

Legal Protection against Consumers at the Execution of the Fiduciary Which Is Not Registered (Unregistered Fiduciary) in Indonesia

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Article History

Received: 26 May 2019

Revised: 12 June 2019

Published: 30 June 2019

Abstract

The distribution of funds by giving credit to the people in need is mostly done by banks or financial institutions in Indonesia by way of executing fiduciary. Fiduciary institutions have been regulated in Law No. 42 of 1999 on Fiduciary which requires registration of the objects of fiduciary to the Office of Fiduciary Registration. Then Fiduciary Registration Office will issue a fiduciary certificate that has executorial power which is similar to the decision of a judge who has permanent legal force. In practice there is a phenomenon of fiduciary execution by fiduciary receiver if the fiduciary giver does not carry out his/her obligations in accordance with the agreement, even though the agreement is not made in accordance with a notary deed and such fiduciary is not registered (unregistered), this is certainly very detrimental to the consumer. This study aims to find out and analyze on the implementation of legal protection for consumers during the execution of unregistered fiduciary. Legal protection for consumers during the execution of unregistered fiduciary is governed under the provision of Article 3 of the Regulation of the Minister of Finance of the Republic of Indonesia Number 10/PMK.010/2012, Article 1365 of the Civil Code, Article 368 of the Criminal Code, Article 4 letter a and Article 18 of the Law on Consumer Protection.

Keywords: Consumer Protection, Execution, Fiduciary, Unregistered

Introduction

In continuing the pace of sustainable development, large amount of funds is needed. Funding needs to be added reflecting from the increase of development and fulfillment activities, which are mostly obtained through lending and borrowing activities (Law of the Republic of Indonesia No. 42 of 1999). For this reason, intermediaries are needed to act as creditors or the providers of funds for debtors, of which agreement between those two parties are resulting in debt or credit agreement. As a financial institution that collects funds, bank channels such fund through credit. This absolutely contains a risk. Thus, for the reason of security of the credit, credit agreements must be supported by a guarantee institution. The creditor has the right to sue the debtor for the debtor's assets that are used as collateral, if the debtor does not fulfill his/her performance voluntarily, i.e. if the debtor does not sell his/her collateral objects and their results to pay his/her debts (Sri Soedewi Masjchoen Sofwan, 1977). Bank as creditor prefers collateral agreements, because it will give precedence rights (preferential rights) to the banks.

In the practice of banking and financial institutions' activities, fiduciary is very favorable and popular, because it can meet the needs of the community. The success or failure of the fiduciary

is solely dependent on the credibility and good faith of the debtor because movable goods which are encumbered in form of fiduciary are still controlled by the debtors (Sri Soedewi Masjchoen Sofwan, 1977: 75). The purpose of the fiduciary agreement made by creditors and debtors, namely for creditors to encumber the repayment of debtors' debts if they are in default, whereas for debtors it is expected that such debtors are able to control and enjoy the benefits of such fiduciary, because only ownership rights are granted to the debtors (Achmad Yusuf Sutarjo, 2018: 96)

Fiduciary institutions are regulated in Law No. 42 of 1999 on Fiduciary. Article 11 in conjunction with Article 12 of the Law requires to register the objects of fiduciary to the Office of Fiduciary Registration. Then the Office of Fiduciary Registration issues a Fiduciary Certificate containing the meaning "For Justice in Accordance With the Almighty God" and has executive power similar to a Court decision that has permanent legal force (J. Satrio, 2007: 198). But in practice there are still fiduciary that is not registered/unregistered (H. Tan Kamelo, 2006: 213), so it does not have executive power when the debtors are in default. At present there is a phenomenon that banks or financial institutions continue to execute the fiduciary, even though such fiduciary is not registered, sometimes debt collectors often collect it by means of intimidating, seizing, and even carrying out acts of abuse when executing such fiduciary. Therefore, consumers need to be protected.

As a guarantee institution, fiduciary initially lived in customary law and was valid in Roman society, then it was regulated in jurisprudence and now it is also governed in laws and regulations. Fiduciary is the transfer of ownership rights of 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 (Article 1 sub 1 of Law Number 42 of 1999 on Fiduciary). In fiduciary, the transfer of ownership rights is solely intended as collateral for repayment of debt, not for the fiduciary receiver. Every promise that gives authority to a fiduciary receiver to possess an object that is the object of a fiduciary if the debtor is in default, will be deemed as null and void.

The Fiduciary Act expressly states that fiduciary is collateral for material or guaranteed property (*zakelijke zekerheid*, security right *in rem*) that gives priority to fiduciary receivers, namely rights to be prioritized against other creditors (Gunawan Widjaja & Ahmad Yani, 2007: 131). Fiduciary is an insurance agreement of a principal agreement that creates an obligation for both parties to fulfill an achievement in the form of giving something, doing something, or not doing something, which can be valued with money.

Research Methodology

This study uses a normative juridical approach, namely research using secondary data or library data (Ronny Hanitijo Soemitro, 1990: 10) and is analytical descriptive in nature, namely conveying a description of the facts that are supported by the applicable and existing provisions (Soerjono Soekanto, 1986: 86).

Research Result

The object of fiduciary is any object that can be owned and of which ownership rights can be transferred. It can be either tangible or intangible, registered or unregistered, movable or immovable, provided that the object cannot be burdened with encumbrance as referred to in Law Number 4 of 1996 on Encumbrance or Mortgage Rights as referred to in Article 314 of the Law on Commercial Law article 1162 and the Civil Code (Gunawan Widjaya & Ahmad Yani, 2007: 141).

The form of the deed of assignment of fiduciary must be in the form of an authentic deed, i.e. Notary Deed and must be written in Indonesian language. Considering that the object of fiduciary insurance in general is movable goods that are not registered, it is only natural that the authentic deed is considered to be the most able to guarantee legal certainty regarding the object of fiduciary.

To provide legal certainty, the objects loaded with fiduciary must be registered to Fiduciary Registration Office. Registration of objects loaded with fiduciary is carried out at the fiduciary's place of domicile, and such registration shall include objects, both inside and outside the territory of the Republic of Indonesia to fulfill the principle of publicity, as well as guaranteeing certainty to other creditors regarding objects that have been burdened with fiduciary (Gunawan Widjaja & Ahmad Yani, 2007: 148). It is also regulated in Article 2 of the Regulation of the Minister of Finance Number 130/PMK.010/2012 on the Registration of Fiduciary for Finance Companies that Provide Financing for the Customers of Motor Vehicles by Imposing Fiduciary (H. Tan Kamelo, 2006).

In order for an object to be burdened with fiduciary, registration can be received by the Office of Fiduciary Registration, then the application for Fiduciary is submitted at maximum 30 (thirty) days from the date of making the fiduciary deed. Then the applicant is required to pay the registration fee for the Fiduciary by submitting proof of registration (Article 5 of the Government Regulation Number 21 of 2015 on Procedures Registration of Fiduciary and Fiduciary Deed). After that, the Fiduciary was made effective on the same date as such Fiduciary is recorded electronically and is also electronically signed by the Official of the Fiduciary Registration Office. Fiduciary is made effective at the time of issuance of a Fiduciary Certificate that contains the meaning "For Justice in Accordance With the Almighty God" that has the same executive power as a court decision that has permanent legal force (Yanuar KUKUH Prabowo, 2018: 362). Relating to the obligation to register Fiduciary Security with regards to the Regulation of the Minister of Finance (PMK) Number 130 of 2012 on Fiduciary Registration for Finance Companies that conduct consumer financing for motor vehicles by imposing fiduciary that require the registration of the fiduciary to the Fiduciary Registration Office for 30 calendar days starting from the date of the stipulation of the consumer financing agreement. If the Fiduciary Registration Office has not issued a fiduciary certificate and submitted it to the finance company, the finance company is prohibited from withdrawing fiduciary in the form of motor vehicles (Henry Donald Lbn. Toruan, 2018: 198). This is a protection for consumers in the event of disclosure made by a financial institution against fiduciary, even though the fiduciary is not registered.

If the debtor or fiduciary is in default of the contract, then the execution of objects that are objects of fiduciary according to Article 29 of the Law on Fiduciary can be done by means of:

- a. Implementation of executive title by fiduciary receiver;
- b. Selling of objects that are objects of fiduciary for the power of the fiduciary's own receiver through public tenders and taking repayments from the proceeds of the selling;
- c. Direct sale carried out based on the agreement of the giver and receiver of the fiduciary, if in this way the highest price can be obtained that benefits both parties.

Provisions regarding the execution of fiduciary objects are important protections of the rights of fiduciary giver, because with these provisions it becomes clear that the position and rights of creditors as fiduciary receivers are limited to the extent necessary to protect their interests as creditors only (Muhammad Moerdiono Muhtar, 2013: 14). The fiduciary giver must submit the object which is the object of the Fiduciary in order to carry out the execution of the fiduciary.

The execution of fiduciary begins with the takeover of ownership of the fiduciary by the creditor from the hands of the debtor. If the debtor does not want to submit a fiduciary object, the creditor can request it, but if the debtor continues to maintain it, the creditor can request assistance from the competent authorities, namely the National Police of the Republic of Indonesia to assist and safeguard the execution. This is stated in the Regulation of the Head of the National Police of the Republic of Indonesia Number 8 of 2011 on Safeguarding the Execution of Fiduciary (Ibnu Artadi, Sudarminto and Wulansari Partinah, 2018: 180). In the Perkap it was stated that to carry out the execution of fiduciary we must meet certain requirements, namely: (Irma Devita, 2013: 2-3)

- a. There is a request from the applicant;
- b. The object has a fiduciary deed;
- c. The object of fiduciary is registered at the Fiduciary Registration Office;
- d. The object of fiduciary has a Fiduciary Certificate;
- e. Fiduciary is available within the territory of the Republic of Indonesia.

Application for the security of the execution is submitted in writing by the recipient of the fiduciary or his/her attorney to the Regional Police Chief (KAPOLDA) or the District Police Chief (KAPOLRES) where the execution is carried out by attaching: (Ibnu Artadi, Sudarminto and Wulansari Partinah: 180)

- a. Copy of fiduciary deed;
- b. Copy of Fiduciary Certificate;
- c. A warning letter to the debtor to fulfill his/her obligation;
- d. Identity of the executor; and
- e. Letter of assignment of the executor

Thus, it is clear that at the time of execution the competent authorities will not carry out assistance and security for the execution if the fiduciary guarantee is not registered to the Fiduciary Registration Office.

The fiduciary agreement to be made by certificate notary, thus providing legal certainty for the parties. If the fiduciary agreement is made with a privately drawn deed, the creditor cannot register the object of fiduciary to the Fiduciary Registration Office. This causes the real execution cannot be carried out, because the requirement to carry out the execution is the availability of a Fiduciary certificate. If the creditor continues to carry out the execution of such fiduciary and the creditor does not hold a Fiduciary Certificate, then the creditor has violated Article 3 of the Regulation of the Minister of Finance No.130/PMK.010/2012 on Fiduciary for Finance Companies that Provide Financing for the Consumers of Motor Vehicles by Charging Fiduciary, i.e. the consumers of the finance companies are prohibited from withdrawing fiduciary in the form of motor vehicles if the Fiduciary Registration Office has not issued a Fiduciary Certificate and submits it to the finance companies and such acts will be categorized as a robbery as stipulated in Article 368 of the Criminal Code (KUHP) (Yanuar Kukuh, 2018: 374-375). Article 368 of the Criminal Code determines that whosoever intends to benefit himself/herself or others illegally, forces someone with violence or threatens someone else to give something, wholly or partly belongs to that person or other person, or to make a debt or eliminate a debt, threatens someone else with extortion, with a maximum of nine years imprisonment.

The execution of fiduciary must pay attention to the debtor's rights which are attached to the objects, because the implementation of the performance has been carried out by the debtor with payment of several installments, so that there has been a portion of the debtor's rights on the object and the other creditor's property. If there is an execution by a debt collector by force, then

the act violates the law and it shall be included in the category of illegal acts as stipulated in Article 1365 of the Civil Code. Therefore, for this action the debtor can sue the creditor through the Court (Muhammad Hilmi Akhsin, Anis Mashdurohatun, 2017: 496-497).

Debtors as consumers on the execution of unregistered fiduciary need to be protected. This is in accordance with Article 1 number 1 of Law Number 8 of 1999 on Consumer Protection which states that consumer protection is any effort that guarantees legal certainty to provide protection to consumers. There were four basic right consumers (Mustofa 'Afifi bin Ab. Halima 1, Kamila Wati binti Mohdb Mohd Mahyeddin Mohd Sallehe, Dr. AsmingYalawaed, Tuan Syed Mohd Najib Syed Omare, Asmidah Ahmadf, Azlin Alisa binti Ahmad Mohd Izhar Ariff bin Mohd Kashimh, 2012: 2):

- a. The right to safety
- b. The right to be informed
- c. The right to choose
- d. The right to be heard

Consumer protection law can be seen to merely set a floor in its pursuit of a sufficiently high level of consumer protection (Dan Jerker B.Svantesson, 2018: 1). Ukwueze argued that consumer rights essentially seek to maintain human dignity and well-being in the market. Ukwueze concluded that consumer rights are evidently incorporated in human rights as there is a growing international recognition of consumer rights as human rights (Sami Alsmadi1 & Ibrahim Alnawas, 2018: 14).

Consumer protection questions the guarantee or certainty of the fulfillment of consumer rights, which Article 4 of the Law on Consumer Protection states the following consumer rights: (Janus Sidabalok, 2006: 10)

- a. The right to be provided with comfort, security and safety in consuming goods and/or services;
- b. The right to choose goods and/or services and obtain goods and/or services in accordance with the exchange rate and conditions and guarantees promised;
- c. The right to gain correct, clear and honest information regarding the condition and guarantee of goods and/or services;
- d. The right to file an opinion and complaint about the goods and/or services used;
- e. The right to obtain advocacy, protection, and efforts to properly resolve consumer protection disputes;
- f. The right to get consumer guidance and education;
- g. The right to be treated or served correctly and honestly and not being discriminated;
- h. The right to get compensation, remuneration, and/or reimbursement, if the goods and/or services received are neither in accordance with the agreement nor appropriate;
- i. Other rights as stipulated in other statutory provisions.

When associated with consumer rights above, the execution of fiduciary that is not registered by the debt collector is in contrast with Article 4 letter a of the Law on Consumer Protection.

Fiduciary financing agreement made and entered into by and between financial institutions and consumers shall be accompanied by a letter of authorization in order to bind such fiduciary. This is not in accordance with Article 18 paragraph (1) of Law Number 42 of 1999 on Fiduciary which states: business actors in offering goods or services intended to be traded are prohibited from specifying standard clauses in each document or agreement when stating that the consumer authorizes to business actors for the imposition of mortgages, liens or collateral rights on goods purchased by consumers in installments. Business actors who violate this article are threatened with a maximum imprisonment of 5 years or a maximum fine of Rp. 2,000,000,000.00.

Thus, registration of fiduciary guarantees is an obligation that must be carried out by creditors as fiduciary recipients, so that the creditor has the right of execution and the right to sell the object of fiduciary collateral on his own power. If the fiduciary guarantee is not registered, it will not guarantee the interests of the fiduciary recipient, because it may be that the consumer as the fiduciary guarantees the object that has been burdened with fiduciary to another party without the knowledge of the creditor. Conversely, if the creditor executes when the consumer defaults and fiduciary collateral are not registered, the consumer gets legal protection.

Conclusion and Recommendation

Based on the description above, it can be concluded that legal protection of consumers on unregistered fiduciary execution is in accordance with Article 3 of the Regulation of the Minister of Finance of the Republic of Indonesia Number 10/PMK.010/2012, of which article states that finance companies are prohibited to withdraw the vehicles before the issuance of a Fiduciary Certificate and if there is a forced fiduciary, then the act is categorized as a criminal offense as stipulated in Article 368 of the Criminal Code (KUHP). In addition, with the withdrawal of fiduciary that is not forcibly registered, the debtor (consumer) can report to the police for the crime of seizure by filing Article 368 of the Criminal Code. With the payment of several installments by the debtor, then there has been a portion of the debtor's rights on the object and the other part belongs to the creditor, so that in the event of forced fiduciary execution, such act will be deemed as violating the law and included into the category of illegal act as stipulated in Article 1365 of the Civil Code and debtors as consumers can sue the creditors through the court. The execution of fiduciary that is not registered by the debt collector is in contrast with Article 4 letter a and Article 18 of the Law on Consumer Protection.

Thus, there is still a need to conduct more public campaigns regarding the obligation to register fiduciary and the existence of strict sanctions for creditors who do not register such fiduciary.

Acknowledgments

This research was funded by the Ministry of Research, Technology and Higher Education of the Republic of Indonesia.

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