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# THE PAYMENT OF RECEIVABLES OF SEPARATIST CREDITOR AS A MORTGAGE RIGHTS HOLDER UNDER THE BANKRUPTCY AND SUSPENSION OF OBLIGATIONS FOR DEBT PAYMENT ACT

**Rijanto Soesilo Hadi***, **Huda M. Khoirul**, **Suhartono Slamet**, **Mangesti Yovita Arie**
Universitas 17 Agustus 1945 Surabaya, Indonesia
*E-mail: soesilohadi368@gmail.com

## ABSTRACT
The Mortgage Rights is a proprietary security right encumbered onto land rights regulated by the Basic Agrarian Act, intended for specific debt repayment, granting a preferential position to certain creditors over others, without reducing the preference of state receivables under the applicable law, should the debtor default. Under the parate execution (parate executie) or enforceable title (executoriale title), the preferred creditor who is the mortgagee, has the right to sell the respective mortgaged assets through a public auction and the debt repayment would then be derived from the sales proceeds. Article 21 of the Mortgage Rights Act, ensures that if the mortgagor is declared bankrupt, the mortgagee still retains the rights obtained under the act. The enforcement of Act Number 37 of 2004 concerning the Bankruptcy and Suspension of Obligations for Debt Payment, (hereinafter referred to as The Bankruptcy and PKPU Act), has caused numerous legal issues, particularly the antinomy between the Mortgage Rights Act and The Bankruptcy and PKPU Act, such as a 90-day bankruptcy stay phase, the suspension of obligations for debt repayment stay phase of 45 days with a maximum of 270 days, a mere 2 months of a time span on executing the proprietary security right, its respective sale conducted by the curator and payment of the debt of the preferred creditor depends entirely on the distribution list of assets that have been approved by the supervisory judge with a legally binding force. The proceeds from the sale conducted by the curator on the said object encumbered with mortgage rights are paid to creditors according to their ranks, whereby the rank of the mortgagee involved does not come first.

## KEY WORDS
Execution, antinomy, public service, regulation, mortgage rights.

Based on Act Number 4 of 1996 Concerning Mortgage Rights over Land and Objects Related to Land (State Gazette of the Republic of Indonesia Year 1996 Number 42, Supplement to the State Gazette of the Republic of Indonesia Number 3632), hereinafter referred to as the “Mortgage Rights Act”, mortgage rights are security rights (*zakelijke zekerheid*) encumbered on rights over land rights as mandated by Article 51 of Act Number 5 of 1960 concerning Basic Agrarian Principles (State Gazette of the Republic of Indonesia Year 1960 Number 104, Supplement to the State Gazette of the Republic of Indonesia Number 2043), with or without other objects that are integrated with the said land, for the settlement of specific debts, and provide a position that is prioritized to specific creditors against other creditors, without reducing the preferences of State receivables according to applicable law, if the debtor defaults.

The preferred creditor as a mortgage rights holder has the right to sell the object of mortgage rights through public auction (*executoriale verkoop*) at the State Assets and Auction Service Office, hereinafter referred to as the “KPKNL”, without having to request for any approval (*fiat*) from the court and without the need for any confiscation in advance, in accordance with the Regulation of the Minister of Finance Number 213 of 2020 concerning Guidelines on the Implementation of Auctions, hereinafter referred to as “PMK 213/2020”.

Afterwards, the preferred creditor as a mortgage rights holder takes the repayment of his receivables from the proceeds of sale of the said object of mortgage rights, if promised clause of self-imposed sale (*beding van eigenmachtige verkoop*) in the Deed of Granting

Mortgage, hereinafter referred to as “APHT”, made in the presence of a Land Deed Official whose jurisdiction covers the said object of mortgage rights, hereinafter referred to as “PPAT”, and such action is obligated to be registered at the Land Office which jurisdiction covers the said object of mortgage rights, as regulated by the provisions of Article 6, Article 13 paragraph (1) and Article 14 paragraph (1) of Mortgage Rights Act. APHT is an accessory agreement (*accessoire overeenkomst*) to the loan agreement. Execution of mortgage rights which is based on clause of self-imposed sale (*beding van eigenmachtige verkoop*) is called "parate execution" (*parate executie*).

After the registration of APHT, the preferred creditor as a mortgage rights holder obtains proof of the existence of such mortgage right in the form of a Mortgage Rights Certificate issued by the local Land Office. Such Mortgage Rights Certificate contains a title that phrases “DEMI KEADILAN BERDASARKAN KETUHANAN YANG MAHA ESA” (“FOR JUSTICE BASED ON ALMIGHTY GOD”) and holds equal executorial force as a court decision which has acquired permanent legal force and serves as a substitute to the mortgage grosse deed (*grosse acte hypotheek*) insofar as it concerns the right of land. The execution of such mortgage rights is based on the title that phrases “DEMI KEADILAN BERDASARKAN KETUHANAN YANG MAHA ESA” (“FOR THE JUSTICE BASED ON THE ALMIGHTY GOD”) in the Mortgage Rights Certificate is called an "enforceable title" (*executoriale title*).

The antinomy of provisions in Mortgage Rights Act and provisions in the Bankruptcy and PKPU Act occurs in the event of the said debtor who is a mortgagor pronounced as bankrupt or in suspension of obligations for debt payment. Bankruptcy covers all estate of the debtor upon the pronunciation of the said bankruptcy declaration decision as well as every single thing that is obtained during the bankruptcy, therefore the rights of a separatist creditor as a mortgage rights holder undoubtedly experience a degradation since the debtor is pronounced as bankrupt or rendered to be in suspension of obligations for debt payment by the commercial court. It could be interpreted that there is a conflict of norms (conflicting norms).

Bankruptcy does not cover the estate of a third party who is encumbered by mortgage rights in order to guarantee the debt of a bankrupt debtor, *vide* Article 21 Bankruptcy and PKPU Act. Separatist creditor as the a mortgage rights holder supposed to still be able to exercise his execution rights towards the said object of mortgage rights that is owned and given by a third party, without being influenced by bankruptcy or the suspension of obligations for debt payment of the debtor. Execution rights from a separatist creditor as the a mortgage rights holder does not sustain degradation since the debtor is declared as bankrupt or decided to be in suspension of obligations for debt payment by the commercial court.

In practice, the execution rights of a separatist creditor as a mortgage rights holder against the estate of a third party – not the estate of the bankrupt debtor – sustains degradation since the debtor is declared bankrupt or decided to be in suspension of obligations for debt payment by the commercial court. The court decision of the Surabaya Commercial Court Number 62/Pdt.Sus-PKPU/2020/PN.Niaga.Sby on December 14, 2020 – its verdict, declares PT Cottonsari and Mrs. Liana Hertanto to be in a state of bankruptcy – poses as an example in this journal. Singgih Hertanto is not the bankrupt debtor. Singgih Hertanto is a third party who provides the said mortgage rights that is charged against his property for the benefit of the separatist creditor in order to guarantee the debts of PT Cottonsari and Mrs. Liana Hertanto. The court decision of the commercial court stated that the object of the said mortgage rights owned by Singgih Hertanto as a third party became bankruptcy property.

The court decision of the Surabaya Commercial Court undoubtedly violates the provisions of Article 21 of the Bankruptcy and PKPU Act, especially when it is reviewed from the perspective of legal certainty (*rechtszekerheid*) – and also of the justice (*gerechtigheid*) – regarding the existence and execution of the mortgage rights which is regulated by the provisions of Article 21 of the Mortgage Rights Act.

The commercial court shall declare a debtor bankrupt, both at his own request or at the request of one or more of his creditors, if the debtor has two or more creditors and does not pay at least one debt which has fallen due and can be claimed, *vide* Article 2 paragraph (1) of the Bankruptcy and PKPU Act.

Under the Article 8 paragraph (4) of the Bankruptcy and PKPU Act, the petition for a declaration of bankruptcy must be granted if a fact is discovered or there is a circumstance that is proven in a simple way (*prima facie evidence*), that the requirements for being declared bankrupt as referred to in Article 2 paragraph (1) have been met. It can be understood, that the phrase of “proven in a simple way” is a vague norm. It is very convenient to bankrupt a person or a legal entity. There is no obligation to conduct an insolvency test under the Indonesian Bankruptcy and PKPU Act. The insolvency test should be a benchmark that provides legal certainty and fairness regarding the requirements for filing for bankruptcy. The considerations in the Constitutional Court Decision Number 071/PUU-II/2004 and Number 001-002/PUU-III/2005 dated May 16, 2005 – regarding the material test against the Indonesian Bankruptcy and PKPU Act – stated that the laxity of the requirements for filing for bankruptcy is a negligence of the law maker in drafting Article 2 (1), by not requiring "inability to pay", so that creditors can easily file a petition for bankruptcy without having to prove that the debtor is in a state of inability to pay his debts. Based on the description, it can be interpreted that there is a vacuum norm in the Bankruptcy and PKPU Act. The court decision of bankruptcy declaration can be enacted first (*uitvoerbaar bij voorraad van e vonnis*), even if towards the said decision there is a submission of an appeal or reconsideration at the supreme court. There is no appeal at the high court in the regime of the Bankruptcy and PKPU Act. If the court decision of a bankruptcy declaration is annulled, every single action which have been carried out by the curator before or on the date the curator receives the notification of such annulment decision against the court decision of the said bankruptcy declaration, remains legitimate and binding on the debtor, *vide* Article 8 paragraph (7) *juncto* Article 16 of the Bankruptcy and PKPU Act.

The Bankruptcy and PKPU Act does not regulate any restitution mechanism (*remedy*) as a juridical consequence on a bankruptcy or suspension of obligations for debt payment annulment verdict. That shows the absence of legal protection for the debtor and his estate.

Quoting the meaning of *remedy*, *judicial remedy*, and *legal remedy* in Black's Law Dictionary, "*Remedy*, 1. *The means of enforcing a right or preventing or redressing a wrong; legal or equitable relief – also termed civil remedy*. 2. REMEDIAL ACTION Cf. RELIEF – *Also termed (in both senses) law of remedy. – remedy, The law of remedies falls somewhere between substance and procedure, distinct from both but overlapping with both*. (A. Garner, 2019) As for “*Judicial remedy*” means, “*a remedy granted by a court*”. (A. Garner, 2019) “*Legal remedy*” is defined as, “*A remedy historically available in court of law, as distinguished from a remedy historically available only in equity. After the merger of law and equity, this distinction remained relevant in some ways, such as in the determining the right to jury trial and the choice between alternate remedies*.” (A. Garner, 2019)

Article 15 paragraph (1), Article 65 and Article 69 paragraph (1) of the Bankruptcy and PKPU Act, determines that within the court decision of a bankruptcy declaration it must contain the appointment of curator and a supervising judge who shall be nominated from one of the judges in the commercial court. The task of curator is to manage and/or settle the bankruptcy property which is supervised by the supervising judge. The bankruptcy property shall be divided among the creditors proportionally (*pari passu pro rata parte*) and based on the types and levels of creditors in such bankruptcy (*structured prorata*).

A Separatist creditor as a mortgage rights holder receives payment for their receivables after:

- the object of mortgage rights, which is used as collateral is sold by the curator publicly/auctioned, through KPKNL, in accordance with PMK 213/2020, and in the event that a public sale is not achieved, then a private sale (*private selling*) is conducted by the curator with the permission of the supervising judge, after conducting a public sale at least 2 (two) times, proofed by the auction minutes with

the notation "TAP" (No Bidders), *vide* Article 185 paragraph (1) and paragraph (2) of the Bankruptcy and PKPU Act, and

- after the distribution list of the bankruptcy asset becomes binding, *vide* Article 196 paragraph (4) of the Bankruptcy and PKPU Act, the proceeds from the sale of the object of the mortgage rights, whether sold publicly or privately (*private selling*), are to be paid to creditors in their respective ranks, namely: wages of labour, taxes, bankruptcy costs, curator's fees, separatist creditors – in this case a separatist creditor as a mortgage rights holder – severance pay, other preferred creditors, and concurrent creditors, *vide* Article 201 of the Bankruptcy and PKPU Act, Constitutional Court Decision 67/PUU-XI/2013 dated 11th September 2014, and Decree of KMA 109/2020 Book II number 17.3.15.

Based on the principle of *lex consumen derogat legi consumpte* – derived from the principle of *lex specialis systematis* – the norms in the Mortgage Rights Act are antinomic with norms in the Bankruptcy and PKPU Act, thus the norms in the Bankruptcy and PKPU Act are applied.

The reconstruction regulating the execution of mortgage rights in the Bankruptcy and PKPU Act is carried out by altering the norms which regulate the obligation of an *insolvency test* and also determining the amount of debt from the debtor which can be used as the basis for filing bankruptcy or PKPU; the time frame for the execution of separatist creditors, ever since insolvency (*insolventie*) occurs.

Alterations to the norms in the Bankruptcy and PKPU Act can be made through amendments to the said act carried out by the House of Representatives of the Republic of Indonesia and the President or judges by applying *rechtsvinding* and *rechtschepping* towards other lawsuits (*vide* Article 3 of the Bankruptcy and PKPU Act) which is filed by separatist creditor as a mortgage rights holder against the degradation of their preferential position and its execution rights as guaranteed by Article 21 of the Mortgage Rights Act.

The judicial system in Indonesia does not adhere to a precedent system or the binding force of precedent or *stare decisis* principle. However, the Indonesian Supreme Court has *landmark decision* values that cannot be ignored by lower-level judges based on the reasoning that: if a lower court's decision, up to the cassation level, differs from the Supreme Court's decision, then such court decision can be annulled; sharp differences will create legal uncertainty that should be safeguarded by judicial institutions to maintain public trust (Mertokusumo 2019b).

There are two essential elements in *rechtsvinding*, which are: law and facts. *Rechtsvinding* is the concretization of general principles, in this case, the law, to specific and particular events, in this case, the facts, in order to achieve a legal problem resolution. It is crucial in *rechtsvinding* to understand the law in comparison to the facts (Mochtar & Hiariej, 2021).

A judge should perform *rechtsvinding* in deciding bankruptcy or suspension of obligations for debt payment petitions by: mandating an insolvency test; determining the debtor's debt amount that can be the basis for filing for bankruptcy or suspension of obligations for debt payment; modifying the time span for a separatist creditor as a mortgage rights holder to execute the collateral, originally 2 (two) months since insolvency, to 5 (five) months since insolvency.

With such *rechtsvinding*, bankruptcy or suspension of obligations for debt payment becomes the *ultimum remedium*. Court decisions resulting from *rechtsvinding*, which then become established jurisprudence, contribute to *rechtschepping* to achieve justice, legal certainty, and beneficial legally for a separatist creditor as a mortgage right holder, debtor as a mortgagor, and other stakeholders.

## CONCLUSION

The execution of mortgage rights in relation to the enactment of the Bankruptcy and PKPU Act still yet to meet the principles of justice due to the problems in the application of normative law, namely of conflicting norms, a vague norm and a vacuum norm. The

regulation in the Bankruptcy and PKPU Act are antinomic with the norms in the Mortgage Right Act, particularly in terms of norms related to the stay (Article 55 paragraph (1), Article 56 paragraph (1), and Article 246 of the Bankruptcy and PKPU Act); the time span for the execution of mortgage rights by separatist creditors is only 2 (two) months after insolvency (*insolventie*) (Article 59 paragraphs (1) and (2) *juncties* Article 178 or Article 292 of the Bankruptcy and PKPU Act and the Decree of KMA 109/2020, in relation to SEMA 5/2021); payment of receivables to separatist creditors as a mortgage rights holder depends entirely on the distribution list of assets (Article 201 of the Bankruptcy and PKPU Act and Constitutional Court Decision 67/PUU-XIX/2013) and the supervising judge's order in the asset distribution (Article 189, Article 196 paragraph (4), and Article 201 of the Bankruptcy and PKPU Act, Constitutional Court Decision 67/PUU-XIX/2013, and Constitutional Court Decision 23/PUU-XIX/2021).

## REFERENCES

1. Garner, Bryan, 2019, Black's Law Dictionary, 11th (United States, Thomson West).
2. Budiono, Herlien, 2016, Kumpulan Tulisan Hukum Perdata Di Bidang Kenotariatan (Bandung, Citra Aditya Bakti).
3. Departemen Pendidikan Dan Kebudayaan. 2018. Kamus Bahasa Indonesia (Jakarta: Balai Pustaka).
4. Hadjon M., Philipus, Sri Djatmiati, Tatiek, 2017, Argumentasi Hukum – (Legal Argumentation/Legal Reasoning) (Yogyakarta, Gadjah Mada University Press).
5. Mertokusumo, Sudikno, 2019, Perkembangan Hukum Perdata Di Indonesia (Yogyakarta, Genta Publishing).
6. Mertokusumo, Sudikno. 2019, Mengenal Hukum (Suatu Pengantar), (Yogyakarta: Liberty)
7. Mochtar, Zainal Arifin, and Eddy Hiariej. 2021, Dasar-Dasar Ilmu Hukum: Memahami Kaidah, Teori, Asas Dan Filsafat Hukum, (Yogyakarta: Red and White Publishing).
8. Nainggolan, Bernard. 2011, Perlindungan Hukum Seimbang Debitor, Kreditor Dan Pihak-Pihak Berkepentingan Dalam Kepailitan, (Bandung: Alumni).
9. Shidarta, B Arief, Esmi Warasih, and Jufrina Rizal, 2014, Pendulum Antinomi Hukum: Antologi 70 Tahun Valerine J. L. Kriekhoff. Edited by Shidarta and Rizal Jufrinal, (Yogyakarta, Genta Publishing)/
10. Subhan, Hadi. 2019, Hukum Kepailitan (Jakarta: Prenadamedia Group).