TABELLIUS Journal of Law
ISSN 2988-6201
published by Master of Notarial Law Faculty of Law Universitas Islam Sultan Agung Semarang

The Position of Secured Creditors Holding Mortgage Guarantees in Bankruptcy and Suspension of Debt Payment Obligations

Bagus Fitrahndi
Faculty of Law, Universitas Islam Sultan Agung, Semarang, Indonesia, Email: bagusfitrahndi007@gmail.com

Abstract. *This study aims to analyze the position of secured creditors holding Mortgage Rights in bankruptcy cases and the mechanism for executing Mortgage Rights by secured creditors in bankruptcy cases. This study uses a statutory approach. This type of research is normative research. The type and source of data in this study are secondary data obtained through literature studies. The analysis in this study is prescriptive. Based on the research, it is concluded that in bankruptcy cases, creditors are classified into several groups, regulated in the UUK-PKPU, in Article 56 paragraph (2) of Law No. 37 of 2004 which stipulates that secured creditors are given a 90-day deferral right to execute the collateral they hold. The implementation of this article affects the rights of creditors holding Mortgage Rights as regulated in Article 20 paragraph (1) and Article 21 of Law Number 4 of 1996 concerning Mortgage Rights. Execution of Mortgage Rights through direct auction can be carried out immediately by creditors. However, when a debtor is declared bankrupt, their rights are limited as stipulated in the Bankruptcy Law/PKPU. If the collateral is not successfully sold within two months, the right to enforce the collateral is transferred to the curator. It can be concluded that synchronization is necessary between the Mortgage Law and the Bankruptcy Law/PKPU to ensure legal protection for secured creditors.*

Keywords: *Creditors; Bankruptcy; Mortgage; Secured.*

1. Introduction

Mortgage is one of the material guarantees in Indonesia regulated by Law No. 4 of 1996. The object is the registered land rights such as: Ownership Rights, Building Use Rights, Cultivation Use Rights, Usage Rights along with objects that are an integral part of the land. In the classification of material rights, two main groups are distinguished: enjoyment rights (such as ownership rights and use rights) and rights that provide security (such as: pledges, fiduciaries, mortgage rights, mortgages). However, a conflict of norms arises when the debtor is declared bankrupt.[1]Mortgage rights are one of the property security rights in Indonesia. Creditors who hold mortgage rights are known as separatist creditors. These separatist creditors have preference over the mortgage rights they hold. The characteristic of this mortgage preference is that in the mortgage agreement, it is agreed that if the debtor defaults, the creditor, with his own authority, can sell the mortgage object. This preference is in accordance with the principle known in collateral law, namely the principle of priority "droit de preference."[2]

Law No. 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations stipulates that after a bankruptcy decision, all of the debtor's assets are under the management of a curator. Articles 55 and 59 provide room for creditors holding collateral to execute as if no bankruptcy had occurred. Article 56 imposes a 90-day suspension period from the declaration of bankruptcy, and Article 59 requires that the collateral holder exercise their rights no later than 2 months from the start of the insolvency. If execution is not carried out within this period, the collateral object is taken over by the curator for auction. As a result, the position of the collateral holder, which was previously prioritized, becomes limited and risks being lost in practice: their right to execute is suspended and time-limited, making it often unrealistic for creditors to sell the collateral object themselves within a short time limit. This creates legal uncertainty and multiple interpretations between the provisions of the Mortgage Law, which grants the right of direct execution, and the provisions of the Bankruptcy and Suspension of Debt Payment Law, which suspend/authorize the curator and set a time limit. From a legal and philosophical perspective, this inconsistency raises relevant legal issues that require analysis and synchronization.

Based on the above issues related to the position of separate creditors holding collateral rights in bankruptcy and the suspension of debt payment obligations, the following questions can be formulated: What is the position of separate creditors holding collateral rights in bankruptcy cases? And what is the mechanism for executing collateral rights by separate creditors in bankruptcy cases?

This study aims to analyze the position of secured creditors holding collateral rights in the event of bankruptcy and to analyze the mechanism for executing collateral rights by secured creditors in bankruptcy cases.

2. Research Methods

The type of research used is normative legal research. The methods employed are the statute approach, the historical approach, and the case approach. This type of research utilizes secondary data, and the legal sources used consist of primary, secondary, and tertiary legal materials. The legal material collection technique

[1]Djaja S. Meliala, Development, Civil Law on Objects and Obligations, Nuansa Aulia, Bandung, 2007, pp. 21-22
[2]Sutan Remy Sjahdeini (1999). Mortgage Rights Principles, Basic Provisions and Issues faced by banking. Bandung. Page 17

that supports and relates to this research is library research. Furthermore, the data analysis technique used in this study is qualitative.

3. Results and Discussion

3.1. Position of Separated Creditors Holding Collateral Rights in Bankruptcy Cases

In collateral law, the term "separate creditor" is used. It's called "separate" because its position is separated from other creditors. This means that the creditor has the right to sell the collateral independently and to enjoy the proceeds without having them mixed with the bankruptcy estate as a whole.[3]According to Munir Fuady, a separatist creditor is a party that holds material collateral for a debt, such as a mortgage, pledge, pledge, fiduciary, and the like as regulated in Article 55 paragraph (1) of the Bankruptcy Law. Conversely, creditors who only have non-material collateral, such as a guarantee or bank guarantee, are not included in the category of separatist creditors. Thus, in the context of material collateral, creditors who are entitled to a pledge, mortgage, pledge, or fiduciary are classified as separatist creditors.[4]

According to Article 1 number 2 of the K-PKPU Law, a creditor is a party holding receivables that can be legally claimed for payment. These receivables can arise either through an agreement or based on statutory provisions. In the Civil Code (KUHPerdata), a creditor is the party authorized to collect repayment of a debt from another party, known as the debtor. More concisely, a creditor is the party lending or providing receivables, while a debtor is the party receiving the loan or having a debt obligation.

Separatist creditors are creditors holding collateral rights and can act independently. This group of creditors is not affected by the debtor's bankruptcy declaration, meaning their enforcement rights can still be exercised as if the debtor were not in bankruptcy. This group of creditors can sell the collateral themselves, as if there were no bankruptcy. The proceeds from the sale are taken for the amount of their receivables, and any remaining balance is deposited into the curator's cash as bankruptcy property. Conversely, if the proceeds from the sale are insufficient, the creditor can include the remaining balance as a competing creditor for the unpaid claims.

One of the characteristics of material collateral is that the creditor holding the right has special rights in the form of the authority to sell or execute the collateral object, and obtain the proceeds of the sale before other creditors as a form of repayment of receivables when the debtor defaults or is declared bankrupt. The security rights attached to the secured creditor as the holder of material collateral

[3]Ivida Dewi Amrih Suci and Herowati Poesoko, Bankruptcy Law: Position and Rights of Creditors Separatist over Collateral of Bankrupt Debtor, Yogyakarta: LaksBang Pressindo, 2016, p. 92
[4]Munir Fuady I, Bankruptcy Law in Theory and Practice, Bandung: Citra Aditya Bakti, 2017, p. 97

provide a valid legal basis to prioritize the repayment of its receivables over concurrent creditors. This is in line with the provisions of Article 1132 of the Civil Code which states that all of the debtor's assets become joint collateral for his creditors, and the proceeds from the sale of these assets are divided proportionally according to the amount of each receivable, unless there is a valid reason that gives priority rights to certain creditors.

So that the type of creditor holding the collateral rights above feels that the debtor is in default or the debtor is bankrupt, then the creditor can sell the collateral by means of parate execution. If the proceeds from the sale of the debtor's assets are less than his receivables, the separatist creditor has the right to request the remaining receivables as a concurrent creditor. However, if the proceeds from the sale of the collateralized assets exceed the value of the debtor's debt, the separatist creditor is obliged to return it to the debtor to be used to pay off the debtor's obligations to other creditors on a pari passu prorate parte basis (Article 1123 of the Civil Code).[5]

The principle of pari passu prorate parte means that the assets are joint collateral for the creditors and the proceeds must be distributed proportionally between them, unless there are creditors who according to the law must be prioritized in receiving payment of their bills. This principle emphasizes the distribution of the debtor's assets to pay off his debts to the creditors in a more equitable manner in accordance with the proportions (pond-pond gewijs) and not an equal manner. If the principle of paritas creditorium aims to provide justice to all creditors without distinction of their conditions regarding the debtor's assets even though the debtor's assets are not directly related to the transactions carried out, then the principle of pari passu prorata parte provides justice to creditors with the concept of proportional justice, where creditors who have larger receivables will receive a larger portion of their receivables payments from the debtor than creditors who have smaller receivables than them. The application of the paritas creditorium principle, complemented by the pari passu prorate parte principle, in the context of bankruptcy also has weaknesses if creditors are not equal in status, not only due to the size of the receivables but also because some creditors hold collateral and/or have preferential rights granted by law. This can be addressed by the principle of structured creditors.

Article 56 paragraph (2) of Law No. 37 of 2004 stipulates that secured creditors are given a 90-day deferral right to execute the collateral they hold. This quick sale strategy at a quick price is only used to meet the needs of the collateral-holding creditors. On the other hand, if a 90-day deferral occurs, the curator will have the opportunity to obtain the best and fairest price. This is because the collateral holder basically has a preferential right to the collateral up to the value of his receivables against the debtor, so that if the liquidation value of the collateral exceeds the value of the creditor's receivables, the remaining liquidation of the

[5]Article 1123 of the Civil Code

collateral must be returned to the debtor.

According to Article 6 of Law Number 4 of 1996 concerning Mortgage Rights, the creditor holding the first mortgage right is authorized to sell the mortgage object on his own initiative through a public auction, and from the proceeds of the sale the creditor is entitled to take part in paying off his debt. This mechanism is known as parate execution. The explanation of Article 6 of the Mortgage Rights Law emphasizes that the implementation of parate execution must be based on the provisions agreed upon in the Mortgage Rights Granting Deed.

Gusatav Radbruch in his Theory of the purpose of law, three ideas of legal value in the context of justice as the principle of equality before the law, asserts that every citizen has the right to obtain equal legal protection without discrimination. The concept of "protection" in this principle creates an obligation for the state or government to guarantee legal justice for all its citizens. Legal instruments, both preventive and repressive, are expected to be able to protect the rights and obligations of the parties, especially creditors and debtors as legal subjects, so that a balance is achieved in realizing justice. The ratification of the Mortgage Rights Law (UUHT) is a manifestation of the purpose of the Basic Agrarian Law (UUPA) in providing protection and legal certainty for the community regarding land rights, including land security rights. The legal protection provided to Mortgage Rights holders in the UUHT is a form of privilege that is specifically regulated, such as:[6]

a. *Right of Preference*, meaning that property rights that occur first will be given priority over those that occur later or are often also called the principle of priority.[7]

b. *Droit De Suite*, is one of the characteristics of property rights, namely a right that continues to follow the owner of the object, or a right that follows the object in anyone's hands (het recht volgt de eigendom van de zaak). Droit de suite provides certainty to creditors regarding their rights to obtain repayment from the proceeds of the sale of land with physical control or rights to land with legal control, which are the objects of mortgage rights if the debtor defaults, even if the land or rights to land that are the objects of mortgage rights are sold by the owner or the grantor of mortgage rights to a third party.

c. In the event of bankruptcy of the mortgagee, the creditor holding the mortgage remains authorized to carry out all matters as obtained by him according to the UUHT. The object of the mortgage is not included in the bankruptcy case before the creditor takes payment of his receivables from the proceeds of the sale of the person in question who is declared bankrupt by the mortgagee, namely the party who appoints his assets as collateral.

[6]Bayu Setiawan Hendri Putra and Arief Suryono, The Position of Land Title Certificates as *Material Guarantee Based on the Law on Mortgage Rights for Land and Objects Related to Land*, Private Law Journal Vol. VIII No. 1 January-June 2020, p. 60.
[7]Frieda Husni Hasbullah. Op.Cit. p. 17

d. Mortgage rights cannot be divided, the provision which also gives a special position to creditors holding Mortgage Rights is the nature of Mortgage Rights which cannot be divided, if they are imposed on more than one object, as stated in Article 2 paragraph (1) of the UUHT.[8]

e. Ease and certainty in execution, if the debtor defaults or breaks a promise, there is no need to go through the usual lawsuit procedure which is time-consuming and expensive. For creditors holding Mortgage Rights, special procedures are provided as regulated in Article 20 of the Mortgage Law, namely exercising their right to sell the Mortgage Right object through a public auction based on Article 6 or taking what is known as "parate executie".

Basically, the protection provided by the Mortgage Rights Law to Mortgage Rights holders, especially with guaranteed Land Ownership Rights, is repressive legal protection.

3.2 Mechanism for Executing Mortgage Rights by Separated Creditors in Bankruptcy Cases

In the event of a debtor's default, the secured creditor has the authority to execute the mortgage through auction by submitting a written request to the State Assets and Auction Services Office. This execution can be carried out directly by the creditor without court intervention, known as parate execution. The legal basis for executing the mortgage is stipulated in Law Number 4 of 1996 concerning Mortgage Rights and Minister of Finance Regulation Number 213/PMK.06/2020 concerning auction implementation guidelines.

The implementation of auctions carried out by the State Assets and Auction Services Office (KPKNL) seen from the theory of Good Governance can be explained as follows:[9]

1) The theory of accountability of the auction that is implemented can be accounted for to all interested parties in this case, separatist creditors, bankrupt debtors and the government, including auction administration and management of auction money;

2) The theory of transparency in auctions requires that all levels of society know about the auction plan and have the same opportunity to participate in the auction as long as it is not prohibited by law, therefore every auction must be preceded by an auction announcement, so that unfair business competition practices will not occur;

3) The theory of participation in the auction that is carried out can be followed by

---

[8]Boedi Harsono. 1999. Indonesian Agrarian Law (History of the Formation of the Basic Law) *Agrarian Law, Content and Implementation).* Jakarta: Bridge, p. 421

[9]Eni Suarti, Atika Ismail, 2021, Implementation of Auctions by the Accounts Receivable and Collection Service Office *Auction*, Journal of Legal Studies Vol. 06.

anyone with the conditions that have been regulated by law.

4) The theory of auction efficiency ensures that auctions are conducted quickly and at relatively low cost because they take place at a predetermined time and place. Buyers are confirmed immediately.

According to the provisions of Article 6 of the Mortgage Law, the execution of the Mortgage Rights under one's own authority indicates the privileged position of the Mortgage Rights holder. However, when a debtor is declared bankrupt by a commercial court, legal consequences arise in the form of the application of general confiscation of all the bankrupt debtor's assets as stated in Article 1 number 1 of the Bankruptcy and Suspension of Debt Payment Obligations Law, so that the auction procedure is no longer the same as under normal conditions.

The birth of Mortgage Rights must fulfill 2 conditions, namely the specialization requirement which means the granting of Mortgage Rights by making a Deed of Granting of Mortgage Rights (APHT) for certain land rights made before the Land Deed Making Officer (PPAT), while the second requirement is the publicity requirement which means the registration of Mortgage Rights by the Head of the Land Office which is regulated in Article 13 of the Mortgage Rights Law (UUHT) and Regulation of the Minister of State for Agrarian Affairs Number 3 of 1997.[10]At the time of birth, the Mortgage Right is born on the seventh day after the complete receipt of the documents required for its registration, and if the seventh day falls on a holiday, the land book in question is given a date of the following working day, thus that is when the Mortgage Right is born.

If the collateral cannot be sold within 2 (two) months, then the right to execute the collateral will be transferred to the curator as regulated in Article 59 paragraph (2) of the UUK-PKPU. Consequently, the separatist creditors will also be burdened with the obligation to bear the costs of bankruptcy, including the curator's fees and debts that are the responsibility of the bankrupt estate.[11]Based on Article 18 Paragraph (5) in conjunction with Article 168 Paragraphs (1) and (4) of the UUK-PKPU, bankruptcy costs are classified as preferred receivables and their payment takes precedence over payment of concurrent creditors' receivables.

The suspension of execution based on the explanation in UUK-PKPU Article 56 Paragraph (1) has the following objectives:

a. To increase the possibility of achieving peace;

b. To increase the possibility of optimizing the bankruptcy estate;

[10]Boedi Harsono, Indonesian Agrarian Law, Formation of the Basic Agrarian Law, Contents *And Its implementation,* (Jakarta: Djangkat, 2007) p.444.
[11]Niken Pratiwi Suprapto, "Land and Buildings Owned by Other Parties as Collateral for Mortgage Rights" *What is Included in Bankruptcy Boedel"*, Undergraduate Thesis Program, Islamic University of Indonesia, Yogyakarta, 2023, p. 55.

c. To enable the curator to carry out his duties optimally.

Then in Article 56 Paragraph (3), it is stipulated that during the suspension period, the curator can use the bankrupt's assets in the form of immovable or movable objects or sell the bankrupt's assets in the form of movable objects that are under the curator's control in order to continue the debtor's business.

During the suspension period, any legal claims for payment of a receivable cannot be filed in a court hearing, and neither the creditor nor the third party in question is prohibited from executing or requesting seizure of the collateral. Based on the provisions of the UUK-PKPU, the suspension period applies to all secured creditors from the time the bankruptcy decision is pronounced. The existence of a suspension period (stay) and a 2 (two) month execution time limitation causes secured creditors to lose full freedom in exercising their execution rights.[12]

The Mortgage Law (UUHT) through Article 6, Article 20 paragraph (1), and Article 21 grants the secured creditor the right to execute the collateral independently. The inclusion of the irah-irah "For the Sake of Justice Based on the One Almighty God" has the same legal force as a court decision that has permanent legal force, thus emphasizing the legitimacy of the secured creditor in using the authority to execute. Thus, the position of the secured creditor is placed separately from the concurrent creditor.[13]Therefore, the separatist creditor's ability to execute collateral is not affected by bankruptcy.

Law No. 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations, has regulated the procedures for executing collateral objects as contained in Article 55 paragraph (1), Article 59 paragraph (2), Article 185, Article 189 paragraph (4). From the provisions of these Articles it can be seen that in general there are several ways to execute collateral objects, but if seen from who executes them, they can be divided into 2 (two), namely:

1) Executed by the creditor holding the Mortgage Right guarantee by selling the Mortgage Right object under his own authority through a public auction and taking payment of his debts from the proceeds of the sale before other creditors, this is called Mortgage Right execution (Parate executie/eigenmactige verkoop), or it can be executed through an auction based on the executorial title contained in the Mortgage Right certificate as referred to in Article 14 paragraph (2) of the Mortgage Right Law which states that the Mortgage Right certificate as referred to in paragraph (1) contains the irah-irah "For the Sake of Justice Based on the One Almighty God" and or the sale of the Mortgage Right object privately with the agreement of the Mortgage Right provider and if with the private sale the highest price can be obtained which is profitable for all parties;

[12]Adilah Dea Sentika, The Position of Separatist Creditors in Executing Collateral Objects When They Occur Bankruptcy, Perspectives, Volume 25, Number 1. 2020, p. 72.
[13]Ivida Dewi Amrih Suci and Herowati Poesoko, Op, Cit, p. 195.

2) Executed by the curator which can be done in 3 (three) ways, namely:

a. Sold in public in accordance with the procedures specified in statutory regulations,

b. Sold underhand with permission from the supervising judge, in the event that a public sale is not achieved,

c. If these two methods are not immediately or at all able to settle the collateral, the curator, with the permission of the supervising judge, will decide what action must be taken with the object.

One of the problems that secured creditors may face is insufficient proceeds from the sale of the collateralized object to cover their debts. However, the Bankruptcy Law provides a solution or way out if such a situation arises. This solution is contained in Article 60 paragraph (3), Article 189 paragraph (5), and Article 138.

4. Conclusion

In bankruptcy law, creditors holding collateral rights are categorized as separatist creditors who should have the right to execute collateral objects as if bankruptcy had not occurred (Article 55 paragraph (1) of the Bankruptcy and Suspension of Debt Payment Obligations Law), however, this right is limited by the provisions on suspension of execution for 90 days (Article 56 paragraph (1)) and the obligation to carry out execution within a maximum period of two months after the suspension period (Article 59), so that the preferential position of separatist creditors and the principle of droit de preference are restricted in practice; although the principle of lex posteriori derogat legi priori can be used in interpretation to achieve legal certainty, this time limitation is often unrealistic, thus placing creditors at a practical disadvantage and giving rise to multiple interpretations between the Mortgage Rights Law (Article 21) which protects the rights of separatist creditors and the Bankruptcy and Suspension of Debt Payment Obligations Law which limits the implementation of this right; Therefore, it is necessary to synchronize the norms between the two laws so that the legal protection of secured creditors remains maintained and balanced with the rights of debtors, in line with Gustav Radbruch's principle of justice which demands equal legal protection for all citizens. The author recommends synchronizing the UUK-PKPU (Security and Debt Guarantee) and UUHT (Property Debt Guarantee) laws, given the frequent conflicts between these two laws, which have equal standing. This synchronization is necessary with the regulations governing material collateral to create a harmonious legal framework. This way, secured creditors, as holders of collateral rights, will obtain legal certainty and protection of their rights.

5. References

Journals:

Eni Suarti dan Atika Ismail, 2021, *Pelaksanaan Lelang Oleh Kantor Pelayanan*

Piutang dan Lelang, Jurnal Ilmu Hukum Vo. 06.

Gustav Radbruch, 1950, "*Legal Philosophy," dalam The Legal Philosophies of Lask, Radbruch, and Dabin*, ed. John H. Wigmore, dkk., *20 th Century Legal Philosophy Series: Vol. IV,* Massachusetts: Harvard University Press.

Hak Melaksanakan Eksekusi Barang Jaminan Kebendaan Pasca Putusan Kepailitan. Dalam jurnal *Hukum & Masyarakat, Unisma* url: https://riset.unisma.ac.id/index.php/hukeno/article/view/1073

Niken Pratiwi Suprapto, 2023, "Tanah Dan Bangunan Milik Pihak Lain Sebagai Jaminan Hak Tanggungan Yang Termasuk Dalam Boedel Pailit", Skripsi Program Sarjana Universitas Islam Indonesia, Yogyakarta.

Syafrudin Makmur, 2016, "Kepastian Hukum Kepailitan Bagi kreditor dan debitor Pada Pengadilan Niaga Indonesia" Jurnal Ilmu Syariah, FAI Universitas Ibn Khaldun, Vol.4, No. 2.

Talita Taskiyah & Gunawan Djajaputera. (2022) "Kedudukan Jaminan Kebendaan yang Dibebani Hak Tanggungan Milik Pihak Ketiga Selaku Pemberi Jaminan dalam Kepailitan". Dalam jurnal *Syntax Literate, Vol. 7, No. 8, Agustus 2022* url: https://jurnal.syntaxliterate.co.id/index.php/syntax-literate/article/view/10492

Toni Triyanto, 2025, Disertasi: "Rekonstruksi Regulasi Sita Umum Dengan Sita Pidana Dalam Kepailitan Yang Berbasis Nilai Keadilan", Unissula, Semarang.

Books:

Boedi Harsono. 1999. Hukum Agraria Indonesia (Sejarah Pembentukan Undang-Undang Pokok Agraria, Isi dan Pelaksanaannya), Djembatan, Jakarta.

Djaja S. Meliala, 2007, Perkembangan, Hukum Perdata tentang Benda dan Perikatan, Nuansa Aulia, Bandung.

Frieda Husni Hasbullah, 2005, "Hukum Kebendaan Perdata: Hak-Hak yang Memberi Jaminan Jilid II", Ind-Hill-Co, Jakarta.

Ivida Dewi Amrih Suci dan Herowati Poesoko, 2016, "Hukum Kepailitan: Kedudukan dan Hak Kreditur Separatis atas Benda Jaminan Debitu Pailit", LaksBang Pressindo, Yogyakarta.

Munir Fuady I, 2017, "Hukum Pailit dalam Teori dan Praktek", Citra Aditya Bakti, Bandung.

Sutan Remy Sjahdeini, 1999, Hak Tanggungan Asas-Asas, Ketentuan-Ketentuan Pokok dan Masalah yang dihadapi oleh Perbankan, Alumni, Bandung.