



## Legal Certainty Regarding the Rights of Secured Creditors to Execute Collateral in Bankruptcy Proceedings in Indonesia

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**Abstract:** Separate Creditors as Holders of Security Rights possess a preferential claim over the secured collateral. However, under bankruptcy law, their rights to execute and auction the collateral are subject to statutory limitations. In practice, Supreme Court Decision No. 521 K/Pdt.Sus-Pailit/2021 and Supreme Court Decision No. 527 K/Pdt.Sus-Pailit/2020 have provided divergent interpretations regarding the execution rights of Separate Creditors over their collateral once the debtor has been declared bankrupt. The core issues examined in this research are: (1) How legal certainty is afforded to the execution rights of Separate Creditors pursuant to Supreme Court Decisions No. 521 K/Pdt.Sus-Pailit/2021 and No. 527 K/Pdt.Sus-Pailit/2020; and (2) What legal consequences arise for Separate Creditors who fail to execute their collateral under Law No. 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations (PKPU). This study employs normative legal research using a statutory approach and case-based analysis, focusing on judicial interpretations of bankruptcy decisions affecting the execution rights of Separate Creditors. The research relies on secondary data obtained through literature review and applies qualitative analytical methods. Separate Creditors are granted a two-month period following insolvency to initiate execution proceedings by filing a public auction request with the KPKNL, which is calculated from the commencement of the execution process not from the completion of the auction. Furthermore, the rights of Separate Creditors are not absolute, as they are constrained by a statutory stay period of 90 (ninety) days from the date the debtor is declared bankrupt. During this stay period, the Curator is entitled to demand that the collateral held by Separate Creditors be transferred to the Curator for sale either through public auction or private sale, under the supervision of the Supervisory Judge. It is therefore necessary to revise Law No. 37 of 2004 to clarify the scope of authority held by Separate Creditors in executing collateral, and to establish a digital oversight mechanism for curatorial functions to ensure transparency and accountability when collateral is handed over to the Curator for auction.

**Keyword:** Legal Certainty, Secured Creditors, Bankruptcy

## INTRODUCTION

The rapid development of the national economy has significantly driven the growth of various business activities in Indonesia. This dynamic situation demands a strategic role of law in creating a conducive business climate, particularly through legal certainty. Legal certainty functions as a foundation that provides protection and clarity for all actors in the national economic activities. Thus, law plays not only the role of regulation but also serves as a means to support economic growth. The law also acts as a guide, directing, and controlling the purpose and objectives of development. This means that, ultimately, the law acts as a guide in development to create a just and prosperous society.

The economic crisis of 1997, which affected many Asian countries including Indonesia, led to the collapse of several conventional banks. Erman Radjagukuk explains the impact of the 1997 monetary crisis as follows:

"The development of the global economy had a significant impact on the evolution of the law, particularly commercial law, which plays a central role in driving the economy. As a result, the globalization of law led to modifications in regulations in developing countries regarding investment, trade, services, and other economic sectors, aimed at aligning more closely with the regulations in developed countries."

Yuhelson further explains the impact of the 1997 crisis, which caused high inflation and led to many companies defaulting on their loans with banks, as follows:

"In the middle of 1997, the rupiah experienced significant depreciation against foreign currencies, particularly the U.S. dollar, which dropped from around Rp2,300.00 in March to almost Rp5,000.00 per U.S. dollar by the end of 1997. By mid-1998, the rupiah reached its lowest point at Rp16,000.00 per U.S. dollar. This unstable economic condition caused a decline in economic growth, which had previously been positive around 6–7 percent, contracting to minus 13 to 14 percent. Inflation also surged from below 10 percent to around 70 percent. Many companies struggled to meet their debt obligations to creditors, leading to widespread bankruptcies."

The mounting corporate debts that could not be addressed caused banks, as providers of business capital, to face non-performing loans, further exacerbating Indonesia's economic downturn. Munir Fuady explains the banking system during the 1997 monetary crisis as follows:

"The large foreign debts caused issues within the banking system. Many businesses faced a resurgence of debt burden, leading to non-performing loans, with several banks experiencing liquidity difficulties. This liquidity crisis was worsened as many people lost confidence in several banks, leading to massive withdrawals."

To prevent such non-performing loans, the government took steps to create a bankruptcy institution to ensure that creditors could be paid fairly and proportionately. Niru Anita and Nunuk Sulisrudatin explain:

"To anticipate the large number of companies facing bankruptcy, the government issued Presidential Decree No. 1 of 1998, which later became Law No. 4 of 1998. The government made amendments, additions, and improvements to the articles contained in the Faillissement Verordening Stb. 1905 No. 217 Jo. Stb. 1906 No. 348. However, these amendments and improvements were still considered to have weaknesses, particularly in practice. Subsequently, Law No. 4 of 2004 concerning Bankruptcy and Suspension of Debt Payment was enacted, effective from October 18, 2004. Nevertheless, the implementation of this law still posed various problems. Therefore, solutions are needed to address these issues so that the objectives of the bankruptcy law, which are to create fairness for all parties involved, can be achieved."

The definition of Bankruptcy according to Article 1, Paragraph 1 of Law No. 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment, hereinafter referred to as "Law No. 37 of 2004," is:

"Bankruptcy is a general seizure of all assets of a bankrupt debtor, the management, and settlement of which is carried out by a Curator under the supervision of a Supervisory Judge as stipulated in this Law."

Based on this definition, Rahayu Hartini explains as follows:

"Bankruptcy is understood as a seizure process that involves all assets of the debtor, due to the fulfillment of debts to creditors that have matured. Thus, in simple terms, bankruptcy can be understood as the seizure of all assets of the debtor that have been included in the bankruptcy application. Although a debtor who is declared bankrupt does not automatically lose the ability to perform legal actions, they lose the right to control and manage their assets involved in the bankruptcy, starting from the declaration of bankruptcy."

J Andy Hartanto explains the role of the curator, stating that the curator is appointed when the debtor is declared bankrupt. Due to the bankruptcy situation, the debtor loses their right to manage their assets. Therefore, the authority to manage the assets that are considered bankrupt is transferred to the curator.

Adrian Sutedi explains the purpose of bankruptcy in the debt settlement process for a debtor declared bankrupt, as follows:

"Bankruptcy offers protection not only for creditors but also for the bankrupt debtor and their associated assets, ensuring that the settlement of bankrupt assets is not done arbitrarily by each creditor. Bankruptcy results in all assets of the bankrupt debtor being seized generally, and it authorizes the curator to manage the liquidation of these assets through sales. The proceeds from the sale of these assets are then distributed to the creditors according to their respective rights."

M. Hadi Shuban explains that bankruptcy is crucial for creditors, particularly banks, when the debtor cannot repay their debt, stating that bankruptcy is a commercial exit from the debt problems that burden the debtor, who no longer has the ability to pay their debts to creditors.

The bankruptcy petition must meet the requirements as specified in Article 2, Paragraph (1) of Law No. 37 of 2004, which provides the following provisions:

"(1) A debtor with two or more creditors who fails to fully pay at least one debt that has matured and is due for collection shall be declared bankrupt by a court decision, either upon the debtor's request or upon that of one or more creditors."

The provision regarding the requirements for a bankruptcy petition also mandates the presence of multiple creditors, as stated in Article 2, Paragraph (1) of Law No. 37 of 2004. Sutan Remy Syahdeini provides his opinion as follows:

"The concursus creditorium requirement arises from the application of Article 1131 of the Civil Code (KUHP), where bankruptcy occurs after a general seizure of all the debtor's assets. After a meeting to verify debts and credits, if no agreement or accord is reached, a liquidation process will be carried out on all debtor assets. The result of this liquidation will then be distributed to all creditors in accordance with the creditor ranking determined by the applicable regulations."

The explanation in the general provisions of Law No. 37 of 2004 regarding creditors is divided into three (3) categories, stating:

"By 'creditor' in this article is meant both concurrent creditors, separative creditors, and preferred creditors. Specifically, separative and preferred creditors may file for bankruptcy without losing their right to collateral over the debtor's assets and their right to priority."

Law No. 37 of 2004 has created a creditor sequence in the debt settlement process, known as concurrent creditors, preferred creditors, and separative creditors. A creditor with a lien on goods is entitled to auction the collateral and then be paid first from the proceeds of the sale, as if bankruptcy had never occurred. Mariam Darus Badruzaman mentions that, as a creditor with a lien, who holds a preferred right and is a separative creditor, states the following:

"Separative creditors can sell and take the proceeds from the sale of the collateral. If the sale proceeds do not cover the entire debt, the separative creditor may request to be considered as a concurrent creditor for the shortfall. Conversely, if the sale of the collateral exceeds the debtor's debt, the excess must be returned to the debtor."

The rights of separative creditors in protection are regulated in Article 55, Paragraph (1) of Law No. 37 of 2004, which states:

"With due regard to the provisions in Articles 56, 57, and 58, any creditor holding a mortgage, fiduciary security, or any other collateral over property may execute their rights as though no bankruptcy has occurred."

Article 55, Paragraph (1) of Law No. 37 of 2004 does not fully uphold the untouchable position of separative creditors' collateral rights, as it provides a period for separative creditors to sell assets. If not used, the curator is entitled to seize the collateral, as regulated in Article 56, Paragraph (1) of Law No. 37 of 2004, which states:

"The creditor's right to execute as referred to in Article 55, Paragraph (1) and the third party's right to claim their property held by the bankrupt debtor or curator is suspended for a period of no more than 90 (ninety) days from the date the bankruptcy declaration is pronounced."

Khoidin explains the provisions regulated in Law No. 4 of 1996 on Mortgage in relation to Bankruptcy, stating:

"The separative rights for creditors holding a mortgage are regulated in Article 21 of Law No. 37 of 2004, which explains that if the mortgagor is declared bankrupt, the mortgage holder has the authority to exercise all rights acquired under this law. This regulation on mortgages aligns with Article 55, Paragraph (1) of the Bankruptcy Law and PKPU, which states that: 'Any creditor holding a mortgage, lien, or other collateral may execute as though no bankruptcy has occurred.'"

Ashilby in his book on Guarantee Law explains the rights of collateral holders over an object, as follows:

"The definition of a specific guarantee is a guarantee that arises from a special agreement between the parties involved (creditor and debtor). Creditors want special guarantees because general guarantees are considered less secure. Special guarantees are intended only for certain objects owned by the debtor (the principle of specialty), and only function for specific creditors. Because this guarantee is made specifically, the creditor holding the special guarantee has a prioritized position (separative). This means the special creditor's rights are fulfilled before other creditors. Special guarantees can be either material (*zakelijk recht*), intended for a specific object; or personal (*persoonlijk recht*), intended for a specific individual."

J. Satrio explains the rights of collateral holders having higher status than other creditors:

"Creditors are given priority and ease in collecting their claims from the sale of certain goods or groups of goods owned by the debtor; and/or. There are certain goods owned by the debtor, which the creditor possesses or is tied to the creditor's rights, that hold value for the debtor and may create psychological pressure for the debtor to fulfill their obligations promptly to the creditor. Here, there is psychological pressure on the debtor to repay their debt because the collateral goods are typically items of significant value to the debtor. The

human tendency to want to maintain valuable objects recognized as their own forms the legal basis for guarantees."

According to Ivida Dewi and Herowatie Poesoko, the understanding of the position of separative creditors in bankruptcy law differs from their position in guarantee law. The position of a separative creditor in bankruptcy law is suspended for a certain period. During this suspension period, the separative creditor no longer has priority, is no longer in a higher position, and is no longer separated from concurrent creditors. In other words, it can be said that the position of the separative creditor is equivalent to that of a concurrent creditor, so the authority to execute the collateral during the suspension period will shift to the curator."

## **METHOD**

### **Research Type**

This research uses a normative legal research type, which is conducted to collect and analyze secondary data. In normative legal research, secondary data sources are typically used, such as regulations regarding Bankruptcy Law and Property Security Law, as well as decisions from Commercial Courts, doctrines, jurisprudence on Bankruptcy Law, and technical provisions in the execution of auction procedures, or legal papers and dictionaries. Normative legal research includes studies on:

- a. Positive law inventory research;
- b. Research on legal principles;
- c. Research to find law in concert/clinical legal research;
- d. Research on the systematics of law;
- e. Research on the levels of vertical and horizontal synchronization.

This normative legal research uses the legal inventory method. The characteristics of conducting normative legal research with a legal inventory approach are:

1. Determining criteria to identify norms that qualify as positive legal norms and those that are not part of the legal domain;
2. Adjusting the identified norms as positive legal norms;
3. Organizing the identified and collected norms into a comprehensive system.

Generally, research distinguishes between data obtained directly from the public and data obtained from library sources. Data obtained directly from the public is called primary data (or base data), while data taken from library sources is generally referred to as secondary data. This thesis research uses secondary data from books, regulations, court decisions, articles, papers, and other legal studies to examine and analyze legal certainty concerning the commencement of the creditor's execution rights over property collateral in the Bankruptcy process in Indonesia.

### **Research Nature**

In this research, the applied nature of the research is descriptive qualitative, which is a data analysis method that presents all data, both primary and secondary data, that have been collected, then analyzes them based on relevant theories and regulations, and ultimately produces conclusions. This research uses the descriptive qualitative method aimed at providing an in-depth description of the legal phenomenon concerning the execution rights of separative creditors over property collateral in the Bankruptcy process in Indonesia.

### **Research Approach**

There are several approaches in legal research aimed at gathering information from various aspects regarding the issues to be researched. This research is descriptive with a statute approach, case approach, comparative approach, and conceptual approach. This thesis research uses the statute approach, which is done by examining and analyzing the

legislation concerning Bankruptcy Law, Property Security Law, Banking Law, and related regulations on the technical procedures for the execution of auctions, whether done by Separative Creditors or the Curator over the bankrupt estate.

This research also uses the case approach, which is related to the execution rights of separative creditors over property collateral in the bankruptcy process in Indonesia based on the decisions from the Commercial Court and the Supreme Court's Cassation decisions in the case of Supreme Court Decision No. 521 K/Pdt.Sus-Pailit/2021 and Supreme Court Decision No. 527 K/Pdt.Sus-Pailit/2020, which have final and binding legal force. The main focus of the case approach is the ratio decidendi or reasoning, which refers to the considerations used by the court in reaching a decision.

### **Types of Data and Legal Materials**

Normative legal research is a form of library research, which refers to the analysis of secondary data. Secondary data in the legal context is viewed from the perspective of its binding force. According to Ronny Soemitro as referred to by Suratman and Philips Dillah, it can be classified as:

#### **Primary Legal Materials**

Primary legal materials are authoritative legal materials. The primary legal materials used in this research include:

- Supreme Court Decision No. 521 K/Pdt.Sus-Pailit/2021
- Supreme Court Decision No. 527 K/Pdt.Sus-Pailit/2020
- Constitutional Court Decision No. 015/PUU-III/2005, December 14, 2005
- Constitutional Court Decision No. 67/PUU-XI/2013

Other primary legal materials include:

1. Civil Code (Kitab Undang-Undang Hukum Perdata, KUH Perdata)
2. Commercial Code (Kitab Undang-Undang Hukum Dagang, KUHD)
3. Law No. 4 of 1996 on Mortgage
4. Law No. 42 of 1999 on Fiduciary Security
5. Law No. 37 of 2004 on Bankruptcy and Suspension of Debt Payment Obligations
6. Ministry of Finance Regulation No. 213/PMK.06/2020 on Auction Implementation Guidelines
7. Decree of the Chief Justice of the Supreme Court of the Republic of Indonesia No. 109/KMA/SK/IV/2020 on the Implementation of the Bankruptcy and Suspension of Debt Payment Procedures.

#### **Secondary Legal Materials**

Secondary legal materials are all sources of law that provide explanations, interpretations, and further understanding of primary legal materials. Secondary legal materials include relevant literature, such as books on Bankruptcy Law, Property Security Law, and civil law principles that deeply discuss the position and authority of separative creditors. Additionally, secondary materials also include doctrines or legal theories presented by experts as a foundation for normative analysis, as well as scholarly publications in journals, papers, theses, and dissertations specifically focusing on issues of legal certainty, execution of property collateral, and the bankruptcy process in Indonesia.

#### **Tertiary Legal Materials**

Tertiary legal materials are sources of law that provide additional information, guidance, or clarification for primary and secondary legal materials. In this research, tertiary legal materials include legal dictionaries, encyclopedias, indexes, and online sources such as

online legal dictionaries and Wikipedia, which help clarify terms, concepts, and provide initial references on issues related to legal certainty in the execution rights of separative creditors.

### **Data Collection Tools**

The data collection tools in this research are adjusted to the nature of normative legal research, which emphasizes library research. Data is obtained through searching and reviewing primary, secondary, and tertiary legal materials. To obtain primary data, the researcher uses document study techniques on applicable regulations, court decisions, and related regulatory procedures regarding bankruptcy law and property security law. Secondary data is collected from literature such as textbooks, scholarly journals, previous research, theses, and dissertations discussing separative creditors and legal certainty in the execution of collateral in bankruptcy. Tertiary data is gathered from supporting sources such as legal dictionaries, encyclopedias, and online media that provide definitions or terminological guidance. All collected data is analyzed systematically to address the research problems and build comprehensive legal arguments.

### **Data Analysis**

The data analysis technique in this research uses qualitative analysis with a normative approach. All data obtained from primary, secondary, and tertiary materials are analyzed descriptively-analytically to explain the legal provisions governing the commencement of the execution rights of separative creditors over property collateral in the bankruptcy process. The analysis involves reviewing relevant regulations, doctrines, and court decisions, comparing them to find similarities, differences, and potential legal gaps. The findings are then interpreted based on legal principles and legal theory to generate a systematic and structured argument.

## **RESULTS AND DISCUSSION**

### **Case Study: Supreme Court Decision No. 521 K/Pdt.Sus-Pailit/2021**

This case began with a legal relationship between PT. Sumber Electrindo Makmur (PT SEM) as the debtor and PT. Bank Mayapada Internasional Tbk (Bank Mayapada) as the creditor. In this credit relationship, PT SEM had obtained a credit facility from Bank Mayapada, secured by several assets, including land and buildings, such as one apartment unit and two plots of land with high economic value, namely:

1. One (1) unit of The Summit Kelapa Gading Residential Apartment based on the Certificate of Ownership of Apartment Unit No. 1067/Kelapa Gading Timur;
2. Two (2) plots of land and buildings based on the Building Use Rights Certificate No. 13/Waringinjaya and Building Use Rights Certificate No. 15/Waringinjaya.

As a form of collateral, PT SEM signed a mortgage agreement before a Land Deed Official (PPAT) to secure its credit with Bank Mayapada. With this mortgage right, Bank Mayapada holds the position of a separative creditor, who, according to the law, has the right to execute the collateral without being affected by the debtor's bankruptcy status.

However, after PT SEM defaulted on its obligations to Bank Muamalat, PT SEM was also declared bankrupt by the Central Jakarta Commercial Court Decision No. 102/Pdt.Sus-PKPU/2018/PN Niaga.Jkt.Pst., and all the debtor's assets were taken over by the Curator's team for settlement as part of the bankrupt estate. During the settlement process, the Curator included the assets that had been mortgaged to Bank Mayapada in the list of PT SEM's bankrupt estate.

Upon learning of this action, Bank Mayapada felt disadvantaged because the object of its mortgage was a tangible asset attached to the collateral object. Bank Mayapada argued

that the Curator's action of including the collateral assets in the bankrupt estate was contrary to both collateral law and bankruptcy law.

Bank Mayapada filed a Lawsuit against the Curator of PT. SEM at the Commercial Court, registered under case No. 12/Pdt.Sus-Lawsuit/2020/PN Niaga.Jkt.Pst in conjunction with No. 102/Pdt.Sus-PKPU/2018/PN Niaga.Jkt.Pst. In the lawsuit, Bank Mayapada stated that the following assets:

1. One (1) unit of The Summit Kelapa Gading Residential Apartment based on the Certificate of Ownership of Apartment Unit No. 1067/VI/EVEREST/Kelapa Gading Timur;
2. Two (2) plots of land and buildings based on Building Use Rights Certificates No. 13/Waringinjaya and No. 15/Waringinjaya.

Are Property Collateral owned by Bank Mayapada as a Separative Creditor and not part of the bankrupt estate. Therefore, Bank Mayapada requested the Court to order the Curator to remove the assets from the list of PT. SEM's bankrupt estate. Bank Mayapada also argued that, in accordance with Article 56 of Law No. 37 of 2004 on Bankruptcy and Suspension of Debt Payment Obligations, the execution rights of separative creditors could only be delayed for a maximum of 90 days after the debtor was declared bankrupt, and after this period, the creditor has the right to continue the execution process. Therefore, Bank Mayapada considered the Curator's action of withholding the assets to be in violation of the law.

Furthermore, Bank Mayapada argued that the results of the auction, which had been legally conducted, should not be canceled or claimed by the Curator, because the mortgage right grants a direct execution right (*parate executie*) that can be carried out without a court decision, as regulated in Article 6 of Law No. 4 of 1996 on Mortgage (UUHT).

In the context of bankruptcy law, the Curator's action of taking control of the mortgage object could be categorized as a violation of Article 69 paragraph (1) of Law No. 37 of 2004 on Bankruptcy and Suspension of Debt Payment Obligations, which stipulates that the Curator is only authorized to manage and settle the debtor's bankrupt assets, not assets belonging to third parties or items that are already encumbered with property rights. Based on this, Bank Mayapada argued that the Curator had acted beyond their authority and violated the legal rights of the separative creditor. Therefore, Bank Mayapada requested the Central Jakarta Commercial Court to declare that the assets mortgaged to Bank Mayapada are not part of PT. SEM's bankrupt estate.

Additionally, Bank Mayapada requested the Court to recognize and restore its *parate* execution rights, and to affirm that the entire proceeds from the auction of the collateral assets would belong to Bank Mayapada as the separative creditor with the right to priority. In its claims, Bank Mayapada also asked the Court to state that the Curator had committed an unlawful act (PMH) by obstructing the execution rights of the separative creditor, resulting in material losses for Bank Mayapada. Bank Mayapada also requested the Court to instruct the Curator to correct the Bankruptcy Asset Distribution List (DPHP) by removing all the collateral assets mortgaged to Bank Mayapada from the list and to declare that Bank Mayapada's mortgage rights remain valid and binding.

However, the decision of the Central Jakarta Commercial Court in case No. 12/Pdt.Sus-Lawsuit/2020/PN Niaga.Jkt.Pst in conjunction with No. 102/Pdt.Sus-PKPU/2018/PN Niaga.Jkt.Pst, dated December 3, 2020, ruled otherwise by rejecting the lawsuit filed by Bank Mayapada in its entirety, arguing that the Curator's actions were still within their authority according to Law No. 37 of 2004 on Bankruptcy and Suspension of Debt Payment Obligations, and that the disputed assets were still under the control of the bankrupt debtor at the time of the bankruptcy declaration.

Dissatisfied with the outcome of the Commercial Court's decision, Bank Mayapada filed a cassation to the Supreme Court of Indonesia. In the cassation stage, the Supreme Court

ruled differently, overturning the decision of the Central Jakarta Commercial Court and granting Bank Mayapada's request. In Supreme Court Decision No. 521 K/Pdt.Sus-Pailit/2021, the Supreme Court emphasized that assets mortgaged to a separative creditor cannot be included in the bankrupt estate, and the Curator does not have the authority to seize them.

The Cassation Panel of Judges disagreed (dissenting opinion) with the Commercial Court's decision in Central Jakarta for the following reasons:

1. Bank Mayapada, as the Separative Creditor of the Bankrupt Debtor (PT. SEM), is entitled to auction the mortgaged collateral securing its debt, as after the debtor PT. SEM was declared bankrupt and insolvency occurred, Bank Mayapada, as per Article 55 paragraph (1), must exercise its rights within two (2) months after insolvency begins as referred to in Article 178 paragraph (1) of Law No. 37 of 2004 on Bankruptcy and Suspension of Debt Payment Obligations.
2. Based on the Minutes of Meeting No. 102/Pdt.Sus PKPU/2018/PN.Niaga.Jkt.Pst dated May 14, 2019, the Debtor was declared insolvent.
3. Based on the explanation of Article 59 paragraph (1) of Law No. 37 of 2004, the Cassation Panel interpreted that the term "must exercise its rights" means that the creditor has already started to exercise its rights. Evidence P-9 showed that Bank Mayapada began exercising its rights on May 15, 2019, by submitting the Auction Request Letter No. 084/RC/SRT/V/2019, which was scheduled for auction by the State Treasury and Auction Office Jakarta II according to Auction Determination Letter No. S 1495/WKN.07/KNL.02/2019 dated July 14, 2019. Therefore, the Supreme Court interpreted that the two-month period after insolvency meant that Bank Mayapada had already begun the auction process within the stipulated timeframe, and the auction conducted by the auction office on behalf of Bank Mayapada was valid. This provided sufficient reason for the Supreme Court to overturn the Commercial Court's decision.

Thus, based on Supreme Court Decision No. 521 K/Pdt.Sus-Pailit/2021 dated May 4, 2021, the Supreme Court declared that Bank Mayapada is entitled to execute the collateral based on Law No. 37 of 2004 on Bankruptcy and Suspension of Debt Payment Obligations, and ordered the Curator of PT SEM to remove the assets from the bankrupt estate list. This decision affirmed the principle of legal certainty and the protection of separative creditors' rights, while also clarifying the Curator's authority limits in the bankruptcy estate settlement process under Indonesian bankruptcy law.

### **Case Study: Supreme Court Decision No. 527 K/Pdt.Sus-Pailit/2020**

This dispute originated from the position of PT. Bank Perkreditan Rakyat Lestari Bali (hereinafter referred to as BPR Lestari Bali) as a separative creditor, specifically a creditor holding a property collateral right over the assets of debtor HD. The legal position as a separative creditor grants the bank a privilege (priority right) to execute the collateral independently, without waiting for the completion of the bankruptcy process. However, the execution process conducted by KPKNL Bali was delayed due to a request for postponement from the Curator of HD (In Bankruptcy).

In the bankruptcy case of Hadiono (HD), assets that had been mortgaged to BPR Lestari Bali as collateral for the loan were included by the Curator of HD (In Bankruptcy) in the bankrupt estate, which is the collection of assets used to settle all debts owed to creditors. BPR Lestari Bali considered this policy to be contrary to the priority right of separative creditors as stipulated in Article 55 paragraph (1) of Law No. 37 of 2004 on Bankruptcy and Suspension of Debt Payment Obligations (UU Kepailitan).

According to Article 55 of the Bankruptcy Law, separative creditors have the right to execute their collateral as if bankruptcy had not occurred. However, the Curator's action of

including the collateral assets in the bankrupt estate was considered by BPR Lestari Bali to limit its execution rights, which adversely affected its position as a separative creditor. The mortgaged collateral objects pledged by debtor HD (In Bankruptcy) to BPR Lestari Bali were as follows:

1. One (1) plot of land and building with SHM No. 589 on behalf of Handiono, area: 2520 m<sup>2</sup>, Survey Certificate No. 01887/MENGWITANI/2012 dated 26-09-2012, located in Mengwitani Village, Mengwi Subdistrict, Badung Regency, Bali, known as Jalan Bukit Tinggi No. 8;
- a. Property collateral via fiduciary security including:
  - a. One (1) unit of 4-wheeled vehicle (car) Toyota/Dyna with BPKB No: E 1354502-O;
  - b. One (1) unit of 4-wheeled vehicle (car) Mitsubishi/L 300 with BPKB No: R 18822/II-O (D 3148822 O);
  - c. One (1) unit of 4-wheeled vehicle (car) Mitsubishi/L 300 with BPKB No: D 6551591-O;
  - d. One (1) unit of 4-wheeled vehicle (car) Isuzu/NHR 55 with BPKB No: C 1308806-O;
  - e. One (1) unit of 4-wheeled vehicle (car) Isuzu/NHR 55 with BPKB No: A 7571746-O.

All collateral objects were held by BPR Lestari Bali for asset sale by KPKNL Bali, but during the execution auction, a delay order was issued by the Curator of HD.

As a result of this action, BPR Lestari Bali filed a Lawsuit under case No. 11/Pdt.Sus-G.Lain-lain/2019/PN Niaga Sby in conjunction with No. 13/Pdt.Sus/Pailit/2018/PN Niaga Sby. In the lawsuit, BPR Lestari Bali explained that the assets pledged had been validly secured with a mortgage through an authentic deed, giving it legal force as collateral for the loan. Therefore, these assets no longer belonged entirely to the bankrupt debtor, but rather became collateral subject to the provisions of mortgage and fiduciary security laws, which have an execution right. Furthermore, BPR Lestari Bali argued that the Curator's action of requesting a postponement of the auction for these assets without involving the separative creditor was inconsistent with the principle of caution and had caused harm to the bank. Therefore, in its petition, BPR Lestari Bali requested the Commercial Court to instruct KPKNL Bali to cancel the auction schedule for the said assets. Additionally, the plaintiff requested that the court grant full authority to BPR Lestari Bali to execute the collateral in accordance with its rights as a separative creditor under property security law.

However, the Surabaya Commercial Court, in its decision for the Lawsuit No. 11/Pdt.Sus-G.Lain-lain/2019/PN Niaga Sby, rejected the entire claim of BPR Lestari Bali and stated that the Curator of HD could not be classified as committing an unlawful act, as it was done in the course of fulfilling administrative bankruptcy duties. Therefore, the lawsuit filed by BPR Lestari Bali was deemed groundless.

Subsequently, BPR Lestari Bali filed a cassation request to the Supreme Court of the Republic of Indonesia in Case No. 527 K/Pdt.Sus-Pailit/2020. The Supreme Court upheld the Surabaya Commercial Court's decision, confirming that the execution of the disputed collateral by the Bali State Property and Auction Office (KPKNL Bali) as requested by BPR Lestari Bali was still under a "stay" period as referred to in Article 56 paragraph (1) and had not yet entered insolvency status as per Article 57 paragraph (1) and Article 178 paragraph (1) of the Bankruptcy Law. Therefore, the Curator's action to request the postponement of the auction was not deemed an unlawful act, and the Supervisory Judge's Decree No. 13/Pdt.Sus-Pailit/2018/PN Niaga. Sby., dated January 24, 2019, was deemed valid and binding.

In its ruling, the Supreme Court in Decision No. 527 K/Pdt.Sus-Pailit/2020, dated June 9, 2020, rejected BPR Lestari Bali's cassation request, represented by Pribadi Nudiono, stating that the case filed did not contradict the law and/or regulations.

## **Case Study: Constitutional Court Decision on the Rights of Separative Creditors in Bankruptcy**

A material review petition in case No. 015/PUU-III/2005 was filed by Tommi S. Siregar, SH., LLM, challenging several provisions in Law No. 37 of 2004 on Bankruptcy and Suspension of Debt Payment Obligations (UU Kepailitan). The main issue raised was the responsibility of the Curator for losses caused by errors or negligence in managing and/or settling the bankrupt estate.

The petition focused on objections to the provisions in Articles 69 paragraph (3) and 72 of Law No. 37 of 2004, claiming that these provisions were in conflict with Articles 27 paragraph (1) and 28D paragraph (1) of the 1945 Constitution, particularly regarding the rights of separative creditors. The petitioners argued that the Curator should not block the execution rights of separative creditors without legal basis, and that separative creditors' rights must be protected against any overreach by the Curator. Separative creditors, as holders of property collateral rights (such as mortgages, pledges, fiduciary rights, or liens), have an execution right guaranteed by Article 55 of Law No. 37 of 2004. However, in practice, this right is often hindered by actions of the Curator in managing the bankrupt estate.

The petitioner argued that the lack of clear limitations on the Curator's authority led to a risk of abuse of power, allowing the Curator to obstruct or delay the execution rights of separative creditors under the guise of managing the bankrupt estate. The petitioners also noted that the supervision of the Curator by the Supervisory Judge was ineffective, disrupting the separative creditors' rights to receive payment from the collateral they held, which violated the principle of justice.

The Constitutional Court, in its deliberation, held that while the Curator has broad authority, this authority is not absolute as it is limited and monitored by the Supervisory Judge and can be held accountable. The Court affirmed that separative creditors still have legal protection and that their execution rights over property collateral do not disappear due to the debtor's bankruptcy, but are only temporarily suspended according to Article 56 paragraph (1) of the Bankruptcy Law. The temporary suspension of the execution right is considered rational and proportional, as it aims to maintain equality among creditors and ensure that the bankruptcy estate is settled orderly under judicial supervision.

The Court also emphasized that legal protection for separative creditors is guaranteed under Articles 55 and 56 of the Bankruptcy Law, and thus there is no violation of the principle of legal certainty as guaranteed by the Constitution.

However, in its ruling in Decision No. 67/PUU-XI/2013, the Constitutional Court held that workers' wages take precedence over the rights of separative creditors in terms of priority in bankruptcy payments. This decision arose from a review of the constitutionality of Article 95 paragraph (4) of Law No. 13 of 2003 on Manpower, particularly the phrase "except claims from separative creditors." Prior to this ruling, separative creditors such as banks or financial institutions holding property collateral rights had a preference for executing their collateral before workers' claims.

In its ruling, the Constitutional Court removed the phrase "except claims from separative creditors" in Article 95 paragraph (4) of Law No. 13 of 2003 on Manpower, which previously placed workers below separative creditors in terms of payment priority. By removing this phrase, the Court reaffirmed that workers' wages must be paid first before claims from separative creditors, including those holding mortgages, liens, or fiduciary security.

## **Legal Certainty Regarding Execution Rights by Separative Creditors Based on Supreme Court Decisions No. 521 K/Pdt.Sus-Pailit/2021 and No. 527 K/Pdt.Sus-Pailit/2020**

A Separative Creditor is a term used in the Bankruptcy Law to describe the rights held by creditors over the debtor's assets once the debtor is declared bankrupt through a Commercial Court decision. As defined in the Bankruptcy Law, a Separative Creditor is a creditor who holds a collateral security to guarantee the repayment of a debt owed by the debtor. According to Article 2 paragraph (1) of the Bankruptcy Law, "The term 'Creditor' includes concurrent creditors, separative creditors, and preferred creditors. Regarding separative and preferred creditors, they have the right to apply for a bankruptcy declaration without losing their collateral rights over the debtor's assets and their priority rights."

In Indonesia's civil law system, a separative creditor is one who holds collateral such as mortgages, liens, or fiduciary rights, which gives them a privileged position regarding the debtor's assets. This privileged position is known as the right of preference (right to be paid first). Separative creditors have the right to execute the collateral they hold without waiting for the completion of the bankruptcy process managed by the Curator.

The Bankruptcy Law allows separative creditors to sell the collateral assets independently, as if bankruptcy had not occurred. The proceeds from the sale are used to pay off the creditor's debt, and any excess is given to the Curator as part of the bankrupt estate. If the sale does not cover the full debt, the creditor becomes a concurrent creditor for the remaining unpaid debt.

The principle of preference in property security law provides strong legal protection for separative creditors, ensuring that they are paid from the sale of the collateral before other creditors. This is emphasized in Articles 1131 and 1132 of the Civil Code (KUHPer), which state that all the debtor's assets are secured against the debt, except for privileged rights that give higher priority to certain creditors. Therefore, the position of separative creditors is an exception to the principle of *pari passu pro rata parte*, which applies to concurrent creditors.

The rights of separative creditors are not only regulated in the Bankruptcy Law (Law No. 37 of 2004) but also in other laws that were enacted earlier, such as Law No. 4 of 1996 on Mortgage and Law No. 42 of 1999 on Fiduciary Security. These laws establish that separative creditors, such as those holding mortgages or fiduciary rights, retain the right to execute their collateral despite the debtor's bankruptcy status.

In conclusion, separative creditors have the right to execute collateral independently (*parate executie*), without requiring court approval or Curator's consent, and the sale proceeds are used to settle the creditor's debt first. This ensures that their rights are upheld even in bankruptcy, emphasizing the principle that property rights remain effective and are not nullified by the debtor's bankruptcy.

The Supreme Court decision in Case No. 521 K/Pdt.Sus-Pailit/2021 clarified the issue of separative creditors' rights, stating that Bank Mayapada, as a separative creditor, had the right to execute its collateral despite the debtor's bankruptcy status. The decision reinforced the principle of legal certainty and protection for separative creditors, ensuring that their rights are protected even when a debtor is declared insolvent. This ruling overturned the lower court's decision and affirmed the separative creditor's priority in executing the collateral.

This case demonstrates the legal conflict between the Bankruptcy Law's provisions and the rights of separative creditors, particularly in cases where the execution right is delayed due to bankruptcy procedures. The Supreme Court's ruling ensures that separative creditors retain their right to execute collateral without being hindered by the bankruptcy process, reinforcing their privileged position in the legal framework.

## CONCLUSION

Legal certainty regarding the rights of Separative Creditors in Supreme Court Decision No. 521 K/Pdt.Sus-Pailit/2021 shows that the Supreme Court has provided an interpretation to fill the legal gap regarding the deadline for Separative Creditors to exercise their right to sell collateral after the Debtor is declared insolvent. The Court determined that the two-month period starts when the Separative Creditor initiates the execution process by submitting an auction request to the State Property and Auction Office (KPKNL). The Supreme Court held that the phrase "must exercise its rights" should be understood as the creditor's actual action to begin the execution process, not the completion of the entire auction process.

Furthermore, legal certainty regarding the rights of Separative Creditors in Supreme Court Decision No. 527 K/Pdt.Sus-Pailit/2020 essentially reaffirms that the execution rights of Separative Creditors to sell their collateral as if bankruptcy had not occurred are still protected by law. However, the rights of Separative Creditors are not absolute because they are limited by a 90-day postponement period, as regulated in Law No. 37 of 2004 on Bankruptcy and Suspension of Debt Payment Obligations. The Curator's action of postponing the auction of the bankrupt debtor's collateral, which was pledged by the Separative Creditor, is not considered an unlawful act, as the bankruptcy process had not yet reached the insolvency stage when the auction was postponed. Therefore, the Separative Creditor's execution rights were temporarily suspended.

## REFERENCE

- Acep Rohendi. "Upaya Pemegang Hak Tanggungan Mengantisipasi Hapusnya Hak Atas Tanah Sebagai Obyek Hak Tanggungan". *Ecodemica*. Vol. III No. 1 (April 2015).
- Dedy Tri Hartono. "Perlindungan Hukum Kreditor Berdasarkan Undang-Undang Kepailitan". *Jurnal Ilmu Hukum Legal Opinion*. edisi I. Vol. 4 (2016).
- Dilva Muzdaliva Sawotong. "Jaminan Kebendaan Pada PT. Pegadaian Terhadap Barang Yang Digadaikan". *Lex Privatum*. Vol II No. 1 (Januari-Maret 2014).
- Depri Liber Sonata. "Permasalahan Pelaksanaan Lelang Eksekusi Putusan Perkara Perdata Dalam Praktik". *Fiat Justitia Jurnal Ilmu Hukum*. Vol. 2 No. 2 (Mei-Agustus 2012).
- Radjaguguk. Erman. "Peranan Hukum Dalam Pembangunan Pada Era Globalisasi." *Jurnal Hukum* 2. no. 6 (2017).
- Putri. Indri Adelia. "Perlindungan Hukum Bagi Kreditor Separatis Dalam Pembagian dan Pembersihan Harta Pailit." *Jaksa: Jurnal Kajian Ilmu Hukum dan Politik* 2. no. 2 (April 2024).
- Putriyanti dan Wijayanta. "Kajian Hukum Tentang Penerapan Pembuktian Sederhana Dalam Kepailitan". *Mimbar Hukum*. Vol. 22 No. 3. (Oktober. 2010).
- Moh. Novri Patamangi. "Tinjauan Hukum Tentang Parate Eksekusi Hak Tanggungan Bank (Studi PT. Bank Rakyat Indonesia (Persero) Cabang Palu)". *Jurnal Ilmu Hukum Legal Opinion*. Edisi 2 Vol. 3 (2015).
- Nasution. M. Irsan. "Peranan Hukum Dalam Pembangunan Ekonomi: Perspektif Penyelesaian Sengketa Melalui Peradilan Niaga." *Adliya Jurnal Hukum dan Kemanusiaan* 10. no. 1 (Juni 2016).
- Niken Prasetyawati dan Tony Hanoraga. Niken Prasetyawati dan Tony Hanogara. "Jaminan Kebendaan dan Jaminan Perorangan Sebagai Upaya Perlindungan Hukum Bagi Pemilik Piutang". *Jurnal Sosial Humaniora*. Vol. 8 No. 1 (Juni 2015).
- Nur Adi Kumaladewi. "Eksekusi Kendaraan Bermotor Sebagai Jaminan Fidusia Yang Berada Pada Pihak Ketiga". *Jurnal Repertorium*. Vol. II No. 2 (Juli-Desember 2015).
- Anita. Niru. dan Nunuk Sulisrudatin. "Hukum Kepailitan dan Permasalahannya di Indonesia." *Jurnal Ilmiah Hukum Dirgantara* 7. No. 1 (September 2016).

- Satijpto Rahardjo. "Penyelenggaraan Keadilan Dalam Masyarakat Yang Sedang Berubah". *Jurnal Masalah-Masalah Hukum*. 1993.
- Sri Redjeki Hartono. "Analisis Terhadap Peraturan Kepailitan dalam Kerangka Pembangunan Hukum". *Makalah Seminar Nasional dan Lokakarya Restrukturisasi Organisasi Bisnis Melalui Hukum Kepailitan*. (Semarang: FH UNDIP – Elips Project. 2007).
- Sulfandi Kandou. "Tinjauan Yuridis Jaminan Hipotik Kapal Laut dan Akibat Hukumnya". *Jurnal Lex Crimen*. Vol. V. No. 4. April-Juni 2006.
- Sunarmi. "Konsep Utang Dalam Hukum Kepailitan Dikaitkan Dengan Pembuktian Sederhana (Studi Putusan No: 04/Pdt.Sus.Pailit/2015/Pn.Niaga.Jkt.Pst)". *USU Law Journal*. Vol. 4 No. 4 (2016).
- Sri Ahyani. "Perlindungan Hukum Bagi Kreditor Melalui Perjanjian Jaminan Fidusia". *Jurnal Wawasan Hukum*. Vol. 24 No. 1. Februari.
- Lusia Sulastri. "Konstruksi Perlindungan Hukum Debitur Dalam Penyelesaian Kredit Bermasalah Dengan Pelaksanaan Lelang Jaminan Hak Tanggungan". *Jurnal Pembaharuan Hukum*. Vol. II No. 1 (Januari-April 2015).
- Vivi Lia Falini Tanjung. "Implementasi Asas-Asas Hukum Kebendaan Dalam Undang-Undang Nomor 42 Tahun 1999 Tentang Jaminan Fidusia". *De Lega Lata*. Vol. 2 No. 1 (Januari-Juni 2017).
- Wahyu Pratama. "Tinjauan Umum Tentang Sertifikat Hak Tanggungan Menurut Undang-Undang Nomor 4 Tahun 1996". *Jurnal Ilmu Hukum Legal Opinion*. Vol. 3 No. 6 (2015).
- Yunita Krysna Valayvi. "Jaminan Hak Tanggungan Atas Tanah Milik Pihak Ketiga Dalam Perjanjian Kredit di Lembaga Keuangan: Perbankan Berdasarkan Undang-Undang Nomor 4 Tahun 1996 Tentang Hak Tanggungan". *Privat Law*. Vol. IV No. 2 (Juli-Desember).
- Yunita Kadir. "Pembuktian Sederhana Dalam Kepailitan". *Jurnal Ilmiah Mahasiswa Universitas Surabaya*. Vol. 3 No. 1 (2014).
- Abdul Aziz, Nasihuddin, et al. *Teori Hukum Pancasila*. Tasikmalaya: Elvaretta Buana. 2024.
- Abdul Ghofur, Ansori. *Perbankan Syariah di Indonesia*. Yogyakarta: Gadjah Mada University Press. 2007.
- Abdulkadir Muhammad. *Hukum Perdata Indonesia*. Bandung: Citra Aditya Bakti. 2010.
- Adrian Sutedi. *Hukum Hak Tanggungan*. Jakarta; Sinar Grafika. 2012.
- Adrianus, Meliala. *Praktik Bisnis Curang*. Jakarta: Pustaka Sinar Harapan. 2006.
- Ahmad Yani & Gunawan Widjaja. *Seri Hukum Bisnis Kepailitan*. (Jakarta: PT. Raja Grafindo Persada. 2000).
- Ahmadi Miru dan Sutarman Yodo. *Hukum Perlindungan Konsumen*. (Jakarta: Raja Grafindo. 2015).
- Achmad Ali. *Menguak Tabir Hukum (Suatu Kajian Filosofis dan Sosiologis)*. Jakarta: Toko Gunung Agung. 2002.
- Ali, Achmad. *Menguak Teori Hukum (Legal Theory) & Teori Peradilan (Judicialprudence) Termasuk Undang-Undang (Legisprudence). Volume I: Pemahaman Awal*. Jakarta: Kencana Prenada Media Group. 2010.