

**TORT ACCUSATION TO PARATE EXECUTIE IN THE MURABAHAH FINANCING
RECEIVABLE AND LIABILITY
(Analysis of Boyolali District Court Verdict No: 41/Pdt.G/2016/PN.Byl)**

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ABSTRACT

This article is aimed to find out legal consequence whether a deed certificate was not signed in front of the notary. This research used juridical normative approach. The deed should be signed before the notary, according to UUJN (Act of Notary Position), meant that the notary supposed to be present physically and signed the deed certificate in front of the client and witnesses as explained in Article 16 paragraph (1) letter l. Under certain conditions, the parties may not be able to attend, and the signatures they put in their respective places or the signing process was not conducted in front of the notary, then the parties may deny the contents or their signatures, the deed which was not signed in front of the notary will lose its power, or the power of the deed will be degraded.

Key Word: Notary; The Notarial Deed; Degraded

Introduction

Indonesia as a legal state which is based on Pancasila and 1945 Constitution of the Republic of Indonesia guarantees certainty, order and legal protection for every citizen. It is required an authentic written evidence concerning action, agreement, determination, and legal event created by or in front of the Notary to guarantee the certainty, the order, and the legal protection. Notary, as a public official having profession to provide legal service for society, needs to get protection and guarantee for legal certainty toward notary's job duty implementation. It is regulated in Act No. 30 of 2004 about Position of Notary (UUJN or *Act of Notary Position*) and Act No. 2 of 2014 about Change of Notary Position (UUJN-P or *Act of Notary Position-Amended*)

Article 1 paragraph (1) UUJN-P explained that Notary is public official who has authority to make authentic Deed and others authority as mentioned in this Act or other Act. The Notary job duty which is mentioned in Article 15 Paragraph (1) UUJN-P that Notary has authority in making authentic deed concerning all of actions, agreements, and determinations required by legislation and/or desired by those who concerned to be stated in the authentic deed, guaranteeing the certainty date of making the deed, saving the Deed, providing the *grosse* (a copy of Notarial Deed which has function as an *executorial*), copy and quotation of the deed. All matters of making the deed do not assigned or excluded to other officials or other people determined by law.

Etymologically, according to S. J. Fachema Andreae, the word "deed" comes from Latin "acta" which means "geschrift" or letter. Furthermore, R. Subekti and R. Tjitro Sudibyo said that the word "deed" comes from "acta" which is plural of "actum", coming from Latin which means actions. A. Pitlo, cited by Suharjono, stated that the deed is a letter signed, made to be used as evidence, and to be used by other people, for whom the letter is made. In addition, according to Sudikno Mertokusumo, a deed is a letter given a signature, containing events which become a foundation for a right or engagement, which is deliberately created as evidence.

Authentic deed must fulfill the requirement stated in Article 1868 of the Civil Code, it has cumulative nature or it must cover everything. The deeds which was made, although it was signed by all parties it still does not fulfill the requirement mentioned in the Article 1868 of Civil Code. The kind of deed cannot be considered as authentic deed, it is only has a power as a writing (Article 1869 of Civil Code). Provision concerning Notary's authority in making authentic deed regulated in the Act No. 30 of 2004 about Position of Notary which has been amended by the Act No. 2 of 2014 (UUJN). In the Article 1 point 1 of UUJN mentioned that Notary is a Public official who has authority to make authentic Deed and others authority as mentioned in this Act or other Act. Deed is a writing which is signed by all parties aimed to be evidence. M Yahya Harahap explained that deed is a document created by public official (Notary) and it is used as evidence.

In credit development activities as mentioned above, it cannot be separated from the providing of credit by the bank itself and guarantee for repayment of the credit. It is caused by the position of the bank as a financial institution which its operational activities are within the business area, which the business is collecting funds from the society and managing the funds by reinvesting it to the society (as a credit) until the funds return to the bank. Therefore, in the credit activities, the bank needs to get guarantee on receivables payment, it is a thing owned by the debtor.

Certain guarantee mostly used in banking activities is land. The use of land as collateral for credit, both for productive and consumptive credit, it is based on land considerations because the land is considered as the safest and relatively has high

economic value. Hence, it is required a strong guarantee rights institution and it is also able to provide legal certainty for the parties, which can support the increasing of community participation in development to create a prosperous, fair and wealthy society as mentioned in Pancasila and 1945 Constitution of the Republic of Indonesia.

For fulfilling society's necessary concerning those rights, the government creates the Act of the Republic Indonesia No. 4 of 1996 which regulates Mortgage Rights on land and the goods related to the land or it can be called as UUHT (Act of Mortgage Rights). Act No. 4 of 1996 provided to fulfill the provision of Article 51 of UUPA (Undang-Undang Pokok Agraria or *Basic Agrarian Law*), which stated: "Mortgage Rights, which can be charged on Freehold title, Cultivation Rights Title, and Building Rights Title, contained in the Article 25, 33, and 39 and it is regulated by the law".

Mortgage Rights is a guarantee which has been known since the Act of the Republic Indonesia No. 5 of 1960 about Basic Agrarian Law (UUPA) was created. This Act was created to replace the mortgage and *credietverband*. Based on the UUPA, the regulation of Mortgage Rights must be conducted by Law. Therefore, UUPA provides a Transitional Provisions in the Article 57 of UUPA which stated that as long as the Law of Mortgage Rights in article 51 has not been established, the applicable provisions regarding the mortgage in the Indonesian Civil Code and *Credietverband* in the *Staatsblad* 1908-542 as amended by the *Staatsblad* 1937-190.

For being debt guarantee, a land must be cashable, because it will be used as guarantee for debt repayment, and it must be transferable. If the debtor has breach of contract, the guarantee land will be sold. Besides these two conditions, for being a debt collateral by being charged with guarantee rights to the land, it must belong to the group registered (certified) and expressly designated by law as the object of the guarantee institution.

The guarantee submitted to creditors is material guarantee, which is material rights guarantee, such as collateral for movable and immovable objects. One of the collaterals for debt repayment appreciated by credit financial institution is land. It is not only possessing high selling price, but also has a value which will keep increasing in certain period and it will not be decreased. For the benefit of the bank, in the case of guaranteeing credit, the collateral submitted by the owner should be bound and charged. Generally, in the credit agreement accompanied by a guaranty, the amount of debt owed by the debtor is always smaller than the value of the object charged by the Mortgage Rights.

Creditors holding mortgage rights are separatist creditors who have a preference for the Mortgage Rights they hold. In the Mortgage Rights agreement stated that if the debtor is breach of contract, the creditors using their own authority can sell the object of the mortgage rights and it is a realization of *droit de preference* principle. This principle applies for mortgage which has been replaced by mortgage right. Freehold Title Certificate is evidence of debtor's ownership on land which is often submitted as collateral for the credit. Freehold Title is a right on land which has hereditary, strongest, and fulfilled. This matter should make the debtor more careful and responsible in carrying out his credit payment obligations. However, in practice, there is still a lot of bad credit, debtors do not carry out the obligation to pay the debt or the debtor is breach of contract. The debtor's lack of awareness is able to create a legal consequence which must be settled by the debtor.

Research Method

According to Peter Mahmud Marzuki, Research is an effort to find, develop, and test the correctness of hypothesis or science carried out by scientific method. Legal research is a *know-how* activity in legal science, and it is not merely about *know-about*. As the *know-how* activity, legal research is carried out to solve legal issue. This research is normative legal research, or it can be called as doctrinal legal research which is prescriptive and applied. It uses statute approach, and it also uses primary and secondary legal material as source of legal material. Technique of collecting legal material of this research is literature study. Meanwhile, technique of analysis legal material uses syllogistic deduction.

Research Finding and Discussion

Basic consideration of the verdict viewed from the procedure of SKMHT (*Power of Attorney to Charge Mortgage Right*)

In making SKMHT must fulfill the provisions provided in the applicable legislation and must be obeyed by every Notary or PPAT (*Land Deed Official*) who will make the SKMHT (*Power of Attorney to Charge Mortgage Right*) or must be obeyed by PPAT (*Land Deed Official*) who will make the APHT (*Certificate of Granting of Mortgage Right*) made based on SKMHT (*Power of Attorney to Charge Mortgage Right*). If they find SKMHT which is not in accordance with the applicable laws and regulations, they must refuse to make the deed. Due to a deviation in making SKMHT which contradicts with the provisions of the applicable legislation, it can have fatal consequences to the deed which is made and it can create legal consequences to the Notary or the PPAT who made the deed. In the Article 15 Paragraph 1 Act No. 4 of 1996 UUHT (Act of Mortgage Rights) imposes that "Power of Attorney to Charge Mortgage Right must be made using notarial deed or PPAT deed. Based on the provision, it is clear that giving the authority in Mortgage Right, SKMHT must be created using authentic deed made in front of Notary or PPAT. The Notary or PPAT mentioned in the Article 15 Paragraph 1 of UUHT is the Notary or PPAT who has authority as the provision of applicable legislation in Indonesia.

Based on the Article 15 of Act of Mortgage Right, SKMHT can be created in Notary and PPAT (*Land Deed Official*). The form of SKMHT is an authentic deed, in other words, although it is created as authentic deed, it is not only created by Notary, but also created by PPAT (*Land Deed Official*). The purpose in assigning PPAT (*Land Deed Official*) is to make a Power of Attorney to Charge Mortgage Rights because its area includes sub-district area. It is conducted in order to facilitate the services for those who need it. Purpose and function of SKMHT in guaranteeing certain credit payment stated

in the Article 15 Paragraph (1) of Ac of the Republic Indonesia No. 4 of 1996 about Mortgage Right asserted that the contain of the SKHMT are;

- a. a. Does not contain a power to carry out legal actions rather than to impose Mortgage Right
- b. b. Does not contain substitution power.
- c. c. Mention clearly the object of the Mortgage Right, amount of the debt and the name, and creditor identity, the debtor name and identity; if the debtor is not the Mortgage Right provider.

Therefore, as explained in the Act No. 4 of 1996 about Mortgage Right that the basic function and purpose of SKMHT (*Power of Attorney to Charge Mortgage Right*) may not contain the power to sell, lease the Mortgage Right object, or extend right on land, but it is only as a medium of authorization for creating the APHT (*Certificate of Granting of Mortgage Right*). In the Article 15 Paragraph (1) letter a of Mortgage Right Act No. 4 of 1996 specifically mentioned that one of the SKMHT conditions is that it may not contain the power to conduct legal actions rather than to impose on Mortgage Right. Hence, as stated in the Article 1796 paragraph (2) of Civil Code, authority in the SKMHT is classified as special.

APHT (*Certificate of Granting of Mortgage Right*) which is created based on the SKMHT should be paid close attention by executive officer concerning the condition of the Power of Attorney to Charge Mortgage, including the time limit, the authority of the executive officer, and the formality of the deed. In the Article 15 paragraph (3) of Mortgage Right Act stated that SKMHT which has been registered must be followed by APHT, no later than 1 (one) month after being given. Meanwhile, in the Article 15 paragraph (4) of Mortgage Right Act stated that rights on land which has yet to be registered must be followed by the APHT, no later than 3 (three) months after being given.

The Panel of Judges should not only focus on the Civil Code in deciding a case, but also review the UUJN (*Act of Notary Position*). According to the writer, the Notary should have authority concerning a place where the deed will be made. Article 18 paragraph (1) of UUJN (*Act of Notary Position*) provided that the Notary have to be placed in the district or city. Notaries, in accordance with their desire, have a place of domicile and an office in the district or city (Article 19 paragraph (1) of UUJN (*Act of Notary Position*)). The Notary has office area covering the entire province from his domicile (Article 19 paragraph (2) of UUJN (*Act of Notary Position*)). Definition of those articles is; in carrying out their duties, the Notaries do not only have to be in their domicile, but also go to their other office which is spread throughout the province. It can be carried out with the provisions, as follow:

- a. a. When carrying out his duty (making a deed) outside the domicile, the notary must be at the place where the deed will be made,
- b. b. In the end of the deed must be mentioned the place of making and completing the deed (city or district).
- c. c. Carrying out the duties outside the Notary's domicile within the area of office in one province is not an order. In other words, it is not continuously (Article 19 paragraph (2) of because what is forbidden is to carry out their duties and positions outside the area of office or outside the province).

In practice, these provisions above provide an opportunity for Notaries to explore and cross the boundaries and places of domicile in making deeds. It is not something forbidden to be done, because something which is forbidden to be done is to carry out their duties and positions outside the area of office or outside the province (Article 17 letter a of UUJN (*Act of Notary Position*)). However, to respect other notaries in other districts or cities, such rights are better not to be implemented.

The provision of Article 19 paragraph (3) of Act No. 02 of 2014 concerning the Amendment on Act No. 30 of 2004 concerning Position of Notary (Act of Notary Position) formulates that "Notaries are not respectively authorized by keeping to carry out their duties outside the place of domicile". In the Article 19 paragraph (3) of UUJN (*Act of Notary Position*) regulates about the displeasure of the notary to carry out their position outside their place of domicile, in this case is in the district or city. The provision related to the Article 19 paragraph (3) of UUJN (*Act of Notary Position*) is in the Notary Code of Ethics in the Article 3 point 8 of INI Notary Code of Ethics formulates that "Provide an office in the place of domicile, and it is the only office for the Notary in carrying out the daily duties." In the Article 3 point 15 of INI Notary Code of Ethics formulates that "Carry out the duty in the office, except for certain reasons". Based on the provisions above, in fact, the Notary, sometimes, will meet the client by their own self, which means that the clients do not come to see the Notary in the office. It happens because there are certain reasons which make the notary should meet the client and automatically the assignment process is unable to be conducted in the office. It is possible to make the notary go outside the regional/city office.

Signing a Notary Deed which is not conducted in the notary's office is still common, such actions will cause a violation to the law of the notary and the notary code of ethics, yet it is still carried out by certain parties. Based on the case above, it can be happened due to lack of Notaries supervision. The supervision of the Notary is an important thing, because with the existence of notary supervision, the duties of the notary can always be in accordance with legal rules that underlie their authority, and it can avoid misuse or trust of given authority. Article 16 paragraph (1) letter *m* stated that "reading the Deed in front of the client attended by at least 2 (two) witnesses, or 4 (four) witnesses especially for making deed of will under the hand, and it should be straightway signed by the client, the witness, and the Notary". In the Article 16 paragraph (1) letter *m* explained that the Notary should physically attend and sign the Deed in front of the client and witness.

A legal consequence for the deed is that the deed will lose its authenticity or be degraded into a deed under hand. Generally, the power of the notary deed as an authentic deed has been degraded into an underhanded deed was valid since the existence of permanent court decision (inkracht). The deed which has the power of evidence under the hand remains valid and restraint, except for the existence of a court decision which has a permanent legal power declaring that the deed is canceled

or does not bind the deed. In this case, UUJN (*Act of Notary Position*) does not explain yet whether the provisions of degraded deed which become the deed under the hand are direct or indirect consequence. Therefore, the degradation of the power to prove authentic deed which becomes deed under the hand is not necessarily needed or it must go through an *inkracht*.

Conclusion

In this case, the judge has made appropriate verdict as the provisions provided within the Act which regulates the creation of SKMHT. In addition, by the agreement between debtor and creditor, the agreement of murabahah financing receivable and liability is made. However, the judge should review the information coming from the litigant stating that the signing of SKMHT and APHT deed was not conducted in front of the Notary, instead, it was conducted in front of the staff of the notary named Indra Agung Pradana. Besides, the staff along with bank employee came to the client's house and asked the client to sign the deed, so the signing process was conducted in the client's house. Based on the case, the action should consider as a violation to the rules within the Article 16 paragraph (1) letter m which stated that "reading the Deed in front of the client attended by at least 2 (two) witnesses, or 4 (four) witnesses especially for making deed of will under the hand, and it should be straightway signed by the client, the witness, and the Notary". In the Article 16 paragraph (1) letter m explained that the Notary should physically attend and sign the Deed in front of the client and witness. Therefore, the potential for a dispute over the dismissal of a signature from the debtor caused by the signing of a deed which is not conducted in front of the notary can be avoided. Legal consequence against the deed is that the deed will lose its authenticity or be degraded to be deed under hand. Generally, the power of the notary deed as an authentic deed has been degraded into an underhanded deed was valid since the existence of permanent court decision (*inkracht*). The deed which has the power of evidence under the hand remains valid and restraint, except for the existence of a court decision which has a permanent legal power declaring that the deed is canceled or do not tie the deed. In this case, UUJN (*Act of Notary Position*) does not explain yet whether the provisions of degraded deed which become the deed under the hand are direct or indirect consequence. Therefore, the degradation of the power to prove authentic deed which becomes deed under the hand is not necessarily needed or it must go through an *inkracht*.

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