

SELF-HARMING OF CONSUMER RIGHTS IN THE IMPLEMENTATION OF AKAD MURABAHAH WITH WAKALAH IN SHARIA FINANCING

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ABSTRACT

Sharia Financial Institutions is a financial institution that uses the operating system based on Islamic principles. One of the principles which used is the principle of sale with murabahah. The problems that arise as to how the implementation and the legal consequences murabahah with wakalah on Sharia finance, as well as the shape of self-harming consumer rights in such financing. The method which used is qualitative with normative juridical approach. In the Fatwa DSN No. 04 / DSN -MUI / IV / 2000 the first part of the points 9 said that if banks want to delegate for customer to purchase goods from a third party, murabaha sale and purchase agreement must be made after the goods in principle belong to the bank. In practice, the murabaha contract signing with wakalah performed simultaneously at the beginning of the agreement when the goods become the object of buying and selling has not materialized physically. It is a form of an *shar'i* lack of a transaction because it should be made the signing of the contract murabaha after wakalah implemented so that the essence represent the bank to buy goods with the essence of the sale and purchase between the customer and the bank can be fulfilled. This causes akad murabahah who do become null and void which ensue the ownership of the goods unable to be transferred on sale and purchase transactions. Thus arose self-harming of consumer rights on the *syar'i* assurance services for such financing are not in accordance with Sharia principles.

Key words: Murabaha, wakalah, violation of consumer rights

Introduction

Humans will not be separated from all the necessities of life which it can be obtained individually or obtained with the help of others. Assistance from others can be obtained from the disbursement of funds or called financing. The human need for adequate life led to the appearance of various financial institutions that can help resolve financial problems.

Financial Institutions (Financial Institution) is a company which its business is engaged in the field of financial services. This means that the activities undertaken by this institution will always be related to finance, whether association funds, distribute, or other financial services.¹

Companies engaged in financial services referred to financial institutions. The financial institution is an institution that brings together the intermediary between parties who have surplus funds (surplus of funds) with parties who have underfunded (lack of funds). Because acts as an intermediary, so the financial institutions include as financing methods that are not direct (indirect financing)².

Financial institutions consist of two types, Bank financial institutions and non Bank financial institutions which both can use the operating system in a conventional or sharia. Non-bank financial institutions that conduct business based on sharia principles, one of which is *Baitul Maal wa Tamwil* (BMT).

Operational systems of BMT based on Sharia principles which one of them is *Murabahah akad*. Mutual Murabahah Financing is done by *shahib almal* with those in need through the purchase and sale transactions with the explanation that the procurement price and the selling price there is more value that is an advantage or profit for *shahib almal* and repayment made in cash or gradually. *Murabaha* can be interpreted also as a sale and purchase goods contract by explaining the acquisition price and profit (margin) as agreed upon by the seller and coupled with the expected profit (mark-up) is the selling price³.

In order to achieve a goal is often needed others to represent the first party because the first party can not carry out the affairs probably. In the Sharia economic activity, this kind of activity is called *wakalah*. *Wakalah* is represents the other party to carry out its affairs. In the implementation of the *murabaha* contract is also possible to do with *wakalah* if the seller can not buy the

¹ Kasmir, *Bank dan Lembaga Keuangan Lainnya*, 1st edition, Jakarta: Rajawali Press, 1998, page. 2

² Burhanudin S, *Aspek Hukum Lembaga Keuangan Syariah*, Yogyakarta: Graha Ilmu, 2010, page 14.

³ Ahmadi Miru, *Hukum Kontrak Bernuansa Islam*, 2d edition Jakarta: RajaGrafindo Persada, 2013, page 135.

goods desired by *mudharib* to supplier. *Mudharib* or the owners of assets, or in this case the financial institution can not be acted upon his affairs, the financial institution may delegate to the customer to execute such affairs.

Murabahah contract with *wakalah* that is commonly done on financial institutions, but in practices have to pay attention to the element of caution over the *syar'i* transaction because the financial institutions that claim to be Sharia financial institutions must be able to guarantee that the products and the services in accordance with Islamic principles.

a. Implementation And Consequence Of *Murabahah* Akad With *Wakalah* In Islamic Financing

Wakalah or *wikalah* means *at-Tahfidh* (submission, delegation, or mandate). While the terminology, *wakalah* is a contract giving the authority (*muwwakil*) to the Proxy (representative) to carry out a task (*taufikil*) on behalf of the authority.⁴ According to Article 20 (38) Law Compilation of Islamic Economics/ Kompilasi Hukum Ekonomi Syariah (KHES) mentioned that *wakalah* is the provision of power to another party to do something. Or in other words giving power to another party to do something because not everyone is able to do the work on an affair. In order to achieve a goal is often necessary to represent the other party through *wakalah*, namely the delegation of power by one party to another in matters that may be represented.

Based on the thesis entitled Implementation Funding based on the Principle Sale and Purchase (*Murabahah*) at BMT Hudatama Semarang has been described that the implementation of the financing with *murabahah* in BMT Hudatama through the step of submission of application financing, survey by field officers, signing *murabahah*, then dropping / disbursements means in the *murabaha* financing, the member receives fund, not receive the items needed. BMT Hudatama gave *wakalah* to members to buy their own items needed, but in *wakalah* signed by both, the form that has not been filled / empty.⁵

Thus, in practice, there are Sharia financial institutions that make a purchase agreement with the *murabaha* contract represents the purchase of goods to the customer (buyer) but signing *murabahah* with *wakalah* done early agreement simultaneously when goods becomes the object of purchase has not materialized physically (*Murabaha* contract signed before *wakalah* completed).

In addition to a *murabaha* contract was signed in conjunction with *wakalah*, funding provided by the financial institution can be used by customers to venture capital which it is not in accordance with the agreement that is to buy consumer goods.

Thus, the seller uses *wakalah* letter to authorize the buyer to take advantage of financing funds from financial institutions is not a power of attorney to buy goods for the seller which will be sold to the buyer.

In the Fatwa DSN No. 04 / DSN -MUI / IV / 2000 the first part of the points 9 and article 119 KHES said that if the seller wanted to represent a buyer to purchase goods from a third party, *murabaha* sale and purchase agreement must be made after the goods in principle belong to the seller.

If the seller is going to represent a buyer to purchase the goods, the *murabaha* contract signing should be made after the goods in principle belong to the seller. *Murabaha* is a contract of sale and purchase means that the goods had to be in the hands of the seller to be given to the buyer.

When the *murabaha* contract signed before *wakalah* done then it is an early manifestation of a lack *shar'i* transaction because it should deal with *murabahah* made after *wakalah* implemented so that the essence represents the seller to buy goods with the essence of the sale and purchase between the buyer and seller can be met.

Thus the implementation of the *murabaha* agreement in the sharia financing in Islamic financial institutions showed that the goods are not physically at the time of signing the contract *murabaha*.

Islam is a religion that *syâmil*, which covers all human problems, not least in the bargain. Sale were prescribed in Islam and mubah or be allowed, based on the Qur'an, Sunnah, ijma' and argument aqli. Allah allows buying and selling so that people can meet their needs during the life of this world. But in the trading, of course, there are provisions or requirements that must be followed and should not be violated.

Indonesia as the country with the majority religion of Islam also regulates the legal relationships between the parties in the form of engagement with the Supreme Court issued the Regulation under the name Law Compilation of Islamic Economics/ Kompilasi Hukum Ekonomi Syariah (KHES) as the product of a law to regulate the implementation of economic activities based on Sharia principles.

In the Sharia economic activities of the parties will not be separated from the existence of a contract which this is an agreement between two or more parties that would lead to the engagement. Akad is, according to the language that ties it means he tied with each other being according to the terms *syar'i* that bond granted consent by the appropriate laws of *syara'* which creates legal effect on the object.

⁴ Ahmad Mujahidin, *Prosedur Penyelesaian Sengketa Ekonomi Syariah di Indonesia*, 1st edition, Bogor: Ghalia Indonesia, 2010, page 269

⁵ Rini Lusiana, Skripsi : *Pelaksanaan Pembiayaan Berdasarkan Prinsip Jual Beli (Murabahah) pada BMT Hudatama Semarang*, 2014

Article 22 of Law Compilation of Islamic Economics/ Kompilasi Hukum Ekonomi Syariah (KHES) explains that the pillars of the contract consists of the parties who did *akad*, the object of the contract, principal aim covenants and agreements. Pillars of the contract as a whole must be fulfilled. Thus the object of the contract must also exist.

Human activity can not be separated from the activities of both the subsistence needs of primary, secondary and tertiary. To meet these needs one of them can be done by way of buying and selling. In conducting the sale and purchase transactions would have no objects are bought and sold, Islamic law stipulates that the terms of buying and selling objects should be in accordance with the teachings of Islam in which it is stated in Article 76 of the Law Compilation of Islamic Economics (KHES), namely:

1. Goods are bought and sold must already exist
2. Goods are bought and sold must be submitted
3. Goods are bought and sold must be goods that have a value / price of certain
4. Goods are bought and sold must be lawful
5. Goods dijualbelikan buyer needs to know
6. Specificity of goods which bought and sold must be known
7. Designation deemed eligible specificity of goods which bought and sold if the item was no place of purchase
8. The nature of the goods which can be determined directly by the buyer does not require further explanation
9. Goods which sold must be determined with certainty at the *akad*

From the object on the contract terms can be seen that the first condition that the goods are bought and sold must already exist so in this case if trading based on the principles of *Murabahah* and implemented by the delegate to the buyer to spend the goods to be traded (*wakalah*) then the object must be an existing condition after *wakalah* carried out then signing *murabahah*.

For contract or engagement by the parties, there is a separate law which the law of the contract is divided into three namely:

1. legitimate *Akad* is *Akad* which fulfilled the pillars and terms
2. *Facades Akad* / irrevocable contract which fulfilled the pillars and conditions, but there are terms or otherwise damaging the contract for consideration *maslahat*
3. *Akad null* / void is *Akad* which lack of pillars and or the terms

From the law of the contract explains that the contract can be canceled / void when the contract is less pillars and or the terms. This occurred in the implementation of the *murabaha* contract represents the purchase of goods on the purchaser where the *murabaha* contract was signed in conjunction with *wakalah*. Thus can be ascertained that at the time of the *murabaha* contract is signed, the stuff has not been ready yet, so no legal effect on the contract is null / null and void.

Purchase and sale transactions between buyers and sellers have the legal consequences set out in the Law Compilation of Islamic Economics/ Kompilasi Hukum Ekonomi Syariah :

1. Sale and purchase which valid and binding effected in the transfer of ownership of the object of sale and purchase
2. Sale and purchase the void does not effect in the transfer of ownership
3. Goods that have been received by the buyer in a transaction which void is consignment
4. Buyers need to replace items that have been received as referred to in paragraph (2) above, if the item was damaged due to negligence
5. If the goods are to be replaced was no market, then the buyer must replace the money for the item at the time of submission.

With the purchase is canceled then the legal effect of the transaction was not effected in the transfer of ownership of goods sold.

In a history, there was a friend named Hakim ibn Hazam Radhiyallahu'anhu said to the Prophet sallallahu 'alaihi wa salam: "O, Messenger of Allah. Someone came to me. He wants to buy something from me, while the goods sought was nothing to me. Then I went to the market and buy the goods ". Prophet sallallahu 'alaihi wa sallam said: "Do not sell something that is not on you. [HR. Tirmidhi]. "

It is clear that the object must be agreed in the sale and purchase of objects which has been clear its existence at the time of the agreement between the parties. Islam regulates in detail the activities that are *mualamah* because Islam is to protect the rights of the parties by prohibiting things that are likely harm the rights of either party.

b. Self-Harming Consumer Rights Of Murabahah Funding Which Incorrect According To Sharia

Currently consumers are very weak position, partly because the level of awareness and consumer education level is relatively low. This is further exacerbated by the ethos of business which is not true, such as business must aim to benefit solely, businesses do not have a conscience, ect. ⁶ Entrepreneurs who have a bargaining position (bargaining) higher than the consumer so as to make the consumer as the party desperately needs, businesses also adds to the long list of potential violations of consumer rights.

Consumer protection related to business activities, namely trade in goods and services in the sphere of economic activity. However, can not be separated from other aspects such as the legal, religious, educational, social and cultural. ⁷ Therefore, with

⁶ Neni Sri Imaniyati. Hukum Ekonomi dan Ekonomi Islam Dalam Perkembangan, 2002 Bandung: CV Mandar maju. Page 161

⁷ Ibid, 162

regard to consumer protection, should be examined from various points of view including the study of Islamic law named sharia economy.

In the business activities of all things can be done to make a profit are included in the sharia economic activity carried out by the Sharia financial institutions. Sharia Financial Institutions have an obligation to implement the operational system based on Islamic principles. By the Islamic financial institutions which carry out the contract which is not in accordance with Islamic principles resulting in the contract null and it is also an impact on customers or consumers who use the services of financial institutions.

The impact of consumers who use the services of financial institutions which are not in accordance with Islamic principles that consumer rights have been violated because the operational mechanism of Islamic financial institutions recognized the Sharia Supervisory Board (DPS), which serves as an inspector of products / services and operational systems issued by the Islamic financial institutions.

Article 109 of the law Limited Liability Company states that the company which runs business activities based on sharia principles in addition to having the Board of Commissioners shall have the Sharia Supervisory Board. Sharia Supervisory Board is composed of an expert on sharia or more appointed by the AGM on the recommendation of the Indonesian Ulema Council.⁸

As for the task of the Sharia Supervisory Board is to provide advice and suggestions to the Board of Directors and supervise the activities of the Company to comply with Islamic principles.

Law of Sharia Banking regulates the Sharia Supervisory Board/Dewan Pengawas Syariah (DPS) is in Article 32, the point is that the Supervisory Board Syariah shall be established in Sharia Banking and Conventional Commercial Bank which has a Islamic Business Units, they are appointed by the General Meeting of Shareholders on the recommendation of the Indonesian Ulema Council. DPS duty is to give advice and suggestions to the board of directors and oversees the activities of the Bank to comply with Islamic principles. Further provisions on the establishment of the Sharia Supervisory Board referred regulated by Bank Indonesia.⁹

Existence of the Sharia Supervisory Board in an Islamic Financial Institutions may mean that the Islamic financial institutions which provide assurance that entire system services and operations of sharia financial institutions that are in accordance with Islamic principles.

Understanding Consumer according to Consumer Protection Act is everyone who as user of goods and / or services available in the community, for the benefit of themselves, their families, other people and other living beings and not for sale.¹⁰ In this case means customers of Sharia financial institutions that make sale and purchase agreement *murabaha* with *wakalah* entered consumer categories set out in the Consumer Protection Law.

Consumers of Islamic financial institutions are supposed to get an assurance for services consumed. However, consumers are given the service products which are not in accordance with Islamic principles. Agreements offered to customers is a standard agreement made by the financial institution which consumers only know to sign. Undue Influence (abuse of state) play a role in this matter in a state when consumers are psychologically not have the experience and knowledge that qualified in Islamic transactions must sign a contract made by the Sharia financial institutions.

This violates Article 4 letter a jo letter b on Consumer Protection Law that the content consumer has the right comfort, security, and safety in consumption of goods and / or services as well as the right to information which correct, clear and honest about the condition and guarantee of the goods and / or services. When customers are assured of security and safety in the use of goods or services obtained, so that consumers can avoid losses (physical and psychological) when consuming a product.¹¹

The warranty for the services consumed can be seen by the Sharia Supervisory Board every financial institution that serves to monitor the products or services of Islamic financial institutions to comply with Islamic principles so that there is assurance to consumers that all products / services from Islamic financial institutions is a product / services in accordance with islamic principles.

Thus, if consumers get financing *murabaha* financing but the mechanism is not in accordance with islamic principles then in this case there has been a self-harming consumer rights on services consumed not in accordance with islamic principles. An assurance that all services and operational systems of the Islamic financial institutions are in accordance with Islamic principles are not given to the consumer. In other words, the spiritual rights of consumers to obtain financial services shar'i accordance with Islamic principles had been violated .

Based on analysis of data, it can be concluded that the implementation of *murabahah* in Islamic finance has not meet the elements of sharia. The legal consequences of the transaction is buying and selling with no goods which traded is a null / void contract, so the canceled purchase is effected no transfer of ownership. This is detrimental to consumers as users of services of

⁸ Abdul Ghafur Anshori, Hukum Perbankan Syariah, 2nd edition, Bandung: Refika Aditama, 2013, page 72

⁹ Ibid

¹⁰ Lihat Pasal 1 UU No. 8 Tahun 1999

¹¹ Ahmadi Miru dkk, *Hukum Perlindungan Konsumen*, Jakarta: RajaGrafindo Persada, 2011 hlm. 41.

Islamic financial institutions that have entrusted their muamalah activities on Islamic financial institutions so that the transaction contained a self-harming consumer rights in the form of spiritual right where the consumer should be given a guarantee for services provided in the form of a guarantee that all services rendered in accordance with Islamic principles because the financial institutions have put labels as an Islamic financial institution. As a self-harming consumer rights that occurs is the consumer has violated his rights under Article 4 letter a of Law on Consumer Protection, namely the right of comfort, security, and safety in consumption of goods and / or services as well as the right to information which correct, clear, and honest about the condition and guarantee of the goods and / or services.

Thus the writer suggest that contract drafting and implementing sharia should pay more attention to pillars and its requirements and thus avoid violations of sharia elements for customers as consumers have entrusted to the Sharia financial institutions up to the syar'i products and operational systems of the Sharia financial institutions as businesses. Sharia Supervisory Board as the party whom authorized in product stewardship and operational system of Islamic banking had to carry out their jobs effectively so that the practice of Islamic banking can be assured in syar'i.

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