari et al., 2020)(Zakiah & Azhar, 2021)(Atikah, 2021)(Álvarez-Botas & González, 2021)(SINGH et al., 2021). The principle of trust is needed in a reciprocal relationship (Fahmi, 2018). This trust arises due to the fulfillment of all terms and conditions for obtaining bank credit by the debtor, including the clarity of the credit allocation, the existence of collateral or collateral and so on. (Sudharma & Putra, 2019).

In the process of fulfilling credit facilities in banking, of course (Dewi, 2018), will always be associated with and required the object of collateral for the debt (Agustianto & Sartika, 2019;

Simatupang, 2021; Wulan & Kuswanto, 2020). The object of collateral is an object or material right that is given by the debtor to the creditor to create confidence that the debtor will fulfill obligations that can be valued in money arising from an agreement. (Abdullah et al., 2021)(Saija & Sudiarawan, 2021). Collateral objects have very important positions and benefits (Kafa & Sacipto, 2019), so as to provide legal certainty for creditors (Christy et al., 2020; Roselvia et al., 2021; Sipayung, 2019) Meanwhile, for debtors with collateral objects, they can obtain credit facilities from creditors and raise no worries from the financial aspect in developing their business, because there is certainty in doing business with the capital they obtain.

2. RESEARCH METHOD

The research method in this writing is to use a normative legal approach, using a normative juridical approach, including reviewing and analyzing various legal materials and legal issues related to the problem being analyzed, namely Article 1320 of the Civil Code (hereinafter referred to as the Civil Code) in conjunction with Article 1338 of the Civil Code, the principles of consensus and/or freedom of contract are known for the parties making the agreement. A valid agreement is an agreement that meets the conditions stipulated by law. A valid agreement is recognized and given legal consequences (legally concluded contract). According to the provisions of Article 1320 of the Civil Code, the terms of a valid agreement: 1) There is an agreement of will between the parties that make an agreement (consensus). 2) There is the ability of the parties to enter into an agreement (capacity). 3) There is a certain thing (object). 4)There is a lawful cause (causa). This research was conducted to solve problems that arise and the results to be obtained from this research can be used to solve various problems in the field of law by examining a law that applies from various aspects such as aspects of theory, concepts, legal principles, philosophy, comparison, structure/composition, consistency, general explanation and explanation of each article, formality and binding force of a law and the language used is legal language.

The approach used in this study includes a statutory approach and a conceptual approach. The statutory approach is carried out by analyzing the laws and regulations that are relevant to the legal issues being studied. The statutory approach will provide an opportunity for researchers to study the provisions and conformity between one law and another in relation to explaining and examining various legal principles and/or principles. The conceptual approach (conceptual approach) means starting from the development of legislation and doctrines in the science of law is carried out with an approach that starts with opinions and doctrines in legal research. These opinions and doctrines will generate ideas that result in legal understanding, legal concepts, and legal principles related to the legal issues found in this study.

3. RESULTS AND DISCUSSIONS

In social life, both debtors and creditors in credit agreements can be divided into 2 legal subjects, namely natuurlijke persoon as private persons and rechts persoon as legal entities (persona ficta). The two legal subjects will have the same treatment when each of these legal subjects will enter into a credit agreement with the bank.

In the provisions of Article 1320 of the Civil Code (hereinafter referred to as the Civil Code) in conjunction with Article 1338 of the Civil Code, the principles of consensus and/or freedom of contract are known for the parties making the agreement.

A valid agreement is an agreement that meets the conditions stipulated by law. A valid agreement is recognized and given legal consequences (legally concluded contract). According to the provisions of Article 1320 of the Civil Code, the terms of a valid agreement: a) There is an agreement of will between the parties that make an agreement (consensus), b) There is the ability of the parties to enter into an agreement (capacity), c) There is a certain thing (object), d) There is a lawful cause (causa).

Material guarantees referred to above can be divided into movable object guarantees and immovable object guarantees. Guarantees for movable objects are divided into mortgages and fiduciaries, while guarantees for immovable objects are divided into mortgages on land and/or land and buildings on a fiduciary basis. Based on Article 1 paragraph (1) of Law Number 4 of 1996 concerning Mortgage Rights on Land and Objects Related to Land (“UUHT”). it is stated that the

Mortgage Right over the land along with objects related to the land, hereinafter referred to as the Mortgage Right, is a security right that is imposed on land rights as referred to in Law Number 5 of 1960 concerning Basic Agrarian Regulations, following or not accompanied by other objects that are an integral part of the land.

In the provisions of Article 1 paragraph (1) of Law Number 42 of 1999 concerning Fiduciary Guarantees ("Fiduciary Law"), it is stated that "fiduciary is the transfer of ownership rights to an object on the basis of trust provided that the object whose ownership rights are transferred remains in the possession of the owner of the object". Fiduciary guarantees in the provisions of Article 1 paragraph (2) of the Fiduciary Law, it is stated that "Fiduciary guarantees are guarantee rights to movable objects, both tangible and intangible, and immovable objects, especially buildings that cannot be burdened with mortgage rights as referred to in the UUHT which remain is under the control of the Fiduciary Giver, as collateral for repayment of certain debts, which gives the Fiduciary Recipient a priority position over other creditors".

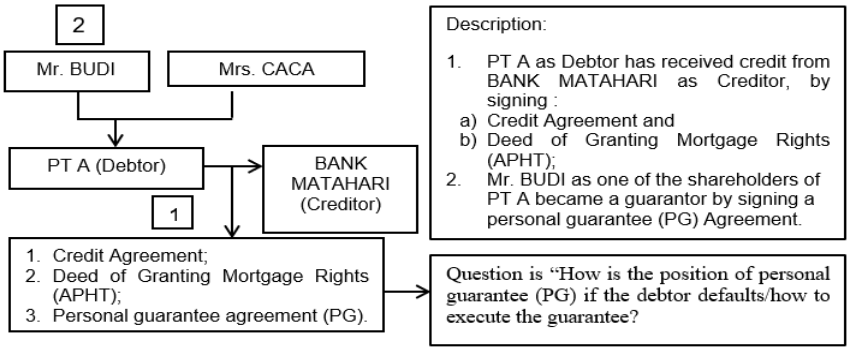

Figure 1. Case example

Based on the provisions of Article 1820 of the Civil Code, the elements of a personal guarantee have a direct relationship to certain legal subjects, which can only be maintained against the debtor and the assets of the debtor in general. In the guarantee agreement there is often a clause stating that the personal guarantee relinquishes the privilege which is actually a legal consequence of giving the personal guarantee. It is often not realized that if the guarantor has released his privileges and then the debtor is negligent in carrying out his obligations to pay off his debts to creditors or more and have matured.

Personal guaranteehave special rights contained in Article 1831 of the Civil Code, it is stated that "the bearer is not obliged to pay the debtor, unless the debtor is negligent, while the debtor's objects must first be confiscated and sold to pay off the debt". Individual guarantees do not give precedence over certain objects, but are only guaranteed by a person's assets through a person who guarantees the fulfillment of the agreement in question.

The imposition of individual guarantee rights must be made through an individual guarantee deed (personal guarantee). The bank makes the deed with a notarial deed or what is known as an authentic deed. This provision is intended to further protect/guarantee and provide legal force for the parties and especially for the benefit of creditors as guarantors and can be used as perfect evidence in solving any problems that arise at a later date.

The existence of a personal guarantee (personal guarantee) makes the position of the creditor better or stronger, so that the guarantee is held not for the benefit of the debtor but for the creditor. In every credit agreement, the position of the bank as the creditor is always higher or stronger when compared to the debtor's position, this is in fact the debtor who needs funds or capital while the creditor provides it. Psychologically, if the debtor needs funds or capital, he will comply with the conditions set by the creditor so that he can get money or capital to fulfill his interests.

In its position as a guarantor, there will be legal consequences that arise in individual guarantee agreements/deeds, where the guarantor is not only required to complete the agreed

achievements or commitments, but when the bank as the creditor feels disadvantaged because of the debtor's carelessness, then the bank according to the agreement can demand payment from the guarantor who owes, as a substitute for the obligations of the debtor who has been negligent.

In this case example, attention must also be paid to the legal subject (Naturljke Persoon) by taking into account Law Number 1/1974, Article 2 paragraph (1) states that marriage is legal, if it is carried out according to the laws of each religion and belief. In the provisions of Article 2 paragraph (2) it is stated that each marriage is recorded according to the applicable laws and regulations, and in the provisions of Article 35 paragraph (1) it is stated that property acquired during the marriage becomes joint property and Article 35 paragraph (2), it is stated that the inherited assets of each husband and wife and the assets obtained by each as a gift or inheritance, are under the control of each as long as the parties do not specify otherwise.

In accordance with the nature of the guarantee, basically the role of the guarantor in the guarantee agreement will only appear if the debtor defaults. In such conditions, the creditor in principle has the right to demand, among other things, compensation stated in an amount of money, this can be interpreted that the guarantee agreement is an act of guaranteeing that the debtor will fulfill obligations to the creditor and if not, the guarantor will fulfill these obligations which actually become debtor's obligations to creditors. Thus, with this position, the interests of creditors are better protected, so that the capital lent to the debtor can be returned.

In regards tothe execution of the collateral object (mortgage right) which is placed as collateral confiscation (consevatoir beslag) in a judgment by a third party, then the court decision granting the collateral confiscation (consevatoir beslag) on land that has been pledged as collateral to the bank is incorrect as referred to in the Supreme Court Jurisprudence Number 394.K/Pdt/1984, dated March 31, 1985. Banks can execute land that has been pledged based on the Mortgage Imposition Deed (APHT) which contains the irah-irah "FOR JUSTICE BASED ON THE ALMIGHTY GOD", as a form of the same executive power with a court decision that has permanent legal force as stipulated in Article 20 paragraph (1) letter b UUHT.

Also related to bankruptcy as stipulated in Law Number 37 of 2004 concerning Bankruptcy and Postponement of Debt Payment Obligations (hereinafter referred to as the Bankruptcy Law), thenpersonal guarantee (personal guarantee) can be bankrupt, as regulated in Article 2 paragraph (1) of the Bankruptcy Law, it is stated that: Debtors who have two or morecreditorsand does not pay off at least one debt that has matured and is payable, is declared bankrupt by a Court decision, either at his own request or at the request of one or more of his creditors.

4. CONCLUSION

Judging from the results and discussion discussed in the previous chapter(Azis et al., 2020)it can be concluded 1) the position of personal guarantees (personal guarantees) will arise, after the debtor does not fulfill the obligations in his engagement as they should (default). Fulfillment by a personal guarantee (personal guarantee) provides a substitute for the debtor's unfulfilled position. If the guarantor does not also show good faith, to fulfill his obligations, the creditor can ask the court to confiscate the guarantor's assets or personal guarantee and can be filed for bankruptcy as in the jurisprudence of court decisions number 39 K/N/1999 and 72/PAILIT/2010 /PN.NIAGA.JKT.PST. 2) Guarantees or guarantees are regulated in Article 1831 to Article 1850 of the Civil Code. From the provisions of the Civil Code it can be concluded that a guarantor or guarantor is also a debtor. 3). If the debtor is declared bankrupt where the debt is guaranteed by an individual guarantor or the guarantor himself becomes the guarantee, then the provisions of Article 1131 and Article 1132 of the Civil Code apply. Suggestions for future research are to analyze the role and practical impact of Articles 1131 and 1132 of the Civil Code in bankruptcy situations.

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