

Jurnal Pak Habib

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A Proposal: The Beginning of a Notary Deed for Sharia Banking Deals

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Abstract

A Notary Deed, if made with a Notary deed, must still be based on the provisions of Article 38 Notary Position Act as a formal requirement that must be fulfilled so that the deed is legally valid. If the deed is not implemented by Article 38 Assignment of Mortgage Rights, there has a sanction based on the provisions of Article 41 Notary Position Act. It is emphasised that the violation of the provisions of Article 38 Notary Position Act will result in the deed only having the value of evidentiary power as an underhand. Such a deed has its position degraded from an authentic deed to have the value of evidentiary power as an underhand deed following the provisions of Article 1869 of the Civil Code. So that the Sharia Banking deed made with a Notary deed is substantially under Sharia Principles and normatively per Article 38; especially paragraph (2) of the Notary Position Act. For Sharia banking, it can be done by transfer. Including the provisions of the opening sentence on the contents of the deed or a separate sheet of paper.

Keywords: *Sharia Banking, Notary Deed, Sanctions.*

A. INTRODUCTION

Article 1, number 13 of Law Number 21 of 2008 concerning Islamic Banking emphasises that aqad is a written agreement (Usanti & Shomad, 2016). This article only requires that the contract or deed in Islamic Banking must be in writing but does not require it in a certain form. And the content or substance of the written agreement contains rights and obligations for each party under sharia principles. In the practice of Sharia Banking or Sharia Business Unit, there is a written agreement made in the form of an underhand deed or a Notary deed (Masriani, 2016). Distinguish the Sharia Banking deed and Conventional Banking, which is made by a Notary deed at the beginning of the deed it is included certain sentences, especially Sharia Banking contracts in the form of a Notary deed, at the beginning of the deed (added a sentence) for example as follows:

AL-MURABAHAH FINANCE CONTRACT

No.

بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

"And Allah SWT has justified buying and selling and forbidden usury."

(Surah Al-Baqarah 2: 275)

"O you who believe, do not falsely eat your neighbour's property, except through commerce which is carried out with mutual consent between you."

(Surah An-Nisaa'4: 29)

Today,

Date

Month

Year

Time

WIB (West Indonesia Time).

Facing me,

or :

الرَّحِيمِ الرَّحْمَنِ اللَّهُ بِسْمِ

AL- MURABAHAH FINANCE CONTRACT

No.

Today,

Date

Month

Year

Time

WIB (West Indonesia Time).

Facing me,

or :

AL - MURABAHAH FINANCE CONTRACT

No.

BISMILLAHIRRAHMAANIRRAHIIM

"And Allah SWT has justified buying and selling and forbidden usury."

(Surah Al-Baqarah 2: 275)

"O you who believe, do not falsely eat your neighbour's property, except through commerce which is carried out with mutual consent between you."

(Surah An-Nisaa'4: 29)

Today,

Date

Month

Year

Time

WIB (West Indonesia Time).

Facing me,

or

:

BISMILLAHIRRAHMAANIRRAHIIM

AL- MURABAHAH FINANCE CONTRACT

No.

Today,

Date

Month

Year

Time

WIB (West Indonesia Time).

Facing me,

or

:

Or in any other form which initially contains and places the sentence as mentioned above.

B. RESULT AND DISCUSSION

Beginning of Notary Deed Based on Article 33 Notary Position Act

Something very good and recommended by the Prophet Muhammad that every good deed must begin with the sentence or saying:

الرَّحِيمِ الرَّحْمَنِ اللَّهُ بِسْمِ

and ends with the words:

الْعَالَمِينَ رَبِّ اللَّهِ الْحَمْدُ

God willing, all will be blessed.

The inclusion of a sentence like the above in the Sharia Banking deed is not only to distinguish it from the Conventional Banking deed. Even though the sentence is not included the contents of the deed, it is different from the Conventional Banking deed (Adjie, 2008). The inclusion of the sentence is already an implementation of the Sharia Principles in a Sharia Banking deed.

Assume the Sharia Banking deed begins with a Notary deed with the beginning of deed as described above (Adjie, 2008). In this instance, the deed does not begin in accordance with Article 38 paragraph (2) of the Notary Position Act. As

previously stated, the Notary deed begins with the following: 1) the title deed; 2) the certificate number; 3) the hour, day, date, month, and year; and 4) the Notary's full name and domicile (Adjie, 2015).

The inclusion of such a sentence at the beginning of the Sharia Banking deed is not in line with the provisions of Article 38 paragraph (2) of the Notary Position Act, and it can be concluded that the deed is a legally flawed formality or form because one of the conditions is not fulfilled. Such a deed is degraded from an authentic deed to having a proof value as an underhand deed following the provisions of Article 1869 of the Civil Code.

Article 1869 of the Civil Code has determined the limits of an authentic deed (notary deed) which has a proof value as an underhand deed if it does not meet the provisions because: 1) The public official concerned is not authorised; 2) The inability of the public official concerned, or 3) Defects in shape (Adjie & Hafid, 2014). However, such a deed still has the power of proof as an underhand deed if the parties sign the deed.

That every legal subject which comes before a Notary, of course, among other things, so that all legal actions he does are poured into the form of a Notary deed, and the Notary must fulfil all aspects, requirements and procedures in making a Notary deed (Dewi & Wirdyaningsih, 2007). Suppose it turns out that the Notary has intentionally violated and knows that making a deed as mentioned above is not following Article 38 of the Notary Position Act so that the deed in question is degraded only has the power of proof as an underhand deed. Can the Notary be held civilly responsible for his actions?

In Article 41 Notary Position Act, it has been emphasised that a violation of the provisions of Article 38 Notary Position Act will result in the deed only having the strength of proof as an underhand deed.

Assume that one or more of the parties or appearers is aware or provides an opinion that the Notary deed violates the provisions of Article 38 of the Notary Position Act. In that situation, it is the parties providing such an assessment that are responsible. The parties must first establish it through a judicial proceeding (lawsuit) and seek recovery of costs, compensation, and interest in order to establish his assessment by identifying whether provisions or the Notary breached the articles (Herawan, 2014). The Notary is required to provide resistance or explanation in this action. Assume the plaintiff establishes his claim and the court determines that the contested deed lacks evidentiary value as an underhanded deed (Imanullah, 2019). In that scenario, the judgment orders the Notary to compensate the plaintiff with specific law.

This approach must be followed to avoid a unilateral assessment of a Notary deed, as the Notary deed possesses perfect evidentiary power, as evidenced by its exterior, formal, and material features (Lestari & Heriyani, 2009). Notary in preparing a deed

at the request of the parties in accordance with the processes or procedures for preparing a notarial deed. When the parties believe something is wrong with the deed and suffer losses as a direct result of the deed, the affected party must sue the Notary and establish whether the Notary deed satisfies the external, formal, or material requirements, as well as establish the damage (Manan, 2016). Thus, the evaluation of a notary deed is based on the strength of proof, as an underhanded deed cannot be carried out by or through a single party but must be carried out by or through multiple parties and proven in court.

If the court determines ²⁵ that the deed possesses proof power as a private deed, the Notary may be sued for fees, compensation, and interest based on the court's ruling. Similarly, if the case is found to be unfounded or rejected, the Notary concerned may initiate a lawsuit against them or the party that filed it. It is an attempt to protect the Notary's rights and obligations when performing his duties in connection with a deed executed prior to or by the Notary (Maulin & Mulyaningsih, 2014).

However, specifically in making a Sharia Banking deed consciously (and it is also possible to fulfil the wishes of the Bank's request which is granted by a Notary so that the initial deed is as the Bank's wish) is carried out by a Notary, then the proof as mentioned above does not need to be done because the Notary has done it intentionally (know that this should not be done), so that for the actions of the Notary who feels aggrieved can file a lawsuit to the Notary concerned (Minardi, 2019).

This problem rarely or even has never happened. A Sharia Bank Customer objects to the formal form of a Sharia Banking deed because there is an institutional misunderstanding so that it is considered a normal thing or a congregational error. Sue the Notaries for the continuous intent of the Notary in making the Sharia Banking deed which is flawed in terms of formality (Musjtari, 2013). If this happens to the Notary, then it is entirely the responsibility of the Notary, and cannot blame other parties, including the Islamic Bank, which has set an example for the Notary to follow the initial example of the deed given the Sharia Bank (Prabowo & Jamal, 2017). In this case, the Notary should have rejected it because it was not following Article 38 paragraph (2) of the Notary Position Act.

The question arises: Does the article need to be revised following Article 38 paragraph (2) of the Notary Position Act? If the Notaries and the Sharia Banking community want it, please submit a revision of the Notary Position Act to the Government and the House of Representatives. But can the notary deed initially only provide special provisions for certain legal actions, such as the Sharia Banking deed?

Due to the Preliminary Law of the Deed Not Being Following Article 38 Notary Position Act

Suppose it turns out that there is a sharia banking customer who knows and understands that the sharia banking deed made with a notary deed that is not following the provisions of Article 38 Notary Position Act and formally degrades the value of the strength of proof as in the deed below. In that case, the person concerned feels disadvantaged to sue or sue the Notary to the court (general) for the action (Saputri & Witasari, 2020). Based on the court's decision proved to have violated the provisions of the formality aspect of the deed, the court then imposed and required the Notary to pay fines, compensation and interest to the Notary if it turns out that the Notary is unable to pay. The Notary will be declared bankrupt. The bankruptcy of a Notary, used as the basis for imposing sanctions, as referred to in Article 12 of Notary Position Act. It is conceivable if a Notary in carrying out his duties and making a deed (sharia banking) violates the formality aspect as mentioned above, then he must be prepared at some point in time to sue, or there will always be a potential lawsuit from the party who feels aggrieved to sue the Notary concerned at any time (Sismanto & Witasari, 2020).

So that the Sharia Banking deed made with a Notary deed is substantially following Sharia Principles and also normatively following Article 38, especially paragraph (2) of the Notary Position Act, then for Sharia banking, it can be done by transferring and including the provisions of the sentence:

اَمْشِىْ بَايْعٍ وَبَايْعٍ

"And Allah SWT. has justified buying and selling and forbidden usury."

(Surah Al-Baqarah 2: 275)

"O you who believe, do not falsely eat your neighbour's property, except through commerce which is carried out with mutual consent between you."

(Surah An-Nisaa' 4: 29)

or

بِسْمِ اللّٰهِ الرَّحْمٰنِ الرَّحِیْمِ

or:

BISMILLAHIRRAHMAANIRRAHIIM

"And Allah SWT. has justified buying and selling and forbidden usury."

(Surah Al-Baqarah 2: 275)

"O you who believe, do not falsely eat your neighbour's property, except through commerce which is carried out with mutual consent between you."

(Surah An-Nisaa' 4: 29)

or:

BISMILLAHIRRAHMAANIRRAHIIM

in the contents of the deed or at the end of the premise.

That the beginning and the end of the deed is the absolute responsibility of the Notary. But the contents of the deed are a written agreement desired by the parties. It is based on applicable laws. It becomes as follows: Notary, but for the contents of the deed is a written agreement desired by the parties as long as it is based on applicable laws and regulations or under Sharia principles, so that it becomes as follows:

AL - MURABAHAH FTNANCE CONTRACT

No.

Today,

Date

Month

Year

Time

WIB (West Indonesia Time).

Facing me,

Furthermore, both parties agreed to pour this Akad with the Al-Murabahah Financing Agreement in this deed (starting now referred to as 'Akad') by using the terms and conditions and beginning with the following sentence:

بسم الله الرحمن الرحيم

----- "And Allah SWT. has justified buying and selling and forbidden usury" --•

----- (Surah Al-Baqarah 2: 275) -----

"O you who believe, do not eat the property of your neighbour falsely, except through commerce which is carried out consensual among you."

----- (Surah An-Nisaa'4: 29) -----

or:

or:

الرحيم الرحمن الله بسم

BISMILLAHIRRAHMAANIRRAHIIM

"And Allah SWT. has justified buying and selling and forbidden usury."

(Surah Al-Baqarah 2: 275)

"O you who believe, do not eat the property of your neighbour falsely, except through commerce which is carried out consensual among you."

(Surah An-Nisaa'4 : 29)

or:

BISMILLAFIRRAHMAANIRRAHIIM

Article 1

DEFINITION

At the end of the deed, before the closing sentence of the deed, the following sentence may also be included: In the end, the parties have agreed to close this deed with the sentence:

%sh 4cs:iii

THAT'S THIS DEED

The inclusion of the sentence is placed at the beginning of the contents of the deed. By including and placing the sentence as mentioned at the beginning of the contents of the Sharia Banking deed, the formality of the Notary deed is following Article 38 paragraph (3) letter c Notary Position Act: the contents of the deed are the will and wishes of the interested parties) it can also be done by the sentence above. It is made on a separate sheet before the first sheet of the deed.

In this regard, it is also necessary to pay attention to guarantees in Islamic Banking. In Sharia Banking, there is no Credit Agreement, but financing as referred to in Article 1 number 25 of Law Number 21 of 2008 concerning Sharia Banking. And for the financing, collateral can be provided. Article 1 number 25 of Law Number 21 of 2008 affirms that "Collateral is an additional guarantee, in the form of movable or immovable property which is submitted by the owner of the Collateral to a Sharia Bank and Syaria Law, to guarantee the settlement of the obligations of the Customer Recipient of the Facility". As a follow-up to the provision of collateral, it is poured into the form of a Power of Attorney for Granting Mortgage Rights or directly with the Deed of Assignment of Mortgage Rights, as mentioned and regulated by Law Number 4 of 1996 concerning Mortgage Rights on Land and Objects Relating to Land or Notary Position Act (Sudirman et al. 2017).

There has been Law Number 21 of 2008 concerning Islamic Banking, which requires additional collateral goods or objects. It turns out that the guarantee still uses Notary Position Act, which is not sharia, and the Attorney for Granting Mortgage Rights and Assignment of Mortgage Rights are not sharia, and there is no sharia auction. In Attorney for Granting Mortgage Rights and Notary Position Act, for example, there are sentences: debt repayment, debt agreements, creditors, debtors and creditors in banking institutions that carry out conventional activities even though these words are not known in the Islamic Banking Contract because it depends on the contract made between the customer and the Islamic Bank (Thalib et al. 2018).

The Attorney for Granting Mortgage Rights and Assignment of Mortgage Rights must be changed and replaced with sentences following the Sharia Banking Agreement to conform with the Sharia Banking deed (Usman & Rasiam, 2019). Notary Position is a neutral institution. Not only Muslim Notaries who can make Sharia Banking deeds, but Notaries who are Christians, Catholics, Hindus, Buddhists or other religions also have the same right to make Sharia Banking deeds.

C. CONCLUSION

From the explanation of the data analysis data, it can be concluded that: 1) The provisions of Article 38 Notary Position Act stipulating a Notary deed apply to all deeds made before a Notary. Article 38 Notary Position Act does not provide specificity for certain deeds, such as Sharia Banking deeds. So the beginning of the Sharia Banking Deed must still be based on the provisions of Article 38 Notary Position Act; and 2) The Sharia Banking Deed was made in the form of a Notary deed which at the beginning of the deed did not comply with the provisions of Article 38 Notary Position Act. Then, according to Article 41 of the Notary Position Act, the proof value was degraded as a private deed.

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