

THE LOSS OF CREDITORS' DROIT DE PREFERENCE (PRIORITY PRINCIPLE) DUE TO DEBTOR'S CORRUPT OFFENSES

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ABSTRACT

Creditors, as mortgage holders, are also entitled to the preeminent status of security in accordance with Droit de Preference as stated in the last sentence of Article 1 number 1 of Mortgage Law (UUHT), which gives priority to certain creditors over others. This mortgage characteristic is also mentioned in the last sentence of Article 20 paragraph (1) letter b, which stated that mortgage holders have privilege rights over other creditors. However, this status is disintegrated, assuming the debtors are involved in a corruption offense because their property becomes confiscated by court order despite being guaranteed to the creditor. Therefore, this condition fails to prioritize the Droit de Preference of the creditors with the implementation of the confiscation state, which needs to take precedence. In Article 19 paragraphs (2) and (3) of Law No. 31 regarding Eradication of Criminal Acts and Corruption, the legal remedy provided for creditors is only by submitting an Objection Letter to the court that imposed the confiscation without suspending the court's ruling. Such regulations tend to injure the goodwill creditors as well as abolish Droit the preference ability to provide legal protection and certainty toward creditors' rights.

Keywords: Creditor, Debitor, Droit de preference.

INTRODUCTION

Based on Law Number 4 of 1996 on Mortgage (UUHT), there are several features and characteristics, of a mortgage including:

1. Features
 - a. Granting priority to creditors as security holders (Droit de Preference) in accordance with the last sentence of Article 1 point 1 of the Mortgage Law (UUHT). This feature is also mentioned in the last sentence of Article 20 paragraph (1) letter b, as follows ...mortgage holders with privilege have rights over other creditors.
 - b. Always keeping up with the existence of the mortgage object (droit de suite), as stated in Article 7 of Mortgage Law (UUHT).
 - c. Fulfill the Specialty and Publicity Principle in the compulsory contents of Mortgage Deed (APHT), as stated in Article 11 of the Mortgage Law as follows:
 - The identity of the recipient and grantor of the mortgage.
 - Domicile of the recipient and grantor of a mortgage.
 - The number of guaranteed debts.
 - Mortgage value.
 - Mortgage object.

Meanwhile, the Publicity Principle is fulfilled by registering the mortgage at the local land office (Article 13 of Mortgage Law (UUHT)).

- d. An easy and definite execution is carried out by:
 - a) Selling the mortgage object through a public auction, to obtain the payment of claims from the proceeds (Article 6)
 - b) Underhand execution of mortgage object assumes it can attain the highest price for all parties' benefits.
 - c) Provide the possibility of using Parate Execution as regulated in Article 244 HIR and 258 Rbg as well as Article 26 in conjunction with 14).
 - d) The object of the mortgage is not included in the boedel bankruptcy of the grantor before the holder takes repayment from the sale proceeds of mortgage object (Article 21).

2. Characteristics

- a. The mortgage overlays on the object, and its part cannot be divided (Article 21). This characteristic does not apply to the possibility of excluding or deviating based on Article 2 paragraph (2), which is conducted using Royalty Partial. This exception is allowed assuming it has been agreed in a Mortgage Deed (APHT). Royalty Partial means that the guaranteed repayment of debt can be made in installments according to each part of the mortgage object's value. The part paid in installments becomes free from the Mortgage right, and this tends to burden the remaining object as a guarantee for the debt that has not been repaid.
- b. The main agreement that creates debts includes the expiration and termination of the mortgage, also known as *assesoir*.

The characteristics and features of mortgages provide legal certainty and protection to creditors and debtors because both of them know their legal position. One of the characteristics that currently needs to be studied is the creditors as mortgage holders entitled to the privileged status (*Droit de Preference*) as stated in Article 1 number 1 and Article 20 paragraph (1), which gives priority to certain creditors over others. *Droit de suite* is a French word widely used in European countries and translated as the right to follow.” (Hasbullah, 2005)

Droit de preference is one of the characteristics of material guarantee. This means that the property rights that befall earlier takes precedence over what happened later or is often called the priority principle. It also means that assuming the debtor is in default, then the preferred creditor has prior rights of the repayment from the sale of the debtor's property over other creditors (Hasbullah, 2005).

Various regulations and court decisions impose limitations on *Droit de preference* as follows:

1. Pledge (Article 1150 of the Civil Code):

A pledge is a right obtained by a creditor in a movable asset and provided by the debtor or representative, to secure a debt. It entitles the creditor priority over others with regard to the settlement of the debt in accordance with the exception of the costs incurred in the sale of the asset and after the pledge, for its maintenance.

2. Fiduciary (Article 27 of Law Number 42 of 1999 on Fiducia Security):

- 1) Fiducia Recipient is prioritized over other creditors.
- 2) The priority right referred to in section (1) is the Fiducia Recipient's right to receive a settlement from the results of execution over the Goods as the object of Fiducia Security.
- 3) The priority right of the Fiducia Recipient is not annulled due to bankruptcy or liquidation of the Grantor

3. Mortgage (Article 6 and 20 paragraph (1) letter b of Mortgage Law (UUHT)):

Article 6:

The mortgage first holder has the right to sell the mortgaged object through a public auction and take the money from the proceeds assuming the debtor defaults making payment.

Elucidation of Article 6:

The right to sell the mortgage object is a manifestation of the first mortgage holder's preferred position. This right is based on the grantor's promise to sell the mortgage object through public auction without requiring further approval assuming a default occurs. However, the remainder of the proceeds from the sale after the repayment amount has been obtained remains the grantor's right.

Article 20 paragraph (1) letter b:

- (1) When the debtor defaults, the following occurs:
 - a. The mortgage first holder has a right to sell the mortgaged object, as referred to in Article 6.
 - b. According to the executorial title contained in the Mortgage Certificate as referred to in Article 14 paragraph (2), the mortgaged object is sold through public auctions in order to obtain a settlement of the Mortgage Holders' receivables with the preceding rights over other creditors.

4. Warehouse Receipt in Article 1 number 9 (Law No. 9 of 2006 concerning the Warehouse Receipt System as amended by Law no. 9 of 2011):

Security Rights on Warehouse Receipts are charged for debt settlement, which entitles a priority on mortgage holders over other creditors.

The legal position of Droit de Preference (Priority Principle) is weakened or disintegrated when connected with Article 19 of Law Number 31 of 1999 concerning the Eradication of Corruption Crimes (UU Tipikor), as follows:

- 1) The court verdict on the confiscation of goods that do not belong to the accused will not be commuted, assuming the third party's rights with ownership are harmed.
- 2) In the event that the court verdict, as referred to in paragraph (1) also includes the goods of a third party, a letter of objection is submitted to the court by the third party, within a maximum period of 2 (two) months.
- 3) The submission of the objection letter, as referred to in paragraph (2), does not delay or stop the implementation of the court verdict.

- 4) Under the circumstances, as referred to in paragraph (2), the judge seeks information from the public prosecutor and the concerned party.
- 5) The applicant or the public prosecutor is allowed to request an appeal to the Supreme Court on the letter of objection under the circumstances as referred to in paragraph(2)

Therefore, regarding the Droit de Preference (Priority Principles) in accordance with Article 19 of the Corruption Act, it is necessary to conduct an assessment of legal protection for creditors as mortgage holders. The court can confiscate the debtor's assets used as collateral objects for corruption offenses, thereby indicating the creditor does not have adequate legal protection. Therefore, creditors need to take legal efforts to ensure the fulfillment of their rights and avoid losses.

METHODOLOGY

In compiling and discussing the problems of this research, writing uses normative juridical methods where library material becomes the basic material to be researched by tracing rules and literature related to existing problems.

DISCUSSION

A. LEGAL PROTECTION FOR CREDITORS AS MORTGAGE HOLDER AGAINST COLLATERAL OBJECT SEIZED BY THE STATE FOR DEBTORS' CORRUPTION OFFENSES

Creditors as mortgage holders have received adequate protection by regulations on Pledge (Article 1150 of the Civil Code), Fiduciary (Article 27 of Law No. 42 of 1999 on Fiduciary Security) and Mortgage (Article 6 and Article 20 paragraph (1) letter b of Mortgage Law (UUHT)). However, when a debtor is involved in a criminal act, these legal protections become invalid, meaning that the Droit de preference (priority principle) for creditors is disintegrated.

A debtor involved in a criminal act can be illustrated as follows:

1. Debtors that previously owned their business and were able to buy several assets (land). In a bid to expand their businesses, credits were applied to a banking institution with their lands used as collateral. After being successful as an entrepreneur, they were tempted to become legislative members, entered as a member of a political party, and were elected. Immediately they become members of the legislature, they have committed "congregational" corruption. Therefore, all existing assets, including those being pledged as collateral to the bank, are confiscated by the court and auctioned off to provide compensation to the state.
2. The debtors have become members of the legislature, and are "collectively" involved in corruption with the money used to purchase assets (land and houses), which are used as collateral for debt to the bank. When they are found guilty, all existing assets, including those pledged into the bank, will be confiscated by the court and auctioned off to provide compensation to the state.

One of the two illustrations above is related to the Bitung District Court Decision Number: 70/Pdt.BTH/2015/PN.Bit, which has been filed with Cassation with the Supreme Court Decision Number 2701 K/Pdt/2017 between PT. Bank Panin Tbk.,

Attorney General's Office cq. North Sulawesi High Prosecutor's Office cq. Head of Bitung District Prosecutor's Office and Mohammad Hasan Rahmat. PT. Bank Panin Indonesia Tbk. holds all mortgage rights in a house with Freehold Title Mohammad Hasan Rahmat. However, based on the Decree of the Head of the Bitung District Court Number 60/Pen.Pid/2014/PN.Btg, the land was confiscated because it was proven to be the result of a criminal act of corruption by Mr. Subchan, S.E. (Subchan, S.E. paid down payment for the house). Furthermore, Manado District Court Decision Number: 18/Pid-Sus-TPK/2014/PN.Mdo related to a corruption case that stated that the house was confiscated for the state to be auctioned off. The judges declared the validity of guarantee rights and the invalidity of the Manado District Court Decision in their legal considerations as follows:

Creditors have special rights over the mortgage object and need to be protected by law. Also, the object in a quo case cannot be confiscated as stated in the Jurisprudence of the Supreme Court Decision of Indonesia No. 1731/K/Pdt/2011 on 14 December 2011. Therefore, a contrarian can be declared as good and reliable.

Based on the 2 (two) illustrations above, both collateral objects/assets purchased using money from corruption and those that are not, are ultimately confiscated by the court and auctioned, with the proceeds submitted to the state.

In this case, creditors become the aggrieved party. Based on Article 19 of Law Number 31 of 1999 on Corruption, creditors can be called as "third parties with goodwill" with the ability to submit objection letters. Unfortunately, it does not delay the implementation of the verdict. Furthermore, this provision, creditors' rights to obtain repayment or collect debts from debtors become disintegrated by the priority of state interests.

Articles 18 to 19 of Mortgage Law confirm the abolition of Mortgage Rights, as follows:

Article 18:

(1) Mortgage rights are abolished due to the following conditions:

- a. Settlement of secured debt.**
- b. Release of Mortgage Rights by Mortgage holders.**
- c. Clearance of mortgage right based on the ranking determined by the Chairman of the District Court.**
- d. Abolition of land rights encumbered with Mortgage Rights.**

(2) Abolition of mortgage released by the holder to provider through the provision of a written statement.

(3) Abolition due to mortgage cleaning up based on the ranking determined by the Head of the District Court, which occurs in accordance with the buyer's request of land rights encumbered with a mortgage, as stipulated in Article 19.

(4) The abolition due to the overthrow of land rights encumbered with a mortgage does not cause the guaranteed debt to be written off.

Article 19:

(1) The buyer of a mortgage object is either in the executorial title or can voluntarily ask the mortgage holder to clear the goods that exceed the purchase price.

- (2) Cleaning, as referred to in paragraph (1), is carried out through a written statement from the mortgage holder, which contains the Mortgage Rights release that burdens objects exceeding the purchase price.
- (3) When the object is burdened with more than one mortgage and there is no agreement between the holders, the purchase price as referred to in paragraph (1) is submitted by the buyer to the Chairman of the District Court. This is usually conducted to determine the distribution of auction proceeds among debtors based on the rank according to the prevailing laws and regulations.
- (4) The application for cleaning an object from the mortgage, according to paragraph (3), cannot be carried out by the buyer assuming the purchase is voluntary. It also occurs when the Mortgage Deeds states that the concerned parties have explicitly agreed that the object will not be cleared, as referred to in Article 11 paragraph (2) letter f.

Furthermore, it needs to be linked to Article 1 number 16 Law Number 8 of 1981 concerning The Law of Criminal Procedure (KUHAP). This law defines seizure/confiscation as a series of acts by an investigator to take possession and retain movable or immovable goods, whether tangible or intangible, for evidentiary purposes in the investigation, prosecution, and adjudication.

Confiscation is a forced attempt (*dwang middelen*) that has the potential to violate human rights. Hence, according to Article 39 of the Criminal Procedure Code, there are restrictions on confiscated goods:

1. The subject of seizure are:

- a. goods or claims of the accused with all or part presumed to have been obtained due to an offense,
- b. goods which have been directly used to commit an offense,
- c. goods used to obstruct the investigation of an offense,
- d. goods specially made and intended to commit an offense,
- e. Other goods that have a direct connection with the offense committed.

2. Goods, which have been seized due to a civil suit, bankruptcy, investigation purposes, prosecution, and adjudication of a criminal case, are stated in Paragraph (1).

Seizure or confiscation is not imposed on the mortgage because it provides strong guarantees for creditors to take precedence over others. The possible confiscation of the Mortgage Rights means that the court ignores or even eliminates the priority position of the mortgage holder creditors.

The Surabaya District Court number 1025 / Pdt.G / 2012 / PN.Sby, stated that the principle of the *droit de suite* assures creditors regarding their rights to obtain repayment from the sale proceeds of land under physical or legal control. This becomes a mortgage object irrespective of being the debtor's default and sold by the owner (mortgage grantor) to a third party.

The Supreme Court Decision Number: 1731K / Pdt / 2011 stated that the object of the credit guarantee encumbered in the Mortgage Certificate has inherent rights and interests and need to receive legal protection. It is stated in the following legal principles:

- An object of dispute in a quo case listed in the Mortgage Certificate as the main right of the mortgage holder for debt settlement since the debtor's right on the object is legally transferred.
- Therefore, the creditor has the privilege of selling the mortgage object for settlement of the debtor's legal obligations, which need to be protected by law.

When a conclusion is drawn from the confiscated property as a mortgage object, then a precedence status is attached over the object. Therefore, the creditors do not lose their mortgage right since it continues to be attached to the object unless the mortgage is abolished as stipulated in Article 18 of Mortgage Law.

In accordance with the above jurisprudence, it is also inferred that the criminal confiscation of objects with mortgage rights does not necessarily eliminate both the creditor's position as mortgage holder and the debtor's responsibility. However, creditors have to take a longer pathway, assuming the debtor's assets are no longer left, such as in cases where the state seized all. Notwithstanding, the Droit de preference has been gradually eroded by Article 19 of Law Number 31 of 1999 (Corruption Law) for the state interests that need to take precedence.

B. LEGAL REMEDIES FOR CREDITORS AS MORTGAGE HOLDERS' AGAINST STATE COLLATERAL OBJECTS SEIZED BY THE STATE FOR DEBTORS' CORRUPTION OFFENSE

Legal remedies are performed assuming the debtor's assets used as collateral for debts are seized, auctioned off, and handed over to the state. Although creditors as "parties with goodwill" still have the opportunity to file an objection letter to the court, it does not delay the execution of the debtor's assets unless it is unrelated to a criminal case. Article 19 of Law Number 31 of 1999 (Corruption Law / UU Tipikor), on the one hand, allowed the creditors to make efforts for their rights conversely the opportunity was immediately closed, indicating that it was not expected. Regarding the confiscation of the debtor's assets, the mortgage holder's right to obtain repayment no longer exists or can be said to be a "fake," thereby making legal remedies necessary to complete.

Legal remedies that can be taken by creditors include filing a civil suit through litigation against a court decision regarding the confiscation on mortgage object. However, as stated in Article 19, paragraph (2) of the Corruption Act, the legal remedy tends to undergo difficulties associated with limitation in the next paragraph (3). Therefore, taking legal remedies as in Article 19 is considered useless and only gives deceptive hopes.

The low probability value of this method leads to the use of civil suit against a district court, by:

Article 1131 of the Civil Code:

"All present and future, movable and immovable assets of the debtor, is regarded as securities for the debtor's agreements."

Article 1132 of the Civil Code:

"The assets also serve as joint guarantees for the creditors with the proceeds divided among them in proportion to their loan, unless there exists a legal order of priority among them."

Article 1134 of the Civil Code:

"Privilege is a right acknowledged by law and applicable to one creditor over the other, in accordance with the nature of the debt. Pledge and mortgage are superior to privilege, with the exception of the circumstances in which the law expressly stipulates otherwise."

Article 1135 of the Civil Code:

"The order of priority between creditors needs to be regulated in accordance with the different nature of the priorities."

Theoretically, creditors are classified into 3 (three) types, as follows:

1. Separatist creditors that hold material guarantees based on Article 1134 paragraph (2) of the Civil Code. The current material guarantees in Indonesia are:
 - a. Pledge (Articles 1150- 1160 of Civil Code),
 - b. Fiduciary (Law Number 42 of 1999 on Fiduciary Security),
 - c. Mortgage (Law Number 4 of 1996 on Mortgage Over Land and Object Related to Land),
 - d. Ship Mortgage (Article 1162-1232 of Civil Code),
 - e. Warehouse Receipt (Law Number 9 of 2006 on Warehouse Receipt System as amended by Law Number 9 of 2011),
2. Preferred Creditors that have the privileges and right since the nature of the receivables gives a special position by law. It consists of specific preferred creditors, as stated in Article 1139 of the Civil Code and generic preferred creditors (Article 1149).
3. Concurrent Creditors that are not included in Separatist and Preferred Creditors (Article 1131 and 1132 of Civil Code).

The difference between a separatist and a concurrent creditor is that the separatist can execute the collateral object and get payment of the receivables. The distribution of the proceeds is carried out based on the priority order. Creditors with a higher position get a more initial share over others, while those in the same level receive payments on a prorated principle (*pari passu pro rata parte*).

In filing a lawsuit against the debtor, the creditor needs to pay attention to the information on whether the debtor still has assets (movable or immovable property). Assuming they do not and they are still being sued, the lawsuit "menang di atas kertas" leads to winning in the court. Therefore, when this happens, the creditor needs always to monitor whether the debtor has any more assets or not, since they sometimes tend to have hidden assets in the name of another legal subject.

Conversely, assuming the debtors are unable to pay off and are sued due to a lack of assets, they are recorded as bad credit in the creditor's notes until it is abolished. Moreover, it also has the ability to generate other problems such as business risk, assuming the creditors are private banks.

CONCLUSIONS

The following were made in accordance with the loss of creditors' Droit de Preference (priority principle) due to debtor's corrupt offenses

1. Legal protection against creditors for the collateral object's confiscation due to the debtor's corrupt offense is the submission of an Objection Letter against a court verdict. However, this effort does not have the ability to delay the verdict implementation.
2. The legal remedy that can be arranged when the objection letter has a low probability is filing a civil suit against the other assets owned by the debtor. It aims to help the court make a foreclosure to pay off the debtor's debt irrespective of the prolonged timeframe since the creditor is allowed to take all possible efforts, especially when they experience defeat in court.

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