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LEGAL REVIEW OF PARATE EXECUTIE OF MORTGAGE RIGHTS IN PROTECTING THE RIGHTS OF SEPARATE CREDITORS IN BANKRUPTCY PROCEEDINGS

Insan Indah Lestari[1)]*, Waluyo[2)]
[1,2)] Faculty of Law, University of Pembangunan Nasional "Veteran" Jawa Timur, Indonesia
*Corresponding Author, E-mail : insanlestari2@gmail.com

ABSTRACT

Background. The existence of collateral in bank credit agreements is crucial as one of the legal safeguards for the bank's security in mitigating risks. This is to ensure that the debtor will repay the loan. Even though the debtor might go bankrupt, creditors who have secured their loans with mortgages or other similar agreements have special rights. These rights protect them in case the debtor can't pay back the loan.
Research Methods. This research investigates the parate executie regulations under Indonesian bankruptcy law and examines the legal protection available to separate creditors in the presence of parate executie. A normative juridical research method was used, with data collected through a literature and document review.
Findings. The results of the study show that the bankruptcy case of a limited liability company causes creditors to lose their civil rights to control and manage the assets of an individual who has been included in the bankrupt estate, where separate creditors have a separate position to be prioritized in the repayment of their claims**.**
Conclusion. The crux of the matter lies in the discord between bankruptcy and mortgage laws. While bankruptcy law imposes a moratorium on creditor enforcement actions, mortgage law accords creditors a more immediate right of execution. This legal dissonance creates uncertainty for secured creditors like PT. BM. To rectify this situation, a reconciliation of these two legal frameworks is essential.

Keywords: Debt; Execution; Legal protection

BACKGROUND

National legal development must be aligned with development in other sectors, particularly the adjustment and updating of laws to support economic development. Economic development is one of the efforts to realize a just and prosperous society based on Pancasila and the 1945 Constitution[1]. Therefore, rapid economic development without corresponding legal reforms and development will create imbalances and may even jeopardize economic development itself. This is because the business world requires a strong legal framework and infrastructure to provide certainty, especially for resolving issues in the implementation of national economic development. Banking institutions must have confidence in the ability and capacity of prospective debtors before disbursing the required credit. Banks will conduct a thorough assessment of the character, ability, capital, collateral, and business prospects of prospective debtors. The need for a thorough assessment of the collateral of prospective credit recipients is related to the risks that may arise at any time due to debtor default[2].

According to Hermansyah, banks face inherent business risks when granting credit to borrowers. The risk lies in the possibility of the borrower's inability to make installment payments or repay the loan due to unforeseen circumstances. Consequently, the longer the loan tenure or grace period, the greater the risk for the bank[3]. The existence of collateral in bank loan agreements is crucial as a legal safeguard to mitigate bank risk. It ensures that the borrower will repay the loan. Article 8 of Law Number 10 of 1998 concerning Amendments to Law Number 7 of 1992 on Banking stipulates that the assurance of a borrower's ability and willingness to fulfill their obligations as agreed upon is a significant factor that banks must consider. To obtain this assurance, banks assess the collateral before granting credit to borrowers, adhering to the principle of prudence[4].

Collateral is a crucial instrument in the credit industry. It provides assurance to creditors that their loans will be repaid. In Indonesia, the legal framework governing collateral encompasses a wide range of laws, including the Mortgage Law and the Bankruptcy Law. The mortgage right, as stipulated in the Mortgage Law, is indivisible, meaning it cannot be divided or transferred separately from the secured debt. The mortgage encumbers the entire mortgaged object and is inherently linked to the underlying agreement, namely the agreement giving rise to the debtor-creditor relationship. The existence and extinguishment of a mortgage are contingent upon the repayment of the secured debt. These characteristics and attributes of a mortgage provide legal certainty and protection to both creditors and debtors, as the legal position of each party is clearly defined[5].

According to Article 21 of the Mortgage Law, the mortgaged property is not included in the bankrupt debtor's estate until the mortgagee has recovered the loan proceeds from the sale of the mortgaged property[6]. When a debtor defaults on a loan, the creditor may, under certain circumstances, exercise the right of self-execution, which allows for the execution of the collateral without going through the courts[7]. This right of self-execution, as stipulated in the Mortgage Law, is intended to facilitate the creditor's recovery of the debt when the debtor defaults. The creditor may sell the mortgaged property on their own authority without the need for court intervention.

If a debtor fails to repay a loan, the creditor may initiate bankruptcy proceedings. Bankruptcy involves a comprehensive seizure of the debtor's assets, which are then managed by a curator under judicial oversight. This process is grounded in the principles of creditor equality and proportional distribution of assets [8]. One of the issues that arise in the relationship between collateral and bankruptcy is the conflict between the provisions of the Law on Bankruptcy and Suspension of Debt Payment Obligations (Bankruptcy Law) and the provisions of the Mortgage Law. The Bankruptcy Law grants the Curator the authority to execute the mortgaged property if the debtor is declared bankrupt. Meanwhile, the Mortgage Law grants the mortgagee the right to independently execute the mortgaged property.

In Supreme Court Decision Number 782 K/Pdt.Sus-Pailit/2017, the conflict between Article 59 of the Bankruptcy Law and Article 21 of the Mortgage Law was addressed. BM, a separate creditor of PT RA. with a mortgage on its assets, objected to the distribution of proceeds from the sale of those assets in bankruptcy proceedings. BM argued for priority payment due to its separate creditor status. However, the Supreme Court rejected this argument, citing Article 59 of the Bankruptcy Law, which grants the Curator authority to execute mortgaged property in bankruptcy proceedings, overriding the separate creditor's priority right. Supreme Court Decision Number 782 K/Pdt.Sus-Pailit/2017 has significant implications for the regulation of collateral in bankruptcy. The decision shows that the right of a separate creditor to be paid first from the proceeds of the sale of the mortgaged assets does not apply in bankruptcy proceedings. This can create legal uncertainty for secured creditors.

The relationship between collateral and bankruptcy is an interesting issue to study. Bankruptcy is a legal process aimed at settling the debts of a debtor who is unable to pay their debts. In bankruptcy proceedings, the rights of secured creditors can be affected. The conflict between the two provisions can create legal uncertainty for secured creditors. Secured creditors do not know whether they can independently execute the mortgaged property or must wait for the Curator to execute it. Therefore, based on this issue, the author is interested in conducting legal research about the potential conflict between the provisions governing collateral and bankruptcy can lead to significant legal uncertainty for these creditors. A key question that arises is whether secured creditors have the autonomy to independently enforce their rights against the mortgaged property or if they must defer to the bankruptcy court's authority. This uncertainty can have far-reaching implications for the financial stability of secured creditors, as they may be unsure of the timing and extent of their recovery. Consequently, the exploration of this legal issue is essential for understanding the intricate relationship between collateral and bankruptcy and for providing clarity to secured creditors navigating the complexities of insolvency proceedings.

RESEARCH METHOD

This research employs a normative legal research methodology[9]. This research focuses on the application of rules or norms in positive law, namely the Civil Code and other regulations related to bankruptcy. This study examines the principles, norms, legal rules, court decisions, agreements, and doctrines that form the positive law on bankruptcy. This research also analyzes the problems faced in the application of positive law regarding bankruptcy. The approach in this thesis uses a statutory approach and a case approach. The statutory approach involves the study of laws, legal sources, or regulations that are theoretical in nature and can be used to analyze the problems to be discussed[10]. This method examines case studies related to the issues under consideration, focusing on those that have been resolved with a final and binding judgment.

FINDINGS

All credit is extended based on a credit agreement. Banks typically provide borrowers with pre-printed agreements that have been standardized [11]. This creates an imbalance of bargaining power, leaving borrowers with little choice but to accept the terms or forego the loan. Indonesian banking law defines credit as a loan agreement between a bank and a borrower, where the bank provides funds or equivalent resources and expects repayment with interest. Banks must assess a borrower's creditworthiness using the 5C's: character, capacity, capital, collateral, and economic conditions before extending credit[12].

Despite such assessments, banks often demand specific collateral, such as the borrower's assets, due to the risk of default. The Mortgage Law governs the creation and enforcement of mortgages, which are essential for securing bank loans. Mortgages have replaced hypothecation and credietverband as the primary security interest in land[13]. The primary purpose of collateral is to protect the lender in case of default. It serves as security that can be liquidated to recover the outstanding debt. The value of the collateral is also used to determine the maximum loan amount. If a borrower defaults on their loan and is unable to pay, the court may declare them bankrupt. The standardization of credit agreements and the requirement for collateral can create a power imbalance between banks and borrowers. However, these measures are designed to mitigate the risk of lending and protect the interests of creditors[14].

Parate executie refers to the right of a creditor to independently sell a debtor's collateral without going through the courts if the debtor defaults. This concept is similar to the right of self-sale in mortgage law[15]. According to Subekti, parate executie means exercising one's own rights without the intervention of a judge, by directly selling a collateral asset. In essence, it grants creditors the authority to sell the collateral themselves without seeking court approval, following procedural rules, or involving court officers, making the process simpler and less costly.

Parate executie offers creditors flexibility and speed in debt collection as it bypasses lengthy court procedures. Creditors can directly seize and sell the collateral, streamlining the process. This makes parate executie an effective tool for creditors, especially when facing the risk of debtor default. Under the Mortgage Law, the first-ranking mortgagee has the right to sell the mortgaged property through a public auction and recover their debt from the proceeds.

The concept of parate executie in the Mortgage Law is similar to that in mortgage law. Both grant creditors the power to execute without court intervention, although the Mortgage Law grants this power automatically. However, Article 11(2)(e) of the Mortgage Law allows parties to include provisions regarding parate executie in the mortgage deed, mirroring the practice in hypothec law.

Article 20 of Law Number 4 of 1996 on Mortgages provides flexibility in the execution process by offering three options: direct execution of the collateral (parate executie), court-ordered execution, or a direct sale agreed upon by both parties. On the other hand, Finance Minister Regulation Number 213/PMK.06/2020 categorizes auctions into three types:

execution auctions (typically related to debt settlement), mandatory non-execution auctions required by law, and voluntary non-execution auctions initiated by the asset owner.

Bankruptcy significantly impacts mortgage rights, as evidenced by Article 56(1) of Law Number 37 of 2004 on Bankruptcy and Suspension of Debt Payment Obligations. This article stipulates that the execution rights of secured creditors, including mortgagees, are suspended for a maximum of 90 days from the date of the bankruptcy declaration. During this suspension, the mortgaged property is under the curator's supervision, marking a new development in bankruptcy law. This reflects the principle of droit de preference, which grants creditors a priority right over specific collateral.

From the proceeds of the sale of these assets, creditors are entitled to be paid first. Article 57(4) of Law Number 37 of 2004 states that the supervisory judge must, within one day of receiving a request from a creditor or third party whose rights have been suspended, order the curator to summon the creditor or third party for a hearing. The judge must then issue a ruling on the request within ten days.

Following a bankruptcy ruling, the process of liquidating the bankrupt estate can commence. As is well known, in parate executie, secured creditors have the privilege to independently execute the collateralized assets of the bankrupt estate. If the secured creditor has not executed the assets within two months of insolvency, the curator will take over the execution to protect the rights of other creditors, as stipulated in Article 59(1) of Law Number 37 of 2004 on Bankruptcy and Suspension of Debt Payment Obligations. After this period, the curator must demand the surrender of the collateral and sell it according to the provisions of the law, without diminishing the rights of the secured creditor to the proceeds of the sale.

According to the pari passu principle, all of the debtor's assets are considered joint collateral for all creditors, and the proceeds from their sale must be distributed equally, unless a creditor has a legal right to priority. In bankruptcy, creditors are not treated equally; their status depends on their type, such as secured creditors, preferred creditors, and ordinary creditors. Secured creditors are entitled to parate executie of their collateral without involving the curator. To exercise parate executie, certain conditions must be met, including a clause in the notarial deed granting the secured creditor the right to sell the collateral directly in case of default. Additionally, the debtor must be in default, and the secured creditor must notify the debtor of their intention to sell.

The rights of secured creditors are clearly stipulated in Article 20(1) of Law Number 4 of 1996 on Mortgages. This article grants the first-ranking mortgagee the right to sell the mortgaged property through a public auction. The execution procedure under parate executie is outlined in Law Number 37 of 2004 on Bankruptcy and Suspension of Debt Payment Obligations.

However, as demonstrated in the case of PT. BM vs. PT. RA, the exercise of parate executie may not always align with the intended legal protections for secured creditors. In this case, PT. BM, as a secured creditor, challenged the distribution of the bankrupt estate, arguing that certain expenses, such as operational costs and fees, were improperly included and reduced the amount available for distribution to secured creditors. The court's decision in this case has implications for the exercise of parate executie and the protection of secured creditors' rights. In conclusion, while parate executie provides secured creditors with a powerful tool for recovering their debts, it is essential to consider the potential challenges and limitations associated with its exercise, particularly in the context of bankruptcy proceedings.

DISCUSSIONS

The contribution of this research, parate executie is an effective tool for creditors to secure their rights. It allows creditors to directly sell the collateral without going through lengthy and complex court proceedings. The advantages of parate executie include the elimination of the need for seizure, court approval, and the ability to be exercised based on an agreement with the debtor. The primary principle behind parate executie is to provide legal protection to creditors by accelerating the execution process and reducing costs. Protection, in

the Indonesian language, means to shield, prevent, defend, and safeguard. Legal protection, therefore, refers to the safeguarding of rights through legal means[16].

The lawsuit filed by PT. BM against the curator based on Supreme Court Decision Number 782 K/Pdt.Sus-Pailit/2017 of the Jakarta Central District Court has sparked legal debates regarding the execution of collateral. Article 59(1) of Law Number 37 of 2004 on Bankruptcy and Suspension of Debt Payment Obligations provides creditors with a two-month window to execute their claims. However, this often conflicts with other laws governing the direct execution of collateral. In the case of PT. BM, as a secured creditor, the execution rights shifted to the curator when the bank failed to sell the collateral within two months.

While this is in line with Article 59(2) of the Bankruptcy Law, Article 55(1) does not provide sufficient protection for secured creditors to exercise their execution rights during bankruptcy. This creates legal uncertainty for creditors like PT. BM, potentially resulting in them not receiving full payment. To address such issues, creditors can file objections to the distribution list as per Article 193(1) of the Bankruptcy Law. The contributors of this research, allows creditors to challenge the distribution and ensure that their rights are protected. However, the interplay between parate executie and the bankruptcy process, especially regarding the 90-day suspension period, often creates conflicts and delays.

The protection of secured creditors is further emphasized in Article 21 of Law Number 4 of 1996 on Mortgages, which states that secured creditors can exercise their rights even if the debtor has been declared bankrupt. However, the 90-day suspension period in the Bankruptcy Law can undermine this protection. The overlapping provisions in the Mortgage Law and the Bankruptcy Law can create inconsistencies and hinder the effective exercise of parate executie. The two-month deadline for execution in the Bankruptcy Law may be unrealistic, especially for complex asset sales. This can lead to delays and undermine the purpose of parate executie, which is to provide swift and efficient recovery for secured creditors. There is a need for greater harmonization between the Mortgage Law and the Bankruptcy Law.

The protection of secured creditors should be given more prominence within the bankruptcy framework, ensuring that their rights are not unduly compromised. The case of PT. BM highlights the complexities and challenges faced by secured creditors in bankruptcy proceedings. While parate executie offers a valuable tool for protecting creditor rights, the interplay between different legal provisions and the practical realities of bankruptcy can create significant obstacles.

CONCLUSION

In Indonesia, parate executie is regulated by the Mortgage Law and the Bankruptcy Law. Parate executie allows secured creditors to auction a bankrupt debtor's assets without court involvement or to prioritize their debt recovery. In the case of PT. BM, the bank sued the curator of PT. RA because it believed its right to be paid first as a secured creditor was not honored in the distribution of proceeds from the sale of bankrupt assets.

The main issue in this case is the conflict between bankruptcy law and the law on mortgages. Bankruptcy law provides a waiting period for creditors to execute their claims, while mortgage law grants creditors the right to immediate execution. This creates legal uncertainty for creditors like PT. BM. To address this issue, the two laws need to be harmonized. Legal protection for secured creditors, especially in bankruptcy situations, must be strengthened.

Guidelines for asset execution in bankruptcy should not be contradictory. Legal provisions should be clear and unambiguous to avoid loopholes and multiple interpretations. The law should prioritize certainty, fairness, and justice in every state policy. Harmonization between Law Number 4 of 1996 on Mortgages and Law Number 37 of 2004 on Bankruptcy and Suspension of Debt Payment Obligations is necessary to avoid conflicting norms that harm secured creditors. The law should provide specific protections for secured creditors, such as priority in payment or expedited execution processes. Additionally, curators should have a

thorough understanding of the rights of secured creditors and perform their duties professionally and transparently.

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