Execution of Mortgage Object Against Bankruptcy Debtors

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Submission date: 25-Jul-2023 11:20AM (UTC+0700)
Submission ID: 2136446451
File name: Mortgage.pdf (236.1K)
Word count: 3693
Character count: 19033

ATLANTIS PRESS
Advances in Social Science, Education and Humanities Research, volume 590
Proceedings of the 2nd International Conference on Law Reform (INCLAR 2021)

Execution of Mortgage Object Against Bankruptcy Debtors

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ABSTRACT
The problems arise when the company is unable to pay its debts to the bank and then the bank submits a legal remedy for bankruptcy which results in the debtor (company) being declared bankrupt. So that in the event the debtor has been declared bankrupt, the curator will carry out the execution process under the power of the supervisory judge. The execution of collateral when the debtor goes bankrupt is related to two main issues, namely, the legal regulations regarding execution and the status of collateral related to the debtor's bankruptcy. In connection with the legal regulations regarding the execution and status of collateral when a debtor goes bankrupt, it is found that there are two different regulations, namely Law no. 37 of 2004 regarding KPKPU and Law no. 4 of 1996 regarding Mortgage Rights, so that a principle is needed to solve these problems, namely lex specialis derogate legi generalis (Special Laws defeat general laws). Therefore, based on these problems, research is carried out using normative legal research methods, by taking an approach, namely, a statute approach related to execution.
Keywords: *Mortgage, Bankrupt, Execution.*

1. INTRODUCTION

In the world of economy, a company in carrying out its business cannot be denied will always be in contact with other companies such as banks[1]. The bank itself is needed nationally in development to achieve its main targets, such as in the field of income distribution and efforts to improve and strengthen the economic sector. This is the reason other companies cannot be separated from banking companies. William A. Lovett in a book written by Adrian Sutedi argues that the banking sector has a very vital role, including as the lifeblood of the national economy[2]. Therefore, companies that are also part of the system in the economic field are also automatically related to the banking system to help facilitate their business activities.

Therefore, in a transaction, for example, a company's working capital credit agreement with a bank, occurs where the bank asks for guarantees, one of which is in the form of mortgage rights in guaranteeing the company to pay its debts to the bank. However, because the company's assets to be pledged as collateral do not exist or are insufficient, third-party assets (individual companies/shareholders/directors/commissioners) are tied up. Furthermore, it turned out that the company was unable to pay its debts to the bank and subsequently the bank filed a bankruptcy petition which resulted in the debtor (company) being declared bankrupt.

Article 59 of Law no. 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations (Law No. 37 of 2004) states:

> (1) With due observance of the provisions of Article 56, Article 57, and Article 58, Creditors holding rights as referred to in Article 55 paragraph (1) must exercise their rights within a period of no later than 2 (two) months after the start of the insolvency as referred to in Article 178 paragraph (1).
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> (2) After the expiry of the period as referred to in paragraph (1), the Curator must demand the delivery of the goods which become collateral for further sale by the method as referred to in Article 185, without prejudice to the rights of the Creditor holding the right to the proceeds of the sale of the collateral.
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> (3) At any time the Curator may release the object as collateral by paying the smallest amount

between the market price of the amount of collateral and the amount of debt guaranteed by the said collateral to the Creditor concerned.

The provisions of Article 59 of Law no. 37 of 2004 are contrary to Article 21 of Law no. 4 of 1996 concerning Mortgage Rights (UU Mortgage Rights). According to Article 21 of the Mortgage Law which stipulates that if the Mortgage Provider is declared bankrupt, the Mortgage Holder is still authorized to exercise all the rights he has obtained according to the provisions of the Mortgage Law. Such a situation indicates disharmony that creates legal uncertainty for economic actors, especially the holders of guarantee rights between Law no. 37 of 2004 with the Mortgage Law which regulates the rights of separatist creditors (Banking). Therefore, it is hoped that this research can be used as a reference and reference related to problems in the field of bankruptcy law, especially related to the execution of collateral objects that are burdened with mortgage rights when the debtor goes bankrupt. So that this research can provide benefits both in the academic and practical realms. Based on the background of the above problems, the following problems can be formulated: 1) What are the legal arrangements regarding the execution of collateral objects when the debtor goes bankrupt?; 2) What is the status of collateral objects that have been burdened with mortgage rights if the debtor is bankrupt.

2. RESEARCH METHOD

The research method in this study uses a method *normative legal research* by conducting an assessment of legal products in the form of legislation[3]. This study using legal materials which include letters, books, laws, and regulations, to official documents issued by government officials[4]. This normative juridical approach has focus on juridical issues regarding the provisions of the guarantee law in the form of mortgage rights[5]. Approach methods in this study include *statute-approach*, *conceptual approach*[6].

3. RESULTS AND DISCUSSION

a. Legal Arrangements for Execution of Mortgage Objects when the Debtor Banks Bankruptcy

Arrangements regarding the execution of mortgage objects are regulated in Article 20 paragraph 1 of the Mortgage Law. This article stipulates that if the debtor is in breach of contract, the object of the mortgage can be executed in two ways, namely execution on its power (*para te execution*) and execution, namely execution through the court[7]. Based on the provisions of Article 6 of the Mortgage Law, the creditor holding the first mortgage has the right to sell the object of the mortgage on his power through a public auction. The results of the auction are then used by creditors to pay off their receivables, or what is commonly referred to as parate execution[8].

However, in the explanation of Article 6 of the Mortgage Law, it provides a stipulation that the parate of execution is based on what was agreed in a Deed of Granting Mortgage (APHT). The existence of these differences, according to the author, Article 6 of the Mortgage Law stipulates that to perform parate executions do not have to be agreed upon in advance[9]. However, the author still insists that there is a discrepancy between Article 6 of the Mortgage Law and the Elucidation of Article 6 of the Mortgage Law. To sell on its power is expressed as a promise. However, the Mortgage Law also stipulates that if the debtor is in breach of contract, the first mortgage holder is given the right to sell the object of the mortgage on his power through a public auction and take repayment of his receivables from the proceeds of the sale (Article 6 of the Law on Mortgage). Mortgage right). These provisions are *overlapping* and *overboding*, that is, on the one hand, it is regulated as a promise made by the parties, but on the other hand it is determined as a right granted by law. The makers of the Mortgage Law mixed up the power to sell the mortgaged object themselves, namely as a norm and also as a promise. It can be seen from the explanation of Article 6 of the Law on Mortgage which states:

> "These rights are based on the promise given by the grantor encumbrance that if the debtor in default, the holder of the security rights is entitled to sell the object of encumbrance through a public tender".

The setting of the security rights first According to Maria Sumardjono, the mortgage is an implementation of the mandate of Article 51 of the PA Law as an effort to accommodate and at the same time secure credit activities in terms of meeting the availability needs funds to support development activities[10].

Then the explanation of Article 11 paragraph (2) letter e of the Mortgage Law states that "to have the authority as referred to in Article 6, this promise is included in the APHT". The two arrangements, namely as binding norms and as promises that still have to be mutually agreed upon, show the inconsistency between the articles in the Mortgage Law. Meanwhile, according to Herowati Poesoko, the procedure for implementing the *parate executie* according to article 6 of the Mortgage Law confirms the implementation of the parate execution through a public auction, so the legal ratio of the official is the official of the State Auction Office[11]. Therefore, the execution procedure *parate* does not require the fiat of the Head of the District Court. However, in reality, the State Auction Office is not willing to carry out auction sales of mortgage objects based on article 6 of the Mortgage Law

because there must be fiat of the Head of the District Court.

This reason is understandable considering that the State Auction Office in implementing Article 6 of the Mortgage Law must base it on the General Elucidation number 9 in conjunction with the Elucidation of Article 14 paragraphs 2 and 3 of the Mortgage Law, which in essence the parate execution procedure must be based on Article 224 HIR / Article 258 RBg. This is done because the implementation must first obtain the fiat of the Head of the District Court where the object of the mortgage is located. This arrangement becomes redundant and will lead to endless disagreements and even disharmony. It can be said that the makers of the Mortgage Law in granting authority (rights) to creditors holding the first mortgage are inconsistent.

In the execution of parate executions, in the field, there are often obstacles because they are sterilized by the Judiciary. In the decision of the Supreme Court dated January 30, 1986 No. 3210 K/Pdt/1984, it was stated that the execution of the parate execution without seeking the approval of the district court, the auction conducted was null and void because it was an act against the law. The decision weakened the Parate Execution Institution which from the beginning was intended to make it easier for creditors to collect their receivables so that there was an acceleration in the return of receivables from creditors holding mortgages. In addition to the interests of preferred creditors, namely a means to accelerate the return of receivables from debtors who are in default, the Parate Execution Institution is also beneficial for the debtor itself, namely so that the amount of debt does not increase if the execution is carried out for a long time or is protracted.

Meanwhile, fiat execution (execution through the court) of Mortgage Certificates arises because of the legal consequences of the existence of "For Justice Based on One God Almighty", so that Mortgage Certificates have executorial power such as court decisions that already have permanent legal force (*inkracht van gewijsde*). In practice, the execution of the mortgage object through the court is the main legal remedy chosen by the Creditor[12]. Creditors rarely use an underhand sales channel or auction sales on their power (parate execution) if the debtor defaults, the creditor immediately asks the district court to carry out execution based on a mortgage certificate that has an executorial title. The basis for this execution is the provisions of Article 224 HIR (Article 258 RBg).

b. Status of Collateral that Has Been Burdened with Mortgage if the Debtor is Bankrupt

The binding agreement between the debtor and creditor with a mortgage is aimed at facilitating the execution of the collateral object during the process of returning the creditor's receivable by the debtor. Mortgage execution is an effort to speed up the process of repaying debtors' debts. However, in practice, problems are often found, namely when the debtor has debts to more than one creditor, in this case, one of the many creditors in file for bankruptcy. Since the entry into force of "*Verordening op het Faillisement en de Surceance Van Betaling Voor De European in Indonesie*" as stated in staatsblad 1905 No. 217 jo. Staatsblad 1906 No. 348 *faillisementverordening*[13].

Such inability must be accompanied by a concrete action in file, either voluntarily or at the request of a third party. Charles Himawan and Mochtar Kusumaatmaja said that: "*A Debtor may be declared bankrupt if he has stopped paying his debts, even though he is not insolvent, so long as he owes more than one debt. Summary evidence that the debtor has stopped paying his debts is sufficient for an adjudication of bankruptcy*"[14].

This has consequences for creditors, including creditors holding mortgage rights. Based on the provisions of Article 21 of Law no. 37 of 2004 determined that; If the debtor has at least two creditors and only one debt to that creditor has matured, then the debtor can be declared bankrupt by the court. Furthermore, if the bankruptcy decision has been rendered, then all the assets of the debtor that already existed when the bankruptcy was determined and the assets of the debtor that will exist will become the assets of the bankrupt except the debtor's assets which have been limitedly stipulated in Article 22 of Law no. 37 of 2004 is not included as bankrupt assets. Thus, all assets belonging to the debtor other than those excluded in the provisions of Article 22 of Law no. 37 of 2004 into (*estateboedel* bankruptcy).

However, based on the explanation of Article 56 paragraph (1) of Law no. 37 of 2004 there is a suspension of execution of mortgage rights, which is within 90 days from the date of the declaration of bankruptcy. It is understood that the postponement of execution is not necessarily in the interests of the creditor. However, this postponement is also intended to increase the possibility of achieving peace, optimizing the assets of the bankrupt or the curator in carrying out his duties firmly. So that the written form is not merely a means of proof, but is also a condition for the existence (*bestnwaarde*) of the agreement[15].

In the opinion of Soejono and H. Abdulrahman that when collateral objects, especially the registration of land rights, for example, the problem of certainty in question is two things, namely: 1. Certainty regarding the meaning, content, boundaries of property rights on the land about the social function of property rights over land. land. 2. Certainty regarding ways to obtain, use and enjoy property rights that are in harmony and balance

with the principles and objectives of property rights"[15.] The protection of mortgage preferences becomes dysfunctional due to the bankruptcy experienced by the debtor. In any condition experienced by the debtor in a right of insurance, the nature of the preference for a mortgage is intended to protect the creditor.

It is stipulated in Article 59 paragraph 1 of Law no. 37 of 2004 that: "Creditors holding mortgages must execute mortgages within a period of no later than 2 (two) months after the start of the insolvency situation". Followed by the provisions of Article 59 paragraph 2 of Law no. 37 of 2004, namely: "After the expiration of the period as referred to in paragraph 1, the curator must demand that the goods which become collateral be handed over to be subsequently sold by the method as referred to in article 185". Here it can be seen that after the debtor is declared insolvent, the status of the mortgage object is as the property outside the property (*boedel*bankrupt), but the right of execution of the creditor holding the mortgage on the object of the mortgage is given a time limit by the provisions of Law no. 37 of 2004 which was taken over by the curator after a period of 2 months.

Creditors holding mortgage rights in their status as preferred creditors in principle get priority status over other creditors. This precedence status in the Civil Code in article 1133 paragraph (1) states that: "The right to take precedence among people with debts arises from privileges, from pledges, and mortgages", i.e. if the debtor breaks his promise (default), the creditor holding the mortgage will have the right to take precedence in the settlement of its receivables compared to other creditors who are not holders of mortgage rights. The nature of the fulfillment of this priority is referred to as the preferred creditor.

Furthermore, in the general explanation of the Mortgage Law, especially the explanation of point 4 in paragraph 2, there is an exception from the preferred status (*preference*) of the creditor holding the mortgage, namely; that the priority position of creditors holding mortgage rights does not reduce the preference for state receivables according to the applicable legal provisions. Therefore, the status or position that is prioritized, the state's receivable beats the creditor holding the mortgage. If the State's receivables overwhelm the creditor holding the mortgage, Sjahdeini believes that; based on the provisions of Article 1137 of the Civil Code, state receivables whose position is higher than the mortgage as referred to in the number of the General Elucidation of the Mortgage Law are only taxes.

In addition, in the provisions of Article 1134 of the Civil Code, it is determined that mortgages (now mortgages) have a higher status with privileges, however, the higher status of mortgages can be defeated by privileges if the law provides otherwise. According to Setiawan, Separatist Rights are: "Rights granted by law to creditors holding collateral rights, that the collateral (collateral) is not included in the bankruptcy estate". In the case of executing debt guarantees, separatist creditors can sell and take the proceeds from the sale of the debt as if there was no bankruptcy. If it is estimated that the proceeds from the sale of the debt guarantee cannot cover the entirety of their respective debts, then the separatist creditor can request that the shortfall be counted as a concurrent creditor.

4. CONCLUSION

When a debtor goes bankrupt, the mortgage holder is still authorized to exercise all the rights he has obtained, namely to execute his rights as if there was no bankruptcy (as regulated in Article 55 of Law No. 37 of 2004). The phrase "as if" is a phrase that is still ambiguous, which creates a vagueness of norms that can lead to multiple interpretations. Meanwhile, on the other hand, provisions regarding the right of execution of creditors and the right of third parties to claim their assets which are in the control of the bankrupt debtor or curator, are suspended for a period of 90 days from the date the bankruptcy declaration decision is pronounced (Article 56 paragraph (1) of Law No. 37 of 2004). This is contrary to the provisions of Article 21 Mortgage, namely if the Mortgage Provider is declared bankrupt, the Mortgage Holder remains authorized to exercise all the rights he has obtained. This clearly can lead to disharmony between and result in legal uncertainty for economic actors, especially security rights holders.

Then about the status of the collateral object that is encumbered with mortgage rights, both those that already existed at the time the bankruptcy was established as well as the assets of the debtor that would exist if the debtor is declared bankrupt, then the status will become property (*boedel*bankruptcy) (Article 21 of Law No. 37 of 2004) except debtor's assets which are limitedly not part of the bankruptcy estate (as stipulated in Article 22 of Law No. 37 of 2004).

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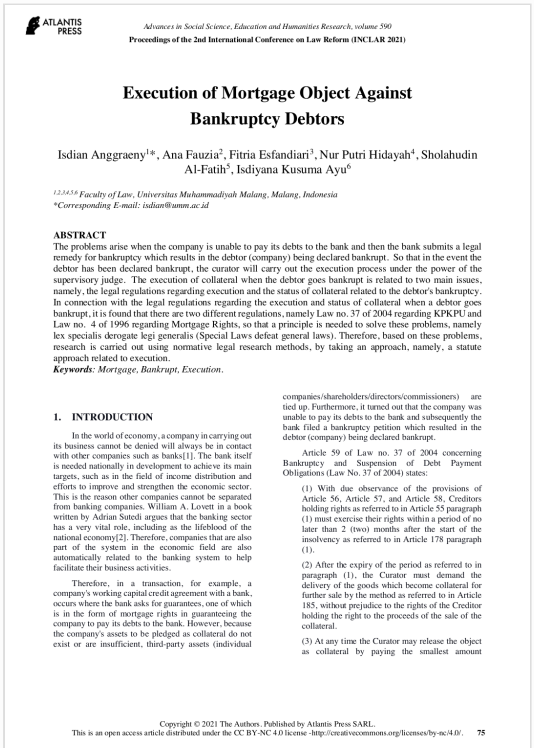

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