

Adjustment/Equalizing Seizure As A Solution To The Filing Of Security Seizure On Objects Encumbered With Mortgage Rights

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Abstract

The creditor holding a mortgage has a prioritized position as stated in Law No. 4 of 1996 about Mortgage Rights on Land and Objects Related to Land. Issues may arise when the court grants a request for a security seizure on an object currently encumbered with a mortgage, as this could lead to overlapping rights over the same immovable property. Normative legal research is the method employed in this study, utilizing a statutory and case-based approach. The findings indicate that seizure cannot be applied to land rights encumbered with a mortgage; instead, only Adjustment/Equality Seizure can be imposed. Although a security seizure was initially requested on the mortgaged object, the court may automatically grant the request as an Adjustment/Equality Seizure. The creditor holding the mortgage retains a superior position compared to the holder of the Adjustment/Equality Seizure.

Keywords: *Mortgage Rights, Security Seizure, Adjustment/Equalizing Seizure*

INTRODUCTION

In fulfilling their needs, individuals and/or legal entities as legal subjects engage in legal acts, which result in the parties involved having rights and obligations to fulfil (Soeroso, 2011). One form of legal act is debt and credit transactions. To ensure the fulfillment of rights and obligations within such transactions, collateral is required. Collateral serves the function of guaranteeing the repayment of debt, there by providing protection for the creditor, ensuring certainty of repayment from the debtor (Hanoraga & Prasetyawati, 2015). In cases of default by the debtor, the existence of collateral allows the creditor to execute it to reclaim their rights.

The presence of security rights in legal regulations is intended to give priority to some creditors over others. This is consistent with the purpose of mortgage rights as stated in the Mortgage Law (Law No. 4 of 1996 concerning Mortgage Rights on Land and Objects Related to Land) hereinafter referred to as the Mortgage Law or UUHT (Sjahdeni, 1999b). Article 1, paragraph (1) of Law No. 4 of 1996 (hereinafter referred to as the Mortgage Law or UUHT) provides a definition stating that, essentially, a mortgage right is a security right imposed on

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land rights, which can be charged either together with any structures attached to the land or on the land alone. The mortgage right is intended to secure the repayment of debt, granting the holder of the mortgage right a prioritized position. When compared to the definition of *Hypothek* as defined in Article 1162 Indonesian Civil Code (KUHPer), the mortgage rights in the Mortgage Law explicitly grants creditors holding mortgage rights a prioritized position above other creditors.

The emergence of the Mortgage Law marks the completion of the unification of national land law, which is one of the primary objectives of Law No. 5 of 1960 about the Basic Agrarian Law. Furthermore, Mortgage Law resolves issues within the provisions of the *Hypothek*, which were inconsistent with the national land law principles and were unable to address the developments in the fields of credit and security rights arising from economic advancements (Sjahdeni, 1999b). The ability of the Mortgage Law to adapt to developments in credit is demonstrated by data from the Ministry of Agrarian (ATR/BPN) showing that national bank financing secured with mortgage rights reaches nearly 900 to 1000 trillion rupiah annually. From a service perspective at the Land Office, mortgage-related requests constitute the highest category, comprising nearly 40% of all applications received.

Nevertheless, in practice, various issues persist regarding the implementation of mortgage rights. One such issue involves court-imposed security seizures on objects encumbered with mortgage rights (Asril, 2020). Essentially, a seizure is an act of forcibly placing the defendant's assets under judicial custody based on a court order. The seized assets may include disputed items or items intended for repayment of the debtor's or defendant's debt through public auction (*executorial verkoop*) (Harahap, 2016). The purpose of seizure is to prevent the defendant's assets from being transferred to third parties, ensuring that, once the court decision gains legal certainty, the assets remain intact and can serve as security for the enforcement of the decision. This prevents the plaintiff's claim from becoming illusory or futile. There is no prohibition against plaintiffs requesting a seizure order from the court for assets encumbered with mortgage rights, as such requests are recognized under Article 227, paragraph (1) Indonesian Civil Procedural Code (HIR). However, issues emerged when the court grants a security seizure on an object encumbered with mortgage rights. This decision creates uncertainty about who holds the rightful claim to the same object: the plaintiff, as the applicant for the security seizure with rights under Article 227, paragraph (1) of the HIR, or the mortgagee creditor, as a separatist creditor with preferential rights under the Mortgage Law.

A court-approved security seizure on an object encumbered with mortgage rights has occurred in Indonesia. In the case 321/Pdt.G/2012/PN.Jak.Tim, The Plaintiff, W. Surungan sued A. Budiman the Defendant for breach of contract due to unpaid debts and sought a security seizure on land and a building located at Jl. Tawes No. 8, RT. 002 RW. 010, Block W.1 Kav. No: 1540, Jati Village, Pulo Gadung Subdistrict, East Jakarta. The land title was registered under Vera Meliana Sibarani (the Defendant's wife) with Certificate of Ownership No. 02442. However, the land was already encumbered with a First-Rank Mortgage Right recorded in Mortgage Certificate No. 226/2013 dated January 22, 2013, in conjunction with the Deed of Mortgage Rights Granting (APHT) No. 73/2012 dated August 1, 2012, drafted and executed before Muhammad Nahi Mungkar, SH., for and on behalf of PT Bank Mega Tbk. On June 10, 2013, the East Jakarta District Court Panel of Judges ruled that the security seizure on the land

was valid and enforceable (Hadisantoso, 2018a). This decision doesn't align with the Supreme Court Decision No. 394K/Pdt/1984, which mentioned that assets already pledged as credit collateral to a creditor cannot be subjected to a security seizure.

There is also a common misinterpretation where judges often assume that seizure cannot be imposed on assets used as loan collateral or encumbered with mortgage rights. As a result, when disputes involve requests for seizure of such assets, judges typically reject these requests (Salam, 2017). However, according to Supreme Court Decision No. 394K/Pdt/1984, the type of seizure that cannot be imposed on collateralized assets is a security seizure. This implies that another type of seizure, namely adjustment/equality seizure, as regulated in Article 463 of the Rv (Reglement op de Rechtsvordering), may still be permissible for objects encumbered with mortgage rights.

This misunderstanding hinders plaintiffs from securing their rights in legal disputes and, at the same time, creates insecurity for separatist creditors who have prioritized claims over the collateral. In light of this issue, the author proposes a study titled "Adjustment/Equality Seizure as a Solution for Security Seizure Requests on Objects Encumbered with Mortgage Rights" to examine the proper legal implications at the normative level when plaintiffs request security seizure on objects under mortgage. The study aims to serve as a reference and raise awareness among legal practitioners and litigants about their rights to ensure the enforcement of court decisions through seizure requests, even when the seized object is under another party's collateral. Additionally, it seeks to provide valuable knowledge to creditors holding mortgage rights, particularly regarding their legal standing when their collateralized assets are subject to seizure requests.

RESEARCH METHOD

This study employs a normative legal research method, utilizing both a legislation approach and a case-based approach. The legislation approach entails an analysis of all relevant applicable laws and regulations to the legal matters being examined (Muhaimin, 2020). This study relies on secondary data obtained from books, opinions of legal experts, research findings, jurisprudence, and other related sources. This research employed the library research method for the data collection technique. Library research refers to a systematic activity involving methods for collecting data from literary sources, reading, taking notes, and processing research materials. This method ensures a thorough examination of relevant legal principles and precedents to support the analysis and conclusions of the study.

DISCUSS AND ANALYSIS

Adjustment/Equality Seizure as a Solution For Security Seizure Requests On Objects Encumbered With Mortgage Rights

In cases where the collateral object is land rights together with objects associated to the land, the type of security right granted is a mortgage right. Article 1, paragraph (1) of Law No. 4 of 1996 (hereinafter referred to as the Mortgage Law or UUHT) provides a definition stating that, essentially, a mortgage right is a security right imposed on land rights, which can be charged either together with any structures attached to the land or on the land alone. The mortgage right is intended to secure the repayment of debt, granting the holder of the mortgage right a prioritized position (Hak Tanggungan Atas Tanah Beserta Benda-Benda Yang Berkaitan

Dengan Tanah, 1996). Based on the definition, there are several key elements of the mortgage right. These elements are a security right for debt repayment, the object is the land rights, can be imposed wither on the land alone or the land with objects that form a unity with the land, the debt guaranteed has to be a specific debt, grants a prioritized position for the mortgage rights holder.

Mortgage rights can only be granted if there is already an agreement underlying them. This is consistent with the accessory nature of the mortgage rights, meaning the granting of a mortgage right is a complement to the principal agreement that defines the debt credit relation, where the debt is secured using the mortgage right. In other words, the agreement to grant mortgage rights cannot stand alone but will only exist when a principal agreement is already in place. The principal debt agreement can be made either through an authentic deed or a private deed, depending on the terms of the agreement. However, the agreement to grant mortgage rights must be executed through an authentic deed, specifically the Deed of Granting Mortgage Rights (APHT), which prepared by Land Deed Official (PPAT). Mortgage rights do not arise at the time of signing the APHT but will only be established when it is followed by registering the APHT with the Land Office within a period of seven working days after the signing of the APHT (Anugerah & Wibowo, 2023). Once the APHT is registered with the Land Office (BPN), the mortgage right is established and legally binding.

With mortgage right enactment, under the Mortgage Law the creditors who hold the mortgage right is granted a special privilege in the form of a prioritized position. Based on the Article 1, paragraph (1) of the Mortgage Law, the mortgage right ensures that certain creditors have priority over others. The "certain creditors" in this article refer to creditors who hold the mortgage right (Sjahdeni, 1999a). This priority position is known as the principle of *droit de preference*. This priority position for mortgage holders facilitates dispute resolution if the debtor defaults. The facilitation referred to is that the Mortgage Law grants the creditors who hold the mortgage right the authority to directly execute the mortgage object if the debtor fails to fulfill their obligations. This means that the mortgage holder is not required to obtain the debtor consent or a court decision or order to execute the mortgage object (Amnan, 2022). As referred to Article 6 of the Mortgage Law, mortgage holders can settle their debts by selling the mortgage object through a public auction. This is done by requesting the Head of the State Auction Office to carry out the auction of the mortgage object.

Under the Mortgage Law, it is that the holders of mortgage rights are granted a prioritized position. However, a complex situation may arise when, at the same time as the granting of mortgage rights, the debtor, who is the grantor of mortgage rights is involved in a legal dispute with a third party (with the debtor as the defendant). In such cases, the third party may request a security seizure (*conservatoir beslag*) on the mortgage object held by the creditor. Essentially, there is no prohibition against filing a request for security seizure on objects encumbered with mortgage rights. Moreover, requesting security seizure of the defendant's property is a lawful act based on Article 227, paragraph (1) of HIR. Security seizure is requested by the plaintiff to secure the enforcement of a court decision by executing the defendant's seized property to fulfill the plaintiff's claim. Once the defendant's property is seized, the legal consequence is that the defendant is prohibited to transfer its property to a third party until the court decision becomes final. If the defendant fails to comply with the decision, the debt

repayment and compensation will be forcibly collected from the seized property through a public auction (Amiliya, 2023).

According to Supreme Court Decision No. 394K/Pdt/1984, security seizure cannot be imposed on property already pledged as loan collateral. Such property may only be subjected to adjustment/equality seizure (*Vergelijkende Beslag*). Referring to Supreme Court Decision No. 1326 K/Sip/1981, if the property intended for security seizure has already been seized in another case, pledged to another party, or subjected to execution seizure, the District Court may only grant and execute adjustment/equality seizure by recording in the minutes that the property in question has already been seized or pledged to another party (Situmorang, 2016). *Vergelijkende Beslag*, or adjustment/equality seizure, literally means "seizure adjustment." M. Yahya Harahap, in his book "*Civil Procedure Law on Lawsuits, Trials, Seizures, Evidence, and Court Decisions*," explains that in addition to adjustment seizure, there is also a term for comparative seizure (Oktavira, 2023). Therefore, in this journal, the author uses the term adjustment/equality seizure. The definition of adjustment/equality seizure has been accommodated in Minister of Agrarian Affairs Regulation No. 13 of 2017 about Procedures for Blocking and Seizure, where Article 1, point 6 explains that adjustment seizure is a subsequent seizure request (second, third, etc.) aimed at adjusting to the previous seizure, provided that the seizure object is already explicitly pledged to another party.

The existence of adjustment/equality seizure is not regulated in the HIR or the Rechtsreglement Buitengewesten (RBg). However, to accommodate judicial practice needs and ensure legal certainty regarding seizures, Article 463 Rv can serve as the legal basis for implementing adjustment/equality seizure to avoid overlapping positions between the seizure applicant and the mortgage right holder. This aligns with Supreme Court Decision No. 1829 K/Pdt/1992, which essentially explains that in practice, the judiciary has applied *Vergelijkende Beslag* as regulated in Article 463 Rv as a procedural principle based on the doctrine of process doelmatigheid. Article 463 Rv stipulates that objects previously seized cannot be subjected to subsequent seizures. Although the initial context of this article concerned the seizure of movable property, over time, judicial practices have extended its application to immovable property. Regarding objects requested for seizure that are already encumbered with mortgage rights, Article 34 of Minister of Agrarian Affairs Regulation No. 13 of 2017 about Procedures for Blocking and Seizure provides clarification that seizure cannot be applied to land rights encumbered with mortgage rights. Instead, a record of adjustment/equality seizure may be made.

In practice, plaintiffs may not always be aware of the encumbrance status of immovable property they intend to request for seizure, resulting in the submission of security seizure requests for property that turns out to be pledged. This is because data on whether an object is encumbered with mortgage rights is held by the National Land Agency (BPN). However, even if the plaintiff initially requests a security seizure, referring to Article 463 Rv Jo. Article 34 of Minister of Agrarian Affairs Regulation No. 13 of 2017 about Procedures for Blocking and Seizure, adjustment/equality seizure may automatically be granted for immovable property initially requested for security seizure if the property is already pledged or has been previously seized in another case.

Case Analysis of the Approval of Seizure Applications on Objects Encumbered with Mortgage Rights

It has been established under Supreme Court Decision No. 394K/Pdt/1984 that security seizure cannot be imposed on assets that have already been pledged as collateral. However, in practice, the imposition of security seizure on objects encumbered with security rights (hak tanggungan) is still occasionally found. In Decision No. 321/Pdt.G/2012/PN.Jak.Tim, The Plaintiff, W. Surungan sued A. Budiman (the Defendant) on the grounds of default due to outstanding debts. The plaintiff requested the imposition of a security seizure on land and a building located at Jl. Tawes No. 8, RT. 002 RW. 010 Blok W.1 Kav. No. 1540, Kelurahan Jati, Kecamatan Pulo Gadung, East Jakarta, with a land ownership certificate (SHM) No. 02442 registered under Vera Meliana Sibarani (the Defendant's wife). It was later revealed that the land was already encumbered with a First-Rank Security Right as recorded in Security Right Certificate No. 226/2013 dated January 22, 2013, and based on the Deed of Granting of Security Rights (APHT) No. 73/2012 dated August 1, 2012, executed by Muhammad Nahi Mungkar, SH, for and on behalf of PT Bank Mega Tbk. On June 10, 2013, the East Jakarta District Court Panel of Judges ruled that the security seizure imposed on the land in question was valid and enforceable valid (Hadisantoso, 2018b).

Essentially, there is no prohibition against a plaintiff filing for security seizure of immovable property owned by the defendant, even if it is encumbered by mortgage rights. Referring to Supreme Court Decision No. 394K/Pdt/1984, the prohibition applies only to the imposition of such seizure, not to its application. Therefore, judges should not grant security seizure on property encumbered by mortgage rights. A decision that approves security seizure on such an object violates the principle of seizure and constitutes a legal error. The only type of seizure permitted on property encumbered by mortgage rights or other forms of collateral is an adjustment/equality seizure (Lin Winarni, 2021). Even if the plaintiff applies for security seizure, under Article 463 Rv in conjunction with Article 34 of the Regulation of the Minister of Agrarian Affairs and Spatial Planning/Head of the National Land Agency No. 13 of 2017 on Blocking and Seizure Procedures, the judge may only approve it in the form of an adjustment/equality seizure. This is because granting security seizure on property encumbered by mortgage rights creates overlapping claims between the seizure applicant and the holder of the mortgage rights.

Adjustment/equality seizure serves as a solution for plaintiffs to secure the enforcement of a court decision without interfering with the rights of the mortgage rights owner. This is because the creditor who own the mortgage rights retains a higher priority than the holder of the adjustment/equality seizure. M. Yahya Harahap states that the adjustment/equality seizure holder is secondary to that of the mortgage rights holder. Because the mortgage rights holder holds a superior position, the proceeds from the sale of the object are given priority to settle the claims of the creditor holding the mortgage rights (Winarni & Harjono, 2021). Only after the settlement of the mortgage rights claims is any surplus from the sale allocated to the adjustment/equality seizure holder. The adjustment/equality seizure holder is entitled to proceeds only when the sale amount exceeds the claims of the security rights holder. If the sale proceeds are sufficient only to settle the claims of the mortgage rights holder, the entire amount belongs to the mortgage rights holder. Therefore, implementing adjustment/equality seizure ensures protection and does not diminish the settlement rights of the security rights holder.

CLOSURE

Conclusion

Adjustment/equality seizure refers to the second, third, or subsequent seizure request that aims to align with the previous seizure, particularly when the seized object is demonstrably pledged or assigned to another party. Assets that have already been pledged as credit collateral cannot be subjected to a security seizure; therefore, adjustment/equality seizure serves as a solution for imposing a seizure on objects encumbered by a mortgage. Adjustment/equality seizure can be automatically granted by the judge, even if the initial seizure request was for a security seizure. Although adjustment/equality seizure may be imposed on objects encumbered by a mortgage, the mortgage holder retains a superior position compared to the holder of the adjustment/equality seizure.

Suggestion

Although there is precedent stating that objects under credit encumbrance cannot be subjected to attachment as collateral, in practice, the granting of security seizure on encumbered objects is still found. Judges should exercise greater caution in understanding the context of the applicable legal provisions to avoid violating the attachment process. Furthermore, in the context of civil procedural law, the legal basis for adjustment/equality seizure has not been explicitly regulated. Therefore, it is recommended that lawmakers create legislation at the level of statutory law to provide a clear legal basis for the imposition of adjustment/equality seizure, particularly in the context of civil procedural law.

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