

The Position of Debtor Legal Protection for Bankruptcy of Separatist Creditors

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Abstract. *The position of the debtor who is bankrupted by the preference rights of the creditor results in injustice, especially in terms of the legal protection of the debtor. The revision of Act No. 4 of 1998 to Act No. 37 of 2004 contained a conflict of norms in it. The purpose of this research is to analyze and find out: 1).Implementation of debtor legal protection against bankruptcy carried out by current separatist creditors. 2). Factors that affect the implementation of legal protection for debtors against bankruptcy carried out by separatist creditors. 3) Implementation of legal protection for debtors for bankruptcy carried out by separatist creditors. The approach method in this research was normative juridical. The data used was secondary data obtained through literature study, data analysis was carried out by analytical descriptive. The results of the research concluded: 1) The implementation of debtor legal protection for bankruptcy carried out by separatist creditors currently as intended by Article 55 and Article 56 of Act No. 37 of 2004 has not been fair to debtors, considering that the two articles are only based on the existence of debt from the debtor and related to the position of the solvent or insolvency based on the view of the creditor alone. This is clearly the case because Act No. 37 of 2004 does not adhere to a balance sheet test system where before being declared bankrupt it is necessary to test the condition of the debtor whether it is really insolvent or actually still solvent. 2) Factors influencing the implementation of debtor legal protection for bankruptcy carried out by separatist creditors are legal factors, namely the existence of provisions in Article 55 and Article 56 of Act No. 37 of 2004 which are unfair to debtors, legal implementation factors are in the form of a culture judges as mouthpieces of the law even though it is well known that the door to justice in bankruptcy cases is the judge's decision. 3) Implementation of debtor legal protection for bankruptcy carried out by separatist creditors which should be in order to realize protection for debtors related to the execution of parate by*

creditors, it is necessary to renew the concept of bankruptcy law in Indonesia.

Keywords: Creditor; Debtor; Protection; Separatist.

1. Introduction

The dynamic development of the economy has the impact that there is an increasing need for supporting facilities to support the pace of the economy in each transitional period along with the development of the banking economy which plays a role in economic development, the Indonesian people. The fact that the fast pace of the Indonesian economy is followed by the diverse number of businesses that are currently being established by several businessmen.¹

Receivables are a natural thing to do in business transactions both on a small to large scale to support business growth. In addition, receivables show the existence of an attachment relationship between the lender (creditor) and borrower (debtor). This is the creditor is the person who has the receivables. Creditors/persons can be natural persons or legal entities, Banks, Financing Institutions, Pawnshops or other Guarantee Institutions. Guarantees are broadly regulated in the laws and regulations of the Republic of Indonesia having the following principles for warehouse receipts:²

- Guarantee rights give priority to creditors holding collateral rights over other creditors.
- Guarantee rights are assessor rights to the main agreement guaranteed by the agreement. The guaranteed principal agreement is an agreement between creditors and debtors, meaning that when the main agreement ends, the guarantee rights agreement by law ends as well.
- The guarantee right gives a separatist right to the creditor holding the guarantee right. This means that the object that is encumbered with collateral rights is not a bankrupt property in the event that the debtor is declared bankrupt by the court.
- Security rights are material rights over real rights, meaning that the security rights will always be attached to the object or always follow the object to whoever the object changes ownership or *droit de suite*.
- The creditor holding the guarantee right has full authority to execute the security right. This means that the creditor holding the guarantee right is authorized to sell himself, either based on a court order or based on the power granted by law, the object that is burdened with

¹Dessy Andiyarningsih, Umar Ma'ruf, Pengalihan Hak Tanggungan Pada Perbankan Di Kabupaten Banjarnegara, *Jurnal Akta*, Vol 5 No. 1, 2018, Unissula, Semarang, p.1

²Andreas Albertus, 2010, *Hukum Fidusia*, Selaras, Malang, p. 32-33

the security right and takes the proceeds from the sale to pay off his debt to the debtor.

- Because it is a material right, the guarantee right applies to third parties, the publicity principle applies to the security right. This means that the security right must be registered at the security right registration office.

In order to protect the rights and obligations of each party (debtors and creditors), the Bankruptcy Law and PKPU were issued. The Bankruptcy Law and PKPU are amendments to Act No. 4 of 1998 concerning Stipulation of Government Regulations in Lieu of Act No. 1 of 1998 concerning Amendments to Laws concerning Bankruptcy into Laws. In Indonesia there was a monetary crisis in 1998, during the monetary crisis many companies were unable to meet debt payments. This has an impact on many companies going out of business. Therefore, the government revised Act No. 4 of 1998 to Act No. 37 of 2004.

The Bankruptcy Law and PKPU accommodate the model for solving problems that arise as a result of an agreement between accounts receivable and insolvency and/or postponement of debt payment obligations. Bankruptcy is carried out by means of general confiscation of all assets of the bankrupt Debtor whose management and settlement is carried out by the Curator under the supervision of the Supervisory Judge as regulated in the Act. A debtor can be declared bankrupt if the debtor has two or more creditors and does not pay off at least one receivable that has matured and can be collected (Article 2 paragraph (1) of the Bankruptcy Law and PKPU). Suspension of payment of receivables (PKPU) is concentrated on providing opportunities for debtors who at maturity have not been able to pay their receivables but may be able to pay the receivables at a later date. PKPU in other words is an alternative method given to debtors to ease the burden of paying their receivables to creditors with an extension for a certain period. Of course, the determination of the deadline for extending the payment of the receivables is based on the agreement of the two parties, namely the creditor and the debtor. This model is also known as the concept of debt restructuring.³

Another major problem today, can be seen in Article 2 (paragraph 1) of Act No. 37 of 2004 concerning irrational bankruptcy requirements because bankruptcy applications can be filed and a bankruptcy decision by the Commercial Court can be imposed on debtors who are still solvent, (namely debtors whose total assets are greater than the total amount of their receivables), with such bankruptcy conditions, it is very difficult to achieve legal certainty and the objective of

³Binov Handitya, Redesign The Relevance Of Justice In Debtor Protection Related To Parate Executions Performed By Separate Creditors In Liability Agreements, *Jurnal Akta*, Volume 8 No. 4, December 2021;

implementing Bankruptcy Law fairly. In addition, Act No. 37 of 2004 pays more attention to and protects the interests of bankrupt creditors than the interests of bankrupt debtors which should also be protected.⁴

2. Research Methods

The approach method used in this research was a normative juridical approach. The data used was secondary data obtained by reviewing the literature (study document). The data that had been collected both from field research and library research were analyzed using qualitative analysis methods.

3. Results and Discussion

3.1. Implementation of Debtor Legal Protection for Bankruptcy Performed by Current Separatist Creditors

Bankruptcy law is the answer to the problem of financial difficulties experienced by debtors. This financial difficulty is not merely an economic problem, but is also a moral, political, individual and social problem that affects the parties related to the financial difficulty.⁵ Implementation of the Bankruptcy Law but has not provided protection to debtors, because:

- The requirements for requesting a declaration of bankruptcy make it easier for a debtor to be declared bankrupt, even though the debtor is actually in a solvent state.

This happens because the Indonesian Bankruptcy Law is not based on a philosophy that protects the interests of solvent debtors but is experiencing financial difficulties to continue to run its business activities.⁶ In making a statutory product such as the Bankruptcy Law, it must consider the impact of a bankruptcy declaration decision on the wider community. The Bankruptcy Act can be a tool for social, political, and economic policy and not only as a simple tool to solve debt and credit problems between debtors and creditors and to distribute bankruptcy assets to creditors. The various interests that exist in society, the interests of debtors and creditors in bankruptcy cases should be

⁴<https://www.Hukumonline.com/Pusatdata/detail/320/node/19/undangundang-nomor-4-tahun-1998/>, accessed on September 4, 2021.

⁵Esmi Warassih, 2010, *Pranata Hukum Sebuah Telaah Sosiologis*, Universitas Diponegoro, Semarang, p. 32

⁶Peter Mahmud Marzuki, 2017, *Penelitian Hukum*, Kencana, Jakarta, p. 67

balanced through a fair judicial system. In this case, the court is allowed to consider various interests.⁷

The ease of filing a debtor's bankruptcy application can be seen from the bankruptcy process in outline as follows. The application for a declaration of bankruptcy is submitted to the Chairman of the Commercial Court whose jurisdiction covers the area where the Debtor's legal domicile is. An application for a declaration of bankruptcy is granted if there are facts or circumstances that are simply proven that the requirement to be declared bankrupt is that the debtor has at least two creditors and has not paid at least one debt that has matured and is collectible.

A copy of the Court's decision granting the petition for a declaration of bankruptcy is sent to the Curator, then after receiving the copy of the decision on the petition for a declaration of bankruptcy, the Curator performs management and settlement tasks. Debtors who are declared bankrupt will by law lose their right to act freely on their assets, as well as the right to manage them. He is no longer allowed to spend money arbitrarily and acts committed in bad faith to harm the Creditors, he can be criminally prosecuted.⁸

As stipulated in Article 21 of the UUK, bankruptcy covers all assets belonging to the Debtor at the time the bankruptcy declaration decision is made and also includes all assets acquired by the Debtor during the course of the bankruptcy, for example due to a grant or inheritance. Then what is meant by wealth is all goods and rights to objects that can be cashed (*ten gelde kunnen worden gemaakt*).⁹

Guaranteed debtor protection through rehabilitative efforts, if this cannot be done, then the next process is general confiscation. A special process of general confiscation is carried out directly on all assets owned by the debtor for the benefit of all creditors. There are two important things before the general confiscation procedure is carried out:

- The debtor has completely stopped paying his debts (insolvent) permanently.
- There are many creditors, actual and potential. That is, if the debtor's wealth is sufficient to pay all his creditors, then there is no need for regulations that protect creditors from other

⁷See the requirements for a declaration of bankruptcy in Article 2 paragraph (1) of Act No. 37 of 2004.

⁸Didi Sukardi, The Legal Responsibility Of Debtor To Payment Curators In Bankruptcy Situation, *Jurnal Pembaharuan Hukum*, Volume 8, Number 2, August 2021;

⁹Henny Tanuwidjaja, 2012, *Pranata Hukum Jaminan Utang dan Sejarah Lembaga Hukum Notariat*, Refika Aditama, Bandung, p. 12-13

creditors. On the other hand, if there is only a single creditor, then there is no need for regulations to protect the debtor.

- The PKPU mechanism has not provided broad opportunities for debtors to improve company performance.

The Bankruptcy Law regulates legal protection for bankrupt debtors, it can be through the PKPU mechanism which is actually a reflection of the implementation of the Debt Forgiveness Principle. The application of this principle is manifested in the form of a moratorium on debtors through PKPU for a specified period, the exclusion of several debtor assets from bankruptcy (asset exemption), and the granting of fresh-starting status for debtors so as to enable debtors to start new businesses without being burdened with debts. old, as well as rehabilitation of debtors.¹⁰

It can be seen in the relatively short time given for debtors to make improvements to their company. The dominance of creditors in determining PKPU, and the limitations of the arbitrariness of the debtor to continue to manage the company which must be carried out together with the management. In addition, that, the Bankruptcy Law and PKPU have not separated Bankruptcy against companies and individuals, in terms of the objectives and benefits of the two are different.¹¹

- Efforts in bankruptcy are dominated by the authority of the creditors

In order to provide legal protection¹² to debtors, bankruptcy can be resolved by way of reconciliation (akkoord) or by settlement of the bankruptcy estate. Settlement of bankruptcy by amicable means (akkoord) can occur if in the bankruptcy the Debtor submits a reconciliation plan and is approved by the Creditor in accordance with the applicable provisions and obtains ratification based on a Court decision which has permanent legal force.

3.2. Factors Affecting the Implementation of Debtor Legal Protection for Bankruptcy Performed by Separatist Creditors

Credit guarantees are needed considering that although the credit agreement is perfect and credit distribution has been carried out based on the principle of

¹⁰Doni Budiono, Analisis Pengaturan Hukum Acara Kepailitan Dan Penundaan Kewajiban Pembayaran Utang, *JHAPER*: Vol. 4, No. 2, July – December 2018;

¹¹See Article 1 point 3 and 11 of Act No. 37 of 2004 concerning Bankruptcy and PKPU.

¹² Irianto, C, Penerapan Asas Kelangsungan Usaha Dalam Penyelesaian Perkara Kepailitan Dan Penundaan Kewajiban Pembayaran Utang (PKPU), *Jurnal Hukum dan Peradilan*, Vol 4 No 3 2015;

prudence, it cannot guarantee that the credit facility will be utilized by the Debtor in accordance with the agreement and in a healthy manner, so as to generate profits for the Debtor himself and for the Debtor. for Creditors because there may be many factors that may occur which are difficult to predict in advance, including changes in socioeconomic conditions that greatly affect the business and ability of the Debtor.¹³ Factors influencing the implementation of debtor legal protection for bankruptcy carried out by separate creditors are:¹⁴

- There are no funds for the management and settlement of bankrupt assets.

Settlement of a bankruptcy requires a large amount of funds, once the Curator receives the bankruptcy declaration decision from the Commercial Court in a relatively short time, he must prepare funds for the announcement of the summary of the bankruptcy declaration decision and the deadline for submitting a creditor's claim/organizing a debt matching meeting. The announcement as stipulated in Article 15 paragraph (4) and Article 114 requires funds of more than IDR 10,000,000, - (ten million rupiah) and in the routine budget of the *Balai Harta Peninggalan* there is no post.

- Bankrupt debtors are not cooperative.

The Curator needs data on the Debtor's assets to make a record of bankruptcy assets as regulated in Article 100 paragraph (1) of the UUK which states: "The Curator must make a record of the bankruptcy assets no later than 2 (two) days after receiving the decision on his appointment as Curator."

Bankrupt debtors who are not cooperative in providing data on their assets will make it difficult for the Curator to make records of bankruptcy assets. A bankrupt debtor who is not present at the accounts receivable verification meeting whose implementation has been determined will result in the postponement of the accounts receivable matching meeting. Based on Article 121 paragraph (1) the presence of the bankrupt Debtor is obligatory, so that if the Bankrupt Debtor is not present at the debt verification meeting, the meeting cannot be continued and the Supervisory Judge will postpone it. The delay in the accounts receivable matching meeting will increase the length of the bankruptcy settlement.

¹³Sri Rejeki, Perlindungan Hukum Dan Kedudukan Kreditor Separatis Dalam Hal Terjadi Kepailitan Terhadap Debitor, *Jurnal Ilmiah*, Vol.12 No.1, 2006, Fakultas Hukum Universitas Esa Unggul, Jakarta. 55

¹⁴Gregorius Yoga Panji Asmara, Protection Relevance of the Execution of Separatic Creditors Based on Pancasila Justice, *Jurnal Akta*, Volume 8 No. 1, March 2021 and see I Ketut Gde Swara Siddhi Yatna, Ni Putu Purwanti, Perbandingan Hukum Negara Indonesia Dengan Hukum Negara Belanda Dalam Penyelesaian Perkara Sisa Hutang Debitor Pailit, *ACTA COMITAS*, Vol 5 No 2 August 2020

- Bankrupt debtors sell/hid their assets before being declared bankrupt.

The task of the Curator is to manage and/or settle the bankruptcy estate, so that if there are assets of the Bankrupt Debtor that have been sold prior to bankruptcy, the Curator must take care of when the sale is made and to whom the assets are sold. Tracing the debtor's assets that have been sold/hidden and the cancellation process takes a long time and costs a lot, this is clearly an obstacle in the settlement of debtors' debts to creditors through bankruptcy. Efforts that can be made to overcome the factors in the implementation of legal protection of debtors against bankruptcy are as follows:

- There are no funds for the management and settlement of bankrupt assets.

The way for the *Balai Harta Peninggalan* as the Curator of the bankruptcy to overcome the absence of funds to finance the management and settlement of the bankruptcy estate is to make loans to Third Parties. This method would be a step that can be accounted for.

- Bankrupt debtors are not cooperative.

The way to deal with an uncooperative Bankrupt Debtor in the event that the Curator asks for data on his assets, as described above, among others, is to coordinate directly or by letter with the bank to obtain data on the Debtor's deposits in a bank.

- Bankrupt debtors sell/hid their assets before being declared bankrupt.

The way to overcome the obstacles against Bankrupt Debtors selling/hiding their assets before being declared bankrupt, as described in the results of the Curator's action research is to file a lawsuit to cancel the sale, while the hidden assets report to the Police.

4. Conclusion

The implementation of debtor legal protection against bankruptcy carried out by separatist creditors currently as intended by Article 55 and Article 56 of Act No. 37 of 2004 has not been fair to debtors, considering that the two articles are only based on the existence of debt from the debtor and related to the position of the solvent. or insolvency in the view of the creditor alone. This is clearly the case because Act No. 37 of 2004 does not adhere to a balance sheet test system where before being declared bankrupt it is necessary to test the condition of the debtor whether it is really insolvent or actually still solvent. Factors that affect the implementation of debtor legal protection against bankruptcy carried out by

separatist creditors are legal factors, namely in the form of provisions of Article 55 and Article 56 of Act No. 37 of 2004 which are unfair to debtors, even though it is widely known that the door to justice in bankruptcy cases is the judge's decision. The implementation of legal protection of debtors for bankruptcy carried out by separatist creditors which should be in order to realize protection of debtors related to the execution of parate by creditors, it is necessary to renew the concept of bankruptcy law in Indonesia. Concepts offered for future renewal of the Indonesian Bankruptcy Law.

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