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THE CONFLICT OF THE NORMS IN THE EXECUTION OF SECURED OBJECTS WHICH ARE ENFORCED BY LIABILITY RIGHTS WHEN THE DEBTOR IS BANKRUPT

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Abstract: *In a transaction, for example a company's working capital credit agreement with a bank, occurs where the bank asks for collateral 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. However, problems arise when the company is unable to pay its debts to the bank and then the bank files a bankruptcy petition which results in the debtor (company) being declared bankrupt. So that in the event that the debtor has been declared bankrupt, the execution process is carried out by the curator under the authority of the supervisory judge. The execution of collateral objects when the debtor goes bankrupt is related to two main problems, namely, related to legal regulations regarding execution and the status of collateral objects related to the bankruptcy of the debtor. With regard to the legal regulations concerning execution and the status of collateral items if the debtor is bankrupt, two different arrangements were found, namely between Law no. 37 of 2004 concerning the KPKPU and Law no. 4 of 1996 concerning Mortgage Rights, so that a principle is needed to solve these problems, namely lex specialis derogate legi generalis (Special Laws beat 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 Right, Bankruptcy, Execution*

I. INTRODUCTION

In the world of economy, a company in carrying out its business cannot be denied that it will always be in contact with other companies such as banks. The bank itself is needed nationally in development in order 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, among others, as the lifeblood of the national economy.[1] 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 collateral 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.

In 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). (2) After the expiry of the period as referred to in paragraph (1), the Curator must demand the delivery of the goods which are used as collateral for further sale in accordance with 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.(3) At any time the Curator may release the object which is the collateral by paying the smallest amount between the market price of the amount of the collateral and the amount of debt guaranteed by the said object to the Creditor concerned.

The provisions of Article 59 of Law no. 37 of 2004 is contrary to Article 21 of Law no. 4 of 1996 concerning Mortgage Rights (Constitution of Mortgage Rights). According to Article 21 of the Mortgage Law which stipulates that if the Mortgage Provider is declared bankrupt, then the Mortgage Holder remains authorized to exercise all the rights he has acquired according to the provisions of the Mortgage Law. This means that Article 59 of Law no. 37 of 2004 take arbitrarily the rights of creditors holding mortgages guaranteed by the Mortgage Law. Such a situation indicates that there is a conflict of norms 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.

II. DISCUSSION

A. Legal Arrangements regarding Execution of Collateral Objects when the Debtor is Bankrupt

The regulation regarding the execution of the mortgage object is regulated in Article 20 paragraph 1 of the Mortgage Law, which stipulates that in the event the debtor is in breach of contract, the object of the mortgage can be executed in two ways, namely execution on its own power (parate execution) and fiat execution, namely execution through the court. 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 own power through a public auction, the proceeds of the auction are then used by the creditor to pay off his receivables, or what is commonly referred to as parate execution.

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. The existence of these differences, according to the author, Article 6 of the Mortgage Law stipulates that in order to carry out a parate execution, an agreement must not be made in advance, but the author still acknowledges 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 own power is stated as a promise, but the Mortgage Law also determines it as a right given by law, namely if the debtor is in breach of contract, the holder of the first mortgage is given the right to sell the object of the mortgage on his own power through a public auction and to take repayment of his receivables from the proceeds of the sale (article 6 of the Mortgage Law). This provision is 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 at the same time as a promise. This can be seen from the explanation of Article 6 of the Mortgage Law which states: "This right is based on the promise given by the mortgage provider that if the debtor fails to promise, the mortgage holder has the right to sell the mortgage object through a public auction."

The regulation on mortgage rights was originally related to agrarian law according to Law no. 5 of 1960 concerning Agrarian Principles. According to Maria Sumardjono, 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 need for available funds to support development activities.[1]

[1] Maria S.W. Sumardjono, 1996, *Basic Principles and Some Issues Around the Mortgage Law*, PT. Citra Aditya Bakti, Bandung, p. 67.

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, the Deed of Granting Mortgage must include this promise". These two regulations show that there are inconsistencies 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 execution of the parate execution through a public auction, so the legal ratio of the officer is the State Auction Office. So that procedures for implementing parate execution do not requiring the fiat of the Head of the District Court.In fact, the State Auction Office is not willing to carry out the auction sale of mortgage objects based on Article 6 of the Mortgage Law on the grounds that 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 and 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 conflicts of norms. It can be said that the makers of the Mortgage Law in granting authority (rights) to the first mortgage holder creditor 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 on January 30, 1986 No. 3210 K/Pdt/1984 stated that the execution of the parate execution without seeking the approval of the district court, the auction conducted was 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 accelerated 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 debtors themselves.

Meanwhile, the fiat execution (execution through court) of Mortgage Certificates arises because of the legal consequences of the existence of states "For Justice Based on the One Godhead", so that Mortgage Certificates have executorial powers such as court decisions that already have permanent legal force (inkracht van gewijsde). In practice, the execution of the mortgage object through the court, by the creditor is used as the main effort. Creditors rarely use an underhand sales channel or auction sales on their own 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 based on Article 224 HIR / Article 258 RBg.

B. Status of Collateral that has been encumbered with Mortgage if the Debtor is Bankrupt

The binding agreement between the debtor and the creditor with the 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 debtor's debt repayment process. However, in practice, problems are often found, namely when the debtor has debts to more than one creditor, in this case it is possible for one of the many creditors to 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 *faillisementverordering*.[2]This inability must be accompanied by a concrete action to 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 stooped paying his debts is sufficient for an adjudication of bankruptcy."*[3]

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 the 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 are 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 bankruptcy estate (boedel). 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

[2] Kartini Mulyadi, "Changes to the Failsement Verordening and Government Regulation in Lieu of Law No. 1 of 1998 in conjunction with Law no. 4 of 1998 concerning the Amendment of the Law on Bankruptcy into Law", *Paper*, Presented at the Seminar on Business Law in Indonesia, Jakarta, 2003.

[3] Charles Himawan and Mochtar Kusumaatmaja, 1984, *Business Law Contracts And Business Associations*, Institute for Research and Criminology, Faculty of Law, Padjadjaran University, Bandung, p. 100.

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.[4]

The purpose of Article 56 paragraph 1 of Law no. 37 of 2004 has the same meaning as the debtor's assets which before bankruptcy had been placed with the burden of mortgage rights were bankrupt assets (*boedel*) when the debtor was declared bankrupt. Supposedly the interests of creditors holding mortgages are prioritized as the nature of the preferences of the mortgages itself is based on 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 acquired". According to Soejono and H. Abdulrahman's opinion that when collateral objects, especially land rights registration, for example, the problem of certainty in question is two things, namely: 1. Certainty regarding the meaning, content, boundaries of land ownership rights in relation to the social function of land ownership rights.

Certainty regarding ways to obtain, use and enjoy property rights that are in harmony and balance with the principles and objectives of property rights.[5]The protection of the mortgage preference becomes non-functional 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 expiry of the period as referred in paragraph 1, the curator must demand the surrender of the objects that become collateral for further sale in accordance with the method as referred in article 185". Here it can be seen that after the debtor is declared insolvent, the status of the mortgage object is as property outside the bankrupt property (*boedel*), but the execution right 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. As the general explanation of the Mortgage Law, it is determined that: "A mortgage is a guarantee right imposed on land rights as intended in Law no. 5 of 1960 concerning Basic Regulations on Agrarian Principles, including or not including other objects which are an integral

[4] R. Subekti, 1991, *Guarantees for Providing Credit Under Indonesian Law,* Citra Aditya Bakti, Jakarta, p. 1.

[5] Soejono and H Abdurrahman, 1998, *Land Registration Procedure*, PT Rineka Cipta, Jakarta, p. 2.

part of the land for the settlement of certain debts, which give priority to certain creditors over other creditors". In principle, the request for guarantees from the debtor through binding in the form of mortgage by a bank or non-bank financial institution is in the event of a default (broken promise) from the debtor,then the institution can immediately get the receivables back simply by bringing a mortgage certificate that uses the "For the sake of Justice Based on God Almighty", and it can be directly apply for execution to the Head of the District Court in the area where the dependent object is located.

Therefore, in this case the fact of the credit agreement is no longer needed considering that the mortgage certificate is sufficient to prove the existence of debts between the creditor and the debtor. Creditors holding mortgage rights in their status as preferred creditors in principle have 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 from mortgages", namely if the debtor breaks his promise (default), the creditor holding the mortgage will has 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 number 4 in paragraph 2, there is an exception from the preferred status (preferred) 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. In the event that the State's receivables overwhelm the creditor holding the mortgage, Sjahdeini is of the opinion 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 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 is not included in the bankruptcy estate". Separatist creditors are creditors who have material debt guarantees (security rights), such as holders of mortgages, pledges, fiduciaries, and others (Article 56 of Law No. 37 of 2004). Creditors with guarantees that are not material guarantees

(such as guarantees including bank guarantees) cannot be said to be separatist creditors. Therefore, What is meant by separatist creditor rights are rights granted by law to creditors holding collateral rights so that they can continue to exercise their rights of execution even though the debtor is declared bankrupt. Separatist creditors (debt guarantee holders) have separate status from other creditors. 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. In fact, 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.

III. CONCLUSION

The process of carrying out the execution of collateral objects when the debtor is in default the legal arrangements are carried out through parate execution and execution based on the executorial power of the mortgage certificate. As for when the debtor has been declared bankrupt, the legal process is carried out by the curator under the authority of the supervisory judge, through the stages of the legal process, namely; securing and sealing bankrupt assets by the curator, verification and verification of receivables, peace offerings to creditors, and finally settlement and distribution of proceeds from execution of bankrupt assets. Specifically with regard to bankrupt debtors, the Mortgage Rights Holder remains authorized to exercise all the rights he has obtained, namely to carry out the execution of 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, that is, it creates a vagueness of norms that can lead to multiple interpretations. Meanwhile, on the other hand, the provisions regarding the right of execution of creditors and the rights 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 in the event that the Mortgage Provider is declared bankrupt, the Mortgage Holder remains authorized to exercise all the rights he has obtained. This can clearly lead to a conflict of norms and result in legal uncertainty for economic actors, especially security rights holders.

Then with regard to the status of the collateral object that is burdened with mortgage rights, both those that already existed at the time the bankruptcy was established and the assets of the debtor that will exist, if the debtor is declared bankrupt, then the status will become bankruptcy property (*boedel*) (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).

SUGGESTION

1. The need for revision, Article 55 paragraph (1) of Law no. 37 of 2004, in particular the word "as if" with a more assertive word, or omitting the word "as if" to avoid legal uncertainty for judges who will decide and for economic actors, especially creditors holding mortgages.
2. There needs to be a revision of Article 56 paragraph (1) of Law no. 37 of 2004 regarding the word "suspended for 90 days". It is better if the word "suspended" is abolished to avoid a conflict of norms, especially between Law no. 37 of 2004 with the Mortgage Law.

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