THE REVIEW OF SHARIA ECONOMIC LAW IN APPLYING PRUDENTIAL BANKING PRINCIPLES IN MUSYARAKAH AGREEMENTS: A Study of Supreme Court Cassation Decision Number 624 K/Ag/2017

Sri Armaini
Doctoral Program Students Department of Islamic Law, Universitas Islam Negeri (UIN) Sumatera Utara, Indonesia
Jl. William Iskandar Ps. V, Medan Estate, Sumatera Utara 20371
E-mail: sriarmaini158@gmail.com

Abstract: This study examines the Supreme Court's Cassation Decision Number 624 K/Ag/2017 pertaining to the *musyarakah* agreement that was executed between the customer and the bank, PT Sumut Padangsidimpuan Branch Office, which effectively provided the customer with funding prior to the issuance of the life insurance policy letter. According to Supreme Court Cassation Decision Number 624 K/Ag/2017, losses have to be distributed proportionately in line with Article 3 paragraph (2) of the *Musyarakah* Financing Agreement. The study problem formulation in this research focuses on how the bank's negligence leads to the conclusion of the *musyarakah* agreement, which disadvantages the customer in having to pay the remaining debt according to Supreme Court Cassation Decision Number 624 K/Ag/2017. This research is qualitative with the case-study-based approach which also employs legal protection theory as a tool to analyze research data in order to help the theory explain the role of law, which is to provide justice, order, certainty, benefit, and peace to all people, particularly when it comes to judge-decided *musyarakah* agreements. This study concludes that, in accordance with Articles 209–210 of the Compilation of Sharia Economic Law, an agreement terminates at the death of one of the parties, and the capital owner is responsible for paying any damages resulting from the *mudharib*'s death. Even though the *musyarakah* agreement contains a combination of assets owned by the customer and the sharia bank, if the bank violates the law and fails to follow prudent banking practices, then the bank should be held legally liable for any losses incurred from the *musyarakah* the agreement as a form of punishment for acting illegally.

Keywords: jurisprudence; *musyarakah* agreement; prudential banking principle

Abstrak: Penelitian ini mengkaji Putusan Kasasi Mahkamah Agung Nomor 624 K/Ag/2017 tentang akad musyarakah yang dilakukan antara nasabah dengan bank PT Sumut Kantor Cabang Padangsidimpuan yang efektif memberikan dana kepada nasabah sebelum terbit surat polis dan asuransi jiwa. Berdasarkan Putusan Kasasi Mahkamah Agung Nomor 624 K/Ag/2017, kerugian harus dibagikan secara proporsional sesuai dengan Pasal 3 ayat (2) Akad Pembiayaan Musyarakah. Rumusan masalah kajian dalam penelitian ini terfokus pada bagaimana kelalaian bank yang berujung pada berakhirnya akad *musyarakah* yang merugikan nasabah karena harus membayar sisa utangnya sesuai Putusan Kasasi Mahkamah Agung Nomor 624 K/Ag/2017. Penelitian ini bersifat kualitatif dengan pendekatan studi kasus yang juga menggunakan teori perlindungan hukum sebagai alat untuk menganalisis data penelitian guna membantu menjelaskan peranan hukum yaitu memberikan keadilan, ketertiban, kepastian, kemaslahatan, dan kesejahteraan. perdamaian bagi seluruh umat manusia, khususnya dalam hal perjanjian *musyarakah* yang diputuskan oleh hakim. Penelitian ini menyimpulkan bahwa sesuai dengan Pasal 209–210 Kompilasi Hukum Ekonomi Syariah, suatu perjanjian berakhir karena meninggalnya salah satu pihak, dan pemilik modal bertanggung jawab untuk membayar segala kerugian yang diakibatkan oleh meninggalnya *mudharib*. Sekalipun akad *musyarakah* itu memuat gabungan harta milik nasabah dan bank syariah, namun apabila bank tersebut melanggar hukum dan tidak mengikuti praktek prinsip kehati-hatian perbankan, maka bank tersebut harus bertanggung jawab secara hukum atas segala kerugian yang timbul dari akad *musyarakah* tersebut sebagai bentuk hukuman atas perbuatan melawan hukum.

Kata kunci: yurisprudensi; akad musyarakah; prudential banking principle

Introduction

According to the Bank's Directors' Decree, Indonesia's Sharia banking industry has advanced significantly. This can be seen from the number of Sharia Commercial Banks, the number of Sharia Business Units, the number of BPRS along with

their office networks, the amount of financing disbursed, and the number of assets.[1] Nevertheless, along with this growth, Islamic banks now face additional financing-related difficulties, particularly about consumer legal protection.[2]

One of the sharia bank financing solutions that has the potential to break the law against customers is the *musyarakah* agreement. *Musyarakah* is defined as a joint venture agreement between two or more capital owners to fund a profitable and halal business enterprise. Income or profits are divided based on the agreed ratio.[3] The DSN MUI fatwa states that the benefits of *musyarakah* financing include unity and fairness in the sharing of gains and losses.[4]

However, there are several issues with default and illegal activity associated with the application of *musyarakah* financing in Islamic banks. There are several factors that cause default in a *musyarakah* agreement. Soca Daru divides it into two factors. First, factors caused by the *mudharib*, which are as follows: *mudharib* violates the terms and other conditions in the financing contract; *mudharib* uses or realizes bank financing provided in a way that is not consistent with the original goals specified in the financing agreement.

Second, factors caused by the bank, which are as follows: bank employees are less cautious when confirming the qualifications of *mudharib* applicants; bank competitiveness encourages banks to speculate by giving their debtors easy credit facilities without considering good sharia banking procedures.[5] In the case of a default, there are a number of ways to proceed with a legal settlement, including issuing mortgage guarantees or compensating for the settlement through the judicial system.[6]

As a service provider institution, banks must exercise caution in all aspects of financing. This is due to the possibility of loss caused by administrative negligence that might affect the bank as well as the *mudharib*. This was what came out in the 2011 *musyarakah* finance agreement at the Bank of North Sumatra (Sumut) Syariah Padangsidimpuan Branch Office.

The lawsuit for the negligence of PT. Bank Sumut Syariah Padangsidimpuan Branch Office in the *musyarakah* agreement started after the bank disbursed funds prior to the customer's insurance policy being granted, even if the client has already been charged the insurance cost. The legal justification used by the bank was a statement letter from the client outlining the transfer of financing obligation to the customer's heirs in the case of the customer's death. However, the customer passed away prior to the insurance coverage being granted. The client's wife filed an insurance claim concerning this, but it was denied since the customer had not fulfilled the conditions for a medical examination.

In relation to financing, the customer's wife was summoned three times by the PT. Bank Sumut Syariah Padangsidimpuan Branch Office to pay the current payments as stated in the statement letter with the threat that the bank may auction off the items the client has offered as collateral if the wife fails to pay the customer's debt. Since the customer's wife felt disadvantaged, she submitted a sharia economic disagreement procedure to the Medan Religious Court in which PT. Bank Sumut Syariah Padangsidimpuan Branch Office was considered as a Defendant I, PT Bank Sumut as a Defendant II, and PT Asuransi Bangun Syariah as a Defendant III.

---

[1] Nofinawati, "Perkembangan Perbankan syariah di Indonesia," *JURIS (Jurnal Ilmiah Syariah)*, vol. 14, no. 2 (2015), p. 182.

[2] Bagya Agung Prabowo, "Perlindungan Hukum Nasabah sebagai Syarik dalam Pembiayaan Al Musyarakah di Bank Syariah Mandiri," *Jurnal Hukum*, vol. 1, no. 17 (2011), p. 83.

[3] Directors Decree of the Bank of Indonesia No. 32/34/Kep/Dir on 12 May 1999. Likewise, in the Regulation of the Chairman of the Capital Market and Financial Institutions Supervisory Agency (Bapepam LK) Number: PER-03/BI/2007 concerning the activities of finance companies based on sharia principles.

[4] Fatwa of DSN-MUI Concerning *Musyarakah*, See Syamsun Nahar, "pembiayaan-bagi-hasil-musyarakah," 2012, accessed on September 29, 2022, https://economy.okezone.com/read/2012/03/30/316/602652/ pembiayaan-bagi-hasil-musyarakah. See also Najikha Akhyati dan Muhammad Maksum, Transformasi Fatwa DSN MUI Tentang Akad Musyarakah Mutanaqisah dalam Peraturan Perundang-Undangan, *Jurnal Syar'ie*, vol. 3, no.2 Agustus (2020), pp. 117-118.

[5] Soca Daru Indraswari, "Penyelesaian Wanprestasi Dalam Perjanjian Musyarakah (Studi di BPRS Bhakti Haji Malang)," *Dinamika: Jurnal Ilmiah Ilmu Hukum*, vol. 26, no. 5 (2020), p. 684.

[6] Shofa Fathiyah dan Nurhasanah, "Eksekusi Jaminan Hak Tanggungan Nasabah Wanprestasi Akad Musyarakah Dalam Perspektif Perlindungan Konsumen," *Jurnal Hukum Replik*, vol. 7, no. 1 (2019), p. 71.

This case was tried at the first level through the Medan Religious Court and at the second level through the Medan High Religious Court. The parties then filed an appeal at the Supreme Court. The result indicated that PT. Bank Sumut Syariah Padangsidimpuan Branch Office had transgressed the values of justice, integrity, and accountability. It had also failed to apply prudential banking principles, and there are signs of *gharar*, negligence, and other issues, like purposefully delaying the purchase of life insurance for a customer in which the customer unexpectedly passed away. Before issuing an insurance policy, the bank should not issue a *musyarakah* agreement, even if the contract is valid without a policy, because insurance is not a condition for disbursing the agreed funds. Nevertheless, in order to ensure the security of funding in the event that unfavorable events occur in the future, a policy is crucial and vital.

In this case, it transpired that the bank had failed to apply the contract principles in *musyarakah* financing in accordance with the terms of Article 21 letters a, b, c, d, and g. Article 26 letters a, b, c, and d KHES, and Articles 2 and 3, Articles 25, 26 and 35 of Republic of Indonesia Law Number 21 of 2008 and implementing *taqabul bil hukmi*, which is the disbursement or provision of *musyarakah* financing with conditions to follow later. Furthermore, the insurance provider committed a wrongdoing and acted negligently in executing insurance administration that contravened sharia insurance rules, particularly those based on the Fatwa of National Sharia Council (DSN) Number 21/2001 regarding Sharia Insurance.

The bank's negligence could result in losses for the customer's heirs, because the heirs were charged with the obligation to pay all remaining customer debts to PT. Bank Sumut Syariah Padangsidimpuan Branch. Furthermore, the loss was not based on the customer's negligence, but solely because of death which no one could avoid. The law that emerges from society therefore does not align with the goals of the law. Consequently, it is inconceivable to achieve legal protection, legal ambiguity, and a sense of fairness under the law. On the other hand, PT. Bank Sumut Syariah Padangsidimpuan Branch had flagrantly disregarded the prudential principle in *musyarakah* agreement.

The prudential banking principle is applied in banking to guarantee that banks are constantly sound, liquid, solvent, and profitable. It is envisaged that the prudential banking principle will raise public confidence in banking and encourage costumer to save cash at banks without hesitation.[7] According to Law Number 10 of 1998 Article 8, prudential banking principles are applied based on analysis to enable debtor to settle their debts or return financing in line with the terms of the agreement, thereby reducing the risk of default or repayment delays.[8]

Research on the analysis of court decisions regarding *musyarakah* agreement has been carried out by Jeroh Miko[9] and Deny Guntara.[10] Meanwhile, research on *musyarakah* practices which examines the legal ramifications of a *mudharib*'s passing has been carried out by Inke Widya[11] and Ali Imran.[12] According to this study, banks have a duty to disclose any insurance clauses in *musyarakah* agreement. As a result, in the case of an incidence when the *mudharib* passes away, all parties will likely share the losses proportionally.

This study will improve the findings of previous studies by investigating the negligence of banks in applying prudential banking rules to *musyarakah* agreement. The object of this research study

---

[7] Sutan Remy Sjadeini, *Perbankan Islam dan Kedudukannya dalam Tata Hukum Perbankan Indonesia*, (Jakarta: Pustaka Utama Grafiti, 2007),p. 53.

[8] Saeed Abdullah, *Bank Islam dan Bunga Studi Kritis Larangan Riba dan Interpretasi Kontemporer*, trans. oleh Muhammad Ufuqul Mubin, Nurul Huda, dan Ahmad Sahidan, (Yogyakarta: Pustaka Pelajar, 2004), p. 138.

[9] Jeroh Miko, Riswan Rambe, dan Ria, "Tinjauan Ekonomi Islam: Analisis Putusan Hakim Dalam Perkara Gugatan Pemenuhan Kewajiban Akad Pembiayaan Musyarakah Di Pengadilan Agama Medan (Studi Kasus Putusan Nomor: 697/Pdt.G./2012/Pa. Mdn)," *Jurnal Al-Qasd: Islamic Economic Alternative*, vol. 3, no. 1 (2023).

[10] Deny Guntara, Farhan Asyhadi, dan Anggy Giri Prawiyogi, "Analisis Legal Reasoning Hakim dalam Memutus Perkara Ekonomi Syariah tentang Wanprestasi Akad Musyarakah," *Jurnal USM Law Review*, vol. 6, no. 2 (2023).

[11] Inke Widya Pangestika, "Pertanggungjawaban Bank Syariah Dalam Akad Pembiayaan Musyarakah Terhadap Mudharib yang Meninggal Dunia (Analisis Putusan Mahkamah Agung Republik Indonesia Nomor: 624 K/Ag/2017)," (Skripsi, Medan, Universitas Muhammadiyah Sumatera Utara, 2019).

[12] Ali Imran, "Tinjauan Terhadap Penanganan Pembiayaan Musyarakah Pada Nasabah Yang Meninggal Dunia Sebelum Jatuh Tempo Pembayaran (Studi Di PT. BPRS Tulen Amanah Lotim)", (Skripsi, Mataram, Universitas Islam Negeri Mataram, 2023).

is the Supreme Court decision Number 624 K/Ag/2017. The study begins with two questions: 1) How did the judge examine the Supreme Court's decision Number 624 K/Ag/2017 concerning the lawsuit pertaining to *musyarakah* financing? and 2) How does the Compilation of Sharia Economic Law assess the banks' disregard for prudential banking principles when interpreting *musyarakah* agreement in the Supreme Court decision Number 624 K/Ag/2017?

Method

The study employs a descriptive qualitative research design that prioritizes analysis and is more evident in the meaning-making process. It also aims to precisely characterize the traits of an individual, situation, symptom, or particular group in order to determine the correlation between one symptom and other symptoms.[13]The research approach used in this study is the case approach. The research's primary data source is interviews. The criteria for interview informants in this research are parties who are actively involved in settling the issue and possess the necessary skills. Based on these criteria, the interview informants were divided into two groups. First, an interview was held with the judges on the panel who handled the Supreme Court Cassation Decision Number 624 K/Ag/2017, namely Amran Suadi. Second, Adi Saputra, a Legal Specialist of PT. Bank Sumut Syariah, was also interviewed. Secondary data about *musyarakah* agreement were gathered from books, journals, regulations and fatwas of DSN-MUI relating to *musyarakah* agreement.[14]

The legal protection theory was employed in this study as a tool for data analysis in order to characterize the role of law, that seeks to ensure that everyone has a right to justice, order, certainty, benefit, and peace, particularly when it relates to judge-decided *musyarakah* agreement. Furthermore, this study draws conclusions by examining the cassation level decision in light of legal protection theory and principles, KHES provisions, and the Fatwa of MUI DSN. It then compares how prudential banking principles are implemented in society with the applicable legal framework or theory.

Results and Discussion

Conceptual Review of Legal Protection Theory and Prudential Banking Principles in Indonesian Banking

According to Fitzgerald, as quoted by Satjipto Raharjo, the origins of the theory of legal protection originate from natural law theory or the school of natural law. This school was pioneered by Plato, Aristotle (Plato's student), and Zeno (founder of the Stoic school). The natural law school of thought believes that morals and the law are inextricably linked and that law comes from God, who is universal and everlasting. Law and morals, according to those who follow this school of thought, are both external and internal representations of human nature and the principles that govern how individuals act.[15]

According to Satjipto Rahardjo, legal protection is an endeavor to coordinate diverse interests within society to prevent conflicts and enable individuals to fulfill all their rights. The process of organizing is conducted by limiting certain interests and transferring authority to others in a quantifiable manner.[16]

This theory was inspired by Fitzgerald's opinion that the function of law is to integrate and coordinate different interests in society by regulating their protection and limitations.[17]

Legal protection is divided into two types: repressive and preventative. Preventive legal protection strives to prevent conflicts and encourages government action to be cautious when making decisions based on discretion, whereas repressive legal protection is legal protection that attempts to settle conflicts.[18]

[13] Soerjono Soekanto dan Sri Mamudji, *Penelitian Hukum Normatif: Suatu Tinjauan Singkat,* (Jakarta: Rajawali Pers, 1995), p. 14.

[14] Sugiyono, *Metode Penelitian Pendidikan Pendekatan Kuantitatif, Kualitatif, dan R & D,* (Bandung: Alfabeta, 2014), p. 330.

[15] Satjipto Raharjo, *Ilmu Hukum,* (Bandung: Citra Aditya Bakti, 2000), p. 53.

[16] Raharjo, p. 54.

[17] Raharjo, p. 69.

[18] Phillipus M. Hadjon, *Perlindungan Hukum bagi Rakyat Indonesia*, (Surabaya: Bina Ilmu, 1987), p. 2.

One of the main components of the Prudential Banking Principles is the provision of strong legal protection for all parties (clients, investors, creditors, and borrowers) participating in banking operations. This principle is frequently put into practice by rules that are supported by a robust legal framework. These two factors work together to promote the same objective, which is to preserve the stability of the financial system and safeguard the interests of all parties participating in banking operations.

The term prudent is closely related to the function of bank supervision and bank management. Although the word "prudent" literally translates to "wise" in Indonesian, it refers to the prudential principle in the banking industry.[19] As a result, the term "prudential principle-based bank supervision" or "prudential principle-based bank management" developed in Indonesia. The word "prudent," which refers to wisdom or the principle of prudence, is not new, but it encompasses a novel idea that addresses the numerous risks that are present in every activity that a bank engages in more forcefully, precisely, and successfully. Thus, prudent is a concept that combines components of attitudes, concepts, policy standards, and practices in bank risk management in order to avoid even the smallest repercussions that might jeopardize or harm the bank itself or customers who have committed their money to the bank. The overarching objective of this concept is definitely to preserve the stability, security, and health of the financial system.

The notion of prudential banking evolved from a series of observations made about the increasingly complex and dynamic shift in the banking industry. Instead of concentrating on the local market, bank firms are beginning to seize new, far broader prospects, such as expanding internationally and engaging in the global market. However, these changes have made the growth and development of banking less controlled so that the impact is truly significant on banking business activities.

The juridical basis for the application of prudential banking principles can be seen in the regulations of Banking Law no. 10 of 1998 as an amendment to Law no. 7 of 1992 as well as in the Sharia Banking Law no. 21 of 2008. In addition, the regulations published by the Bank of Indonesia must be regarded as the legal foundation for implementing this idea into practice. The following articles address prudential banking concepts in both the Banking Law and the Sharia Banking Law:

Table of Basic Legal Prudential Banking Principles

No	Law	Article
1	Law no. 10/Banking/ 1998 concerning Amendments to Law no. 7/Banking/ 1992.	Article 2, Article 8, Article 11, Article 29, Article 34, and Article 35.
2	Law No. 21/Sharia Banking/ 2008 concerning Sharia Banking	Article 2, Article 23, and Article 34

Supreme Court Cassation Decision Number 624 K/Ag/2017 Regarding *Musyarakah* Agreements

The conflict between customer and PT. Bank Sumut Syariah Padangsidimpuan Branch Office emerged on April 2, 2011, when Mr. OSH, as a customer, stepped into a *musyarakah* agreement with PT. Bank Sumut Syariah Padangsidimpuan Branch Office (defendant I/cassation respondent), pledging a certificate of ownership as collateral for a loan amount of IDR 700,000,000.00 (seven hundred million rupiah) for a duration of 12 (twelve) months. The Ownership Certificate No. 395/Pasar Gunung Tua, dated June 7, 2007, is under his name.

When the *musyarakah* agreement was made, Mr. OSH was charged at the same time to pay the life insurance costs of IDR 2,170,000.00 (two million one hundred and seventy thousand rupiah). However, prior to the insurance company issuing the life insurance policy, PT. Bank Sumut Syariah Padangsidimpuan Branch Office distributed funds based on a statement letter from Mr. OSH, which his wife, Mrs. YD (Plaintiff I/Petitioner of Cassation I), was aware of. In simple terms, if the life insurance policy has not yet been granted and an unforeseen circumstance befalls Mr. OSH, endangering his life, his heirs will not file a lawsuit against the bank and will remain accountable for all of Mr. OSH's funding until it is completed.

Sadly, Mr. OSH passed away on July 13, 2011, caused by sickness. Then, after the contract was signed, Mr. OSH's wife attempted to file an

[19] Permadi Gandapradja, *Dasar dan Prinsip Pengawasan Bank*, (Jakarta: Gramedia Pustaka Utama, 2004), p. 21.

insurance claim to PT Asuransi Bangun BA Syariah (defendant III). However, the claim was denied as Mr. OSH had not fulfilled the conditions for a medical examination.

Finally, in response to Mrs. YD's statement, PT. Bank Sumut Syariah Padangsidimpuan Branch Office sent three summonses to Mr. OSH's wife, requesting that she must pay the installments of her husband's debt. The threat was that if Mrs. OSH's wife failed to pay, PT. Bank Sumut Syariah Padangsidimpuan Branch would auction off mortgaged objects owned by Mr. OSH.

As a result, Mrs. YD, the spouse of Mr. OSH, was aggrieved and filed a lawsuit over a sharia economic dispute to the Medan Religious Court which put PT. Bank Sumut Syariah Padangsidimpuan Branch Office as defendant I, PT Bank Medan Sumut Syariah as defendant II, and PT Asuransi Bangun BA Syariah as defendant III. The claims made in the lawsuit were as follows:

1) To grant the plaintiffs' lawsuit entirely,
2) To declare that Defendants I through Defendants III had committed acts that were contrary to sharia economic principles and Sharia texts and/or unlawful acts,
3) To proclaim that the heirs of Mr. OSH, plaintiffs I to IV, are discharged from the obligation of *musyarakah* finance owed by defendants I to III, which amounts to Rp. 752,000,000.00 (seven hundred and fifty-two million rupiah),
4) To declare that all of the correspondence between plaintiffs I and IV regarding the obligation of *musyarakah* financing debts from defendants I to III totaling Rp. 752,000.00 (seven hundred and fifty-two million rupiah) is void or has no legal force, including the statement letter dated 28 April 2011 written by Mr. OSH which was also known by his wife as plaintiff I,
5) To sentence defendant I to defendant III for their failure to pay Mr. OSH's *musyarakah* financing debt worth IDR 752,000,000.00 (seven hundred and fifty-two million rupiah) jointly and severally,
6) To sentence defendant I to defendant II to return the collateral for the Certificate of Ownership No. 457/ Pasar Gunung Tua dated 19 December 2008 in the name of Mr. OSH and Certificate of Ownership No. 395/ Pasar Gunung Tua dated 7 June 2007 in the name of Mr. OSH,
7) To decide and mandate that Defendant I and Defendant II revoke the auction of Mr. OSH's properties,
8) To state that the property confiscation (revindicatoir beslag) that was executed in this case was lawful and valuable.
9) To state that this decision can be implemented immediately even if there are legal appeals and cassation from the defendants. The following is a summary table of the decisions in this case from level I to cassation level.

Summary Table of Case Decisions

Court Level	Contents of the Decision
Medan Religious Court	- To free heirs from the obligation of paying a deceased customer's remaining debts - PT. Bank Sumut Syariah Padangsidimpuan Branch Office is obliged to return the collateral to the heirs
Medan High Religious Court	- To cancel the decision of the Medan Religious Court
Supreme Court	- To cancel the decision of the Medan High Religious Court - PT. Bank Sumut Syariah Padangsidimpuan Branch Office has committed an unlawful act. - Punish PT. Bank Sumut Syariah Padangsidimpuan Branch Office to cover the losses and compensate the heirs - PT. Bank Sumut Syariah Padangsidimpuan Branch Office is required to give the plaintiffs back any remaining auction earnings from the mortgage object after the plaintiffs have paid all of their expenses and debts.

Consideration of the Cassation Tribunal

To consider, that the Supreme Court took into account the following reasons:

To consider, that the Supreme Court believes that the Medan Religious High Court incorrectly applied the law, aside from the reasons for the cassation without having to take into account the reasons for the cassation submitted by the cassation applicant and the counter memorandum from the cassation respondent as follows:

That the action of defendant I in using plaintiff I's statement as the reason for the disbursement of *musyarakah* financing before the insurance policy was issued, was an indication (*qarinah*) of plaintiff I's lack of caution. Plaintiff I should not

have executed a *musyarakah* agreement prior to the issuance of the insurance policy. Even though the contract is valid without a policy, insurance is not a condition for disbursing the agreed funds. However, a policy is very important and urgent to guarantee the security of funding in the case that undesirable things happen in the future. Besides, this conduct went against sharia-compliant economic concepts and was not consistent with the spirit of Islamic economics. Therefore, the bank must remain aware of the consequences since this action had really led to loss and discontent. Thus, defendant I committed negligence by failing to inform Mr. OSH, as a consumer, of the consequences that would be paid by him and his heirs if there was a risk of death in the future as required by article 21 letters (e) and (j) of the Compilation of Sharia Economic Law.

That therefore the decision of the Medan High Religious Court must be annulled, and the Supreme Court will try this case through the following considerations.

To take into account that Defendant I, a bank party, disregarded the prudential banking principle, which stipulates that banks must employ considerable caution while conducting commercial operations, particularly when collecting and disbursing funds to customers.

The aim of implementing this precautionary principle into practice is to ensure that the bank always protects public funds, and the bank is always in a healthy condition, carries out its business well, and complies with the provisions and legal norms that apply in the banking sector as envisioned in articles 2 and 29 paragraph (2) of Law No. 10 of 1998 concerning banking. Based on the statement above, it illustrates that defendant I has infringed upon the law.

To consider, that on April 26, 2011, the first party (defendant I) made a *musyarakah* agreement. At the same time, the second party (plaintiff I) said that all funding would be the heirs' obligation if the insurance policy had not been approved and anything had happened. In brief, as mentioned in article 6, there is a business risk associated with the death of the second party, particularly since it was relatively straightforward for the first party to distribute funds with simply a statement letter—which was obviously full of risks—prior to the insurance policy being granted. Therefore, since this contract is a *musyarakah* agreement, the risks must be borne proportionally between the plaintiff (as the second party) and defendant I (the first party).

To consider, that the *musyarakah* agreement between Mr. OSH and Defendant I had created a risk of loss because there was no life insurance that guaranteed the return of the principal capital of the *musyarakah* agreement received by the customer. If the customer dies, this is an action that could harm the heirs who will be responsible for paying IDR 752,000,000.00 (seven hundred and fifty two million rupiah), which will be covered by the insurance company. However, since the act of disbursing funds without an insurance policy first was an act that was contrary to with article 1 of contract no. 120/KCSY-02-APP/MSY/2011 in which this loss was caused by the bank's negligence, the loss must be borne jointly by the contracting parties. Thus, since the contract is a *musyarakah* contract, the losses must be divided proportionately so that the plaintiff must repay the capital amount of IDR 752,000,000.00 (seven hundred and fifty two million rupiah) in the amount of 53.22 (fifty three point twenty two) percent and defendant I must repay the capital in the amount of 46.78 (forty six point seventy eight) percent as stated in the article 3 paragraph (2) of the *musyarakah* financing agreement No.120/KCSY02-APP/MSY/2011 dated 26 April.

To take into account that, based on the aforementioned factors, the Supreme Court believes that there are sufficient justifications to grant the cassation request made by Mrs. YD and her friends, and to revoke the decision of the Medan High Religious Court No. /Pdt.G/2016/ PTA. Mdn, dated October 5, 2016 AD, which corresponds with 4 Muharram 1438 Hijriah, annulling the decision of the Medan Religious Court No. 944/Pdt.G/2015/PA.Mdn, dated March 10, 2016 AD, which corresponds with 1 Jumadil End 1437 Hijriah.

Analysis: The Review of Supreme Court Cassation Decision Number 624 K/Ag/2017 Based on Prudential Banking Principles as a Form of Legal Protection

In order to provide legal protection for customers in this case, the cassation panel of

judges needs to evaluate numerous crucial factors, including:

1. In general, the bank must take into consideration the following clauses pertaining to contract principles while executing a contract, as stated in the Compilation of Sharia Economic Law (KHES) article 21 letters (e) and (j):
   - every contract must benefit both parties equally and serve the interests of both in order to avoid manipulation and disadvantage to one of the parties.
   - The contract is executed in good faith, upholds the benefit, and is free from any instances of deception or other wrongdoing.[20]
2. The cassation panel's consideration significantly protects customers in cases of improper banking practices that are detrimental to both the customers and the banking institution itself, particularly in *musyarakah* financing agreement that fail to apply the prudential banking principles as intended by article 2 and article 29 paragraph (2) of Law No. 10 of 1998 concerning banking.
3. The bank's procedures for handing out funds to customers before issuing insurance policies, even though they know the risks that will be borne by the customer in the future, are evidence of carelessness, bad faith, and even trapping the customer.
4. The panel of cassation judges emphasized that in Sharia economic activities involving *musyarakah* agreement, where a customer's death is a potential risk arising from the contract's implementation, both the bank and the customer bear proportionate amounts of the associated risks.

The researchers argue that both parties in sharia economic transactions need to be seen as equal and must be mutually beneficial. In addition, benefits must be obtained fairly and with good faith on the side of both parties. The cassation panel's assessment, which concluded that the bank had the audacity to provide financing to customers "only" based on a unilateral statement letter from the customer, which was witnessed by his wife, to fulfill the bank's duties in the case of a risk of death until the insurance policy was issued, was fraught with risk and demonstrated the bank's dishonesty. Even though it is published based on Bank Sumut Syariah's SOP, disbursement of finance is not allowed prior to the insurance firm issuing the policy. The exceptions to this rule are when the consumer refuses to be covered by insurance or when there is a separate policy from an authorized official. Adi Saputra continued by saying that it might be argued that Bank Sumut was not negligent in this situation since the customer's unilateral statement prior to the insurance policy was the basis for the customer's cash withdrawal.[21]

Concerning this issue, Amran Suadi further holds that the policy serves as evidence that the client and the insurance provider are bound by an insurance agreement in which the provider is the insurer, and the client is the insured. If the customer and the insurance company have already made an agreement and are just awaiting the issuance of the policy as evidence of that agreement, then the customer is entitled to receive its rights and the insurance company is required to fulfill its obligations as long as it can be demonstrated that one party has complied with the terms of the agreement. Nevertheless, the agreement is considered invalid if the insurance participant has not complied with certain requirements, causing a delay in the policy's issuance. On the other hand, if the customer and the banking institution agree that the heir will bear responsibility for the financing until it is finished while the insurance policy has not been issued, then the customer will be required to fulfill all of the terms of this agreement, including the option for the bank to auction the customer's collateral if the heir is unable to fulfill his obligations. The heir's obligation to pay the customer's debt to the bank is based on a statement letter that complies with the terms of Article 1338 paragraph (1) of the Civil Code.[22]

[20] See Compilation of Sharia Economic Law, Supreme Court of the Republic of Indonesia Directorate General of Religious Courts, 2011.

[21] Interview with Adi Saputra, Legal Specialist of Law Division– Bank Sumut, September 22, 2022

[22] Interview with Amran Suadi, Supreme Court judge who decided the case in the Supreme Court Cassation Decision Number 624 K/Ag/2017, September 21, 2022.

In contrast, the researchers argue that even though the insurance policy is not a condition for disbursing funds, and disbursement of funds can be done before the policy letter is issued and based on the statement letter from the customer, it indicates that the bank is merely safeguarding itself and is not considering how to protect the customer from potential risks. The customer's statement letter was actually perceived as a trap set by the bank to prevent it from avoiding the risks that the customer would face in the future, although the bank actually knew about this risk from the beginning. The bank is considered to have done an illegal conduct since it fails to apply the prudent banking principle or does so negligently.

The principle of prudence is generally regulated in the rules and regulations of Article 2 of Law Number 10 of 1998 concerning Banking. Constitutionally, banks are now required by law to use this prudent principle while undertaking business.[23] Violation of the precautionary principle in granting credit by banks causes legal consequences, where the party committing the violation may face legal sanctions in the form of a criminal sanction of up to Rp. 100,000,000,000, -. as regulated in Article 49 paragraph 2 letter b of Law Number 10 of 1998 concerning Banking.

Scholars argue that a bank is deemed to have violated the law whenever it fails to adhere to or is negligent in implementing the prudent banking principle. Consequently, Article 208's rules are applicable. KHES governs the principle that "Business losses and damage to products in *mudharabah* / *musyarakah* financing collaborations which are not incurred because of the negligence of the *mudharib*, are borne by the capital owner." Article 209 of KHES declares that "The *mudharabah* contract ends automatically if the owner of the capital or *mudharib* dies, or is unable to carry out legal actions." In addition, article 210 paragraph 2 KHES specifies that "Losses resulting from the death of the *mudharib* are borne by the owner of the capital."[24]

Additionally, PT. Bank Sumut Syariah Padangsidimpuan Branch Office has in practice violated the articles of Law Number 21 of 2008 concerning Sharia Banking. The article that PT. Bank Sumut Syariah Padangsidimpuan Branch Office violated is Article 25 letter b and Article 26 paragraph (1), which state that the Sharia Financing Bank shall adhere to Sharia principles in conducting its business operations and that its Sharia products and services shall not contradict sharia principles.[25] One of the business activities in sharia banking is a *musyarakah* financing agreement. If a bank carries out its business activities based on sharia, then the bank must comply with sharia principles. One of the principles in sharia economics is the principle of benefit. The principle of benefit aims to obtain enjoyment in this world and the afterlife by taking advantage and shunning negatives.

The statement letter between Mr. OSH and PT. Bank Sumut Syariah Padangsidimpuan Branch, which was part of Musyarakah Financing Number 120/KCSY02-APP/MSY/2011,[26] suggested that there was not any legal protection for clients in this financing in the form of the principle of benefit. The insurance company had not issued an

[23] See Law Number 10 of 1998 concerning Banking.

[24] See Compilation of Sharia Economic Law, Supreme Court of the Republic of Indonesia Directorate General of Religious Courts, 2011.

[25] See Law Number 21 of 2008 concerning Sharia Banking

[26] In general, the bank must take into consideration the following clauses pertaining to contract principles while entering into a contract, as stated in the Compilation of Sharia Economic Law (KHES) Article 21 letters (e) and (j): Mutual benefit; every contract is executed in order to satisfy the parties' interests and avoid manipulative tactics and harm to one of the parties; it's not good; the contract is executed in order to maintain the benefits and is devoid of any traps or other unethical behavior. As is known, in the law of engagement there are six principles, namely: 1) the principle of consensualism rooted in agreement (consensus), 2) the principle of freedom of contract, 3) the principle of legal certainty (pacta sunt servanda), 4) the principle of good faith (bonafides, language Roman), 5) principle of personality (personality), 6) principle of obligator. See Daeng Naja, Contract Drafting: Business Contract Drafting Skills Series (Bandung: PT Citra Aditya Bakti, 2006), p. 7-15. Muhammad explained that the principles of contract law consist of, a) the principle of freedom of contract; b) complementary principle; c) consensual principle; d) abligator principle. See Abdul Kadir Muhammad, *Hukum Perdata Indonesia* (Bandung: CV Citra Aditya Bakti, 1993), pp. 225-226. Jaih Mubarok dan Hasanuddin, *Fikih Mu'amalah Maliyah Prinsip-Prinsip Perjanjian*, (Bandung: Simbiosa Rekatama Media, 2017), pp. 46-48. See also Chairul Lutfi, Muhammad Ali Hanafiah Selia, "Penemuan dan Penafsiran Hukum Hakim Mahmakah Agung Tentang Penyelesaian Sengketa Pembiayaan Akad Musyarakah", *Jurnal Syar'ie,* vol. 4, no. 1 - Februari (2021), p. 84

insurance policy from the customer because the consumer failed to provide a medical examination, which was one of the requirements for granting an insurance policy. However, customers were not informed by the bank about the mandatory medical examination. By failing to submit the medical examination, the customer forfeits their insurance coverage. When a customer passed away which result in arrears in the return of the *musyarakah* financing capital to the bank, the insurance company should be the one to compensate for the loss. However, in practice, it is the customer's heirs who bear the loss.

Besides legal protection and the principle of benefit, the other principle of Islamic economics is the principle of honesty and truthfulness. This principle is the basis of morals. The transaction agreement must be firm, unambiguous, and definite, both for the object that is the object of the contract and the price of the item being contracted. Every transaction should be undertaken without causing harm to any parties. Each individual is free to choose agreements without being forced to carry out any transactions—except agreements that must be carried out in order to uphold social norms and fairness principles. However, because of the unilateral agreements made by the sharia bank, the heirs of the customer face losses that they should not have experienced because Musyarakah Financing Number 120/KCSY02-APP/MSY/2011 did not contain these Islamic economic principles. In decision Number 624/K/Ag/2017, the Supreme Court judge decided that the customer's heirs must bear the loss and pay the bank the amount of 53.22% x IDR 752,000,000.00 = IDR 400,214,400.00 (four hundred million two hundred fourteen thousand four hundred rupiah). Meanwhile, the bank bears a loss of 46.78% x IDR 752,000,000.00 = IDR 351,785,800.00 (three hundred fifty-one million seven hundred eighty-five thousand eight hundred rupiah).

According to the Compilation of Sharia Economic Law (KHES), if one of the parties in a contract passes away, the contract terminates.[27] Because the customer has passed away, the *musyarakah* agreement between the sharia bank and the customer has ended according to sharia. In this case, the customer's heirs should be free to return the capital, even if there was a mix of assets between the customer and the PT. Bank Sumut Syariah Padangsidimpuan Branch Office at the beginning of the *musyarakah* agreement. However, since the bank disregarded or ignored the principle of prudence and its actions were against the law, then the losses incurred from the *musyarakah* agreement in this case should only be borne by the PT. Bank Sumut Syariah Padangsidimpuan Branch Office as a form of punishment for its unlawful actions due to failure to apply the precautionary principle, Of course, by determining the customer's heirs, they must bear the loss and pay the bank the amount of 53.22% x Rp. 752,000,000.00 = Rp. 400,214,400.00 (four hundred million two hundred fourteen thousand four hundred rupiah). In the meantime, the bank that experiences a loss of 46.78% x IDR 752,000,000.00 = IDR 351,785,800.00 (three hundred fifty-one million seven hundred eighty-five thousand eight hundred rupiah) eliminates the value of justice and fails to provide its customers any legal protection. After all, how someone could have to be responsible for a crime he/she did not commit.

Based on this case, researchers assess that Decision Number 624/K/Ag/2017 and the practice of financing *musyarakah* agreement at PT. Bank Sumut Syariah Padangsidimpuan Branch Office did not incorporate sharia principles such as the principles of honesty, truth and benefit, which provide legal protection for customers. In contrast, this actually brings the principle of harm to customers and heirs by implementing *taqabul bil hukmi*, namely disbursing *musyarakah* financing with conditions that will come later.

Conclusion

Based on the results of the analysis and discussion of the research that has been carried out, it can be concluded that in the practice of financing *musyarakah* agreement which has been mentioned in the Supreme Court Cassation Decision Number 624/K/Ag/2017, the Panel of Judges found that the bank had engaged in an unlawful act and ignored the prudent banking principle. According to KHES Articles 209-210, when a party in a contract

[27] Hendi Suhendi, *Fiqh Muamalah*, (Jakarta: Raja Grafindo Persada, 2013), p. 128

passes away, the agreement terminates and the capital owner is responsible for paying any losses brought on by the *mudharib*'s death. Nonetheless, it is only fair that the bank bears the losses incurred from the *musyarakah* agreement in this case as punishment for its illegal activities, considering that the bank violated the law and disregarded or neglected prudential banking regulations.

References

Abdullah, Saeed, *Bank Islam dan Bunga Studi Kritis Larangan Riba dan Interpretasi Kontemporer*, translated by Muhammad Ufuqul Mubin, Nurul Huda, and Ahmad Sahidan. Yogyakarta: Pustaka Pelajar, 2004.

Akhyati, Najikha dan Maksum, Muhammad, "Transformasi Fatwa DSN MUI Tentang Akad Musyarakah Mutanaqisah dalam Peraturan Perundang-Undangan", *Jurnal Syar'ie,* vol. 3, no. 2 Agustus, 2020.

Fathiyah, Shofa dan Nurhasanah, "Eksekusi Jaminan Hak Tanggungan Nasabah Wanprestasi Akad Musyarakah Dalam Perspektif Perlindungan Konsumen," *Jurnal Hukum Replik*, vol. 7, no. 1, 2019.

Fatwa DSN. Nomor, 73/DSN-MUI/XI/2008. Tahun, 2008. Tentang, Musyarakah Mutanaqisah

Gandapradja, Permadi. *Dasar dan Prinsip Pengawasan Bank*. Jakarta: Gramedia Pustaka Utama, 2004.

Guntara, Deny, Farhan Asyhadi, dan Anggy Giri Prawiyogi, "Analisis Legal Reasoning Hakim dalam Memutus Perkara Ekonomi Syariah tentang Wanprestasi Akad Musyarakah," *Jurnal USM Law Review*, vol. 6, no. 2, 2023.

Hadjon, Phillipus M, *Perlindungan Hukum bagi Rakyat Indonesia*, Surabaya: Bina Ilmu, 1987.

Imran, Ali, "Tinjauan Terhadap Penanganan Pembiayaan Musyarakah Pada Nasabah Yang Meninggal Dunia Sebelum Jatuh Tempo Pembayaran (Studi Di PT. BPRS Tulen Amanah Lotim)," Skripsi, Universitas Islam Negeri Mataram, 2023.

Indraswari, Soca Daru, "Penyelesaian Wanprestasi Dalam Perjanjian Musyarakah (Studi di BPRS Bhakti Haji Malang)," *Dinamika: Jurnal Ilmiah Ilmu Hukum*, vol. 26, no. 5, 2020.

K, Yusuf, Deni, *Mekanisme Pemberian Kredit dan Pembiayaan di BMT, BMT dan Bank Islam: Instrumen lembaga keuangan syariah*, Bandung: Pustaka Bani Quraisy, 2004.

Kompilasi Hukum Ekonomi Syariah, Mahkamah Agung Republik Indonesia Direktorat Jenderal Badan Peradilan Agama Tahun, 2011.

Lutfi, Chairul dan Selia, Muhammad Ali Hanafiah, "Penemuan dan Penafsiran Hukum Hakim Mahmakah Agung Tentang Penyelesaian Sengketa Pembiayaan Akad Musyarakah", *Jurnal Syar'ie,* vol. 4, no. 1, Februari 2021.

Miko, Jeroh, Riswan Rambe, and Ria, "Tinjauan Ekonomi Islam: Analisis Putusan Hakim Dalam Perkara Gugatan Pemenuhan Kewajiban Akad Pembiayaan Musyarakah Di Pengadilan Agama Medan, (Studi Kasus Putusan Nomor: 697/ Pdt.G./2012/Pa. Mdn), " *Jurnal Al-Qasd: Islamic Economic Alternative*, vol. 3, no. 1, 2023.

Mubarok, Jaih and Hasanuddin, *Fikih Mu'amalah Maliyah Prinsip-Prinsip Perjanjian*, Bandung: Simbiosa Rekatama Media, 2017.

Muhammad, Abdul Kadir, *Hukum Perdata Indonesia,* Bandung: CV Citra Aditya Bakti, 1993.

Nahar, Syamsun, "pembiayaan-bagi-hasil-musyarakah," https://economy.okezone.com/read/2012/03/30/316/602652/ pembiayaan-bagi-hasil-musyarakah.

Naja, Daeng, Contract Drafting: *Seri Keterampilan Merancang Kontrak Bisnis,* Bandung: PT Citra Aditya Bakti, 2006.

Nofinawati, "Perkembangan Perbankan syariah di Indonesia," *JURIS (Jurnal Ilmiah Syariah)*, vol. 14, no. 2, 2015.

Pangestika, Inke Widya, "Pertanggungjawaban Bank Syariah Dalam Akad Pembiayaan Musyarakah Terhadap Mudharib yang Meninggal Dunia (Analisis Putusan Mahkamah Agung Republik Indonesia Nomor : 624 K/Ag/2017)," Skripsi, Universitas Muhammadiyah Sumatera Utara, 2019.

Peraturan Ketua Badan Pengawas Pasar Modal dan Lembaga Keuangan (Bapepam LK) Nomor: PER-03/BI/2007 tentang Kegiatan Perusahaan Pembiayaan Berdasarkan Prinsip Syariah.

Prabowo, Bagya Agung, "Perlindungan Hukum Nasabah sebagai Syarik dalam Pembiayaan Al Musyarakah di Bank Syariah Mandiri," *Jurnal Hukum*, vol. 1, no. 17, 2011.

Putusan Nomor 967/ Pdt.G/2012/PA.Mdn.

Raharjo, Satjipto, *Ilmu Hukum*, Bandung: Citra Aditya Bakti, 2000.

Saputra, Adi, Legal Specialist, Bidang Hukum-Bank Sumut, wawancara peneliti pada Tanggal 22 September 2022.

Sjadeini, Sutan Remy, *Perbankan Islam dan Kedudukannya dalam Tata Hukum Perbankan Indonesia*. Jakarta: Pustaka Utama Grafiti, 2007.

Soekanto, Soerjono, dan Sri Mamudji, *Penelitian Hukum Normatif: Suatu Tinjauan Singkat*. Jakarta: Rajawali Pers, 1995.

Suadi, Amran, Hakim Mahkamah Agung yang memutuskan perkara pada Putusan Kasasi Mahkamah Agung Nomor 624 K/Ag/2017, interview researcher on September 21, 2022.

Sugiyono, *Metode Penelitian Pendidikan Pendekatan Kuantitatif, Kualitatif, dan R & D*. Bandung: Alfabeta, 2014.

Suhendi, Hendi, *Fiqh Muamalah*, Jakarta: Raja Grafindo Persada, 2013.

Surat Keputusan Direksi Bank Indonesia No. 32/34/ Kep/Dir tanggal 12 Mei 1999.

Undang-Undang Nomor 10 Tahun 1998 Tentang Perbankan.

Undang-Undang Nomor 21 Tahun 2008 tentang Perbankan Syariah.