

Legal Protection of Concurrent Creditor on Bankruptcy

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ABSTRACT

Bankruptcy is a method in the process of debt settlement in Indonesia through the Court, the regulation has amended several times and now the regulation of bankruptcy is regulated in The Act Number 37 Year 2004 of Bankruptcy and Postponement of Debt Repayment. In the Act, provides the debtor legal protection in the case by creditors of mass executions does concern, while the process to protect creditors from receivables refund from the debtor. The creditors are classified into 3 (three) criteria, i.e. : Separatist, Preferen and Concurrent, in this paper discussed about the legal protection to the concurrent creditor which must be clarified in the Act because of its position as a creditor who has no mortgage on his receivables.

Keywords: *Legal protection, Bankruptcy, and Creditors*

INTRODUCTION

Bankruptcy is one of the way used by debtor as well as creditor in solving the debt problem between them, due to the nature of bankruptcy for debtor is to avoid despotism of debtor's mass-execution on debtor's property, while the nature of bankruptcy for creditor is to obtain certainty on their debt payment.

The consequence of bankruptcy for debtor and the property is that the property will be foreclosed to be sold, and the debtor will no longer be entitled to manage the property because of the manage will be taken by curator and bankruptcy will occur when the debtor is insolvent or unable to pay the debts.

Indonesia has had the second change on Bankruptcy Act until now. The first one, "Failissementsverordening (Staatblad 1905 Number 217 juncto Staatblad 1906 Number 348) that was applied until 1998. The next one is Law Number 4 of 1998 concerning Government Regulation in lieu of Law Number 1 of 1998 on the Change of Bankruptcy Act. Then, Act Number 37 of 2004 replaced the Act Number 4 of 2004 concerning Bankruptcy and Postponement of Debt Payment or UUKPKPU in abbreviation.

In the debt payment system, there are creditors who has to be paid in higher priority named 1) separate creditor and 2) preferential creditor. In another side, there is creditor who is not entitled to be priority in the debt payment known as concurrent creditor. Act Number 40 of 2007 concerning Company and Act Number 37 of 2004 concerning Bankruptcy and Postponement of Debt Payment have no clear arrangement regarding concurrent creditor who has no rights to be priority in debt payment.

Refer to article 1131 of Indonesian Civil Code, stated that “all property of the debtor, which is movable or immovable whether existed or will be acquired in the future, will be surety for all kind of personal contract” and article 1132 of Indonesian Civil Code explained that the property will be joint guarantee for everyone who owe him money, the income of property selling will be divided proportionally based on the size of their debts, except there are reasons for prioritizing one among other creditors.

How if the insolvent company can only pay to priority creditor and the property under controlled of curator is not enough to pay concurrent creditor? In fact, concurrent creditor has legal certainty and recognized as a creditor who has the right and responsibility on the company’s debt matter.

Bankruptcy Act gives less protection for concurrent creditor’s interest which is legally recognized in bankruptcy law. In Bankruptcy Act, concurrent creditor has no clear standing especially regarding the legal certainty of the protection on their interest when they get insolvent.

Essentially, the aim of bankruptcy based on *Faillissementverordening* is to protect the concurrent creditor in fulfilling their rights regarding the implementation of principle that assure the rights of creditor above debtor’s property. The aim is concluded from the definition of bankruptcy in *Memorie van Toelichting* that stated bankruptcy as a legal foreclosure to entire debtor's property to be used for common interest of the creditors. This aim is consistent with the principle mentioned in article 1131 Burgerlijk Wetboek voor Indonesie,¹ that stated: “*Alle de roerende en onroerende goederen van den schuldenaar, zoo wel tegenwoordige als toekomstige, zijn voer dezelfs persoonlijke verbitenossen aanprakelijk*, (All of debtor's property, including the movable as well as the immovable, the existed as well as the future acquired property, will be the collateral for all kind of debtor's contract)². “Law imposes that

¹ Named *Burgelijk Wetboek*

² Sutan Sjahdenini, (2002), *Hukum Kepailitan Memahami Failissementverordening Juncto Undang-Undang No. 4 Tahun 1998*, Jakarta: Grafiti, p. 7.

principle to assure the creditor's conviction that debtor will pay off all the debts".³

This research is going to review how is the legal protection for concurrent creditor in bankruptcy by analyzing related regulation and by connecting the verdict of commercial court in applying Bankruptcy Act in Indonesia, especially in applying protection for concurrent creditor when the company goes bankrupt.

METHOD

The method used in this research is normative law method, with statute approach, conceptual approach, and case approach.

DISCUSSION

Legal Protection For Concurrent creditor In Bankruptcy

Act Number 37 of 2004 replaced the Act Number 4 of 2004 concerning Bankruptcy and Postponement of Debt Payment has a wider range in norm perspective, scope and debt solving problem. That wider range is needed, because of the improvement and need of law in society while the existed regulation was not adequate as a tool of law in solving debt problem equitably, fastly, openly and effectively. Several new main points in Act Number 37 of 2004 replaced the Act Number 4 of 2004 concerning Bankruptcy and Postponement of Debt Payment are:⁴

1. to avoid multi interpretation in this act, the definition of debt is stated strictly. As well as definition of due date.
2. regarding the requirements and procedure of bankruptcy claim and postponement of debt payment claim, including the exact time frame for taking the bankrupt statement and/or postponement of debt payment responsibility.

Legal protection to assure legal certainty before the law is very important in Indonesian Bankruptcy Law, that is to protect the interests of creditors and debtors who have law connection based on contract. There are many issues arisen in the implementation of bankruptcy practice in Indonesia. One of them is that the existing Bankruptcy Act is unable to fully accommodate the interests and strengthen the legal protection for concurrent creditor who has no property collateral of a debt.

The form of creditor's rights protections are : all creditors are entitled to file the bankruptcy claim to debtors who don't pay the overdue and enforceable debt, the creditors are entitled to payment of overdue and enforceable debt from all bankrupt debtor's property,

³ *Ibid*, p.7 and p. 38-39

⁴ Rejeki Hartono,(2008), *Hukum Kepailitan*, Malang: UMM Press, p. 15

separate creditor guaranteed by lien, fiduciary guarantees, and mortgage are entitled to execute the debt as if there's no bankruptcy, creditors are entitled to oppose against execution postponement, creditors are entitled to file collateral foreclosure claim of debtor's property in order to avoid bad faith during the bankruptcy process, creditors are entitled to cancel all debtor's action assumed as the cause of creditor's loss related to bankrupt property.

The definition of bankruptcy based on Bankruptcy Act is general foreclosure of entire bankrupt debtor's property which process and settlement handled by curator under control of supervisory judge as mentioned in this act (Article 1 Paragraph 1)

"Bankruptcy is a mass execution which is declared by the verdict, implemented necessarily by committing general foreclosure of a bankrupt person's entire property, including the property that existed during bankruptcy statement, as well as the property obtained during bankruptcy occurs, for all creditor's interest that are done under supervision".⁵

Therefore, all matters related to bankruptcy activity are the condition when the debts payment stopped. The terminology of "payment stopped" stated in article 1 of Bankruptcy Act, doesn't mean (*naar de letter*) that the debtor will stop paying the debt at all, but the debtors are unable to pay that debt during bankruptcy claim filed. (High court verdict Number 171/perd/ptb, on 31st July 1973).

The presence of Bankruptcy Act is aimed not only to protect the interest of debtors, but also the interest of the creditors. In Bankruptcy Law, creditors are divided into three groups named separate creditors, preferential creditors and concurrent creditors.

Article 55, article 56, article 60, article 138 and article 189 in Law Act Number 37 of 2004 show a very strong position of separate creditors in bankruptcy, which essentially give the rights to separate creditors to execute their own debt's collateral. If it is not enough, the separate creditor gets the concurrent rights above their less debt payment, while the concurrent creditor has no clear arrangement since they have no privilege in law.

Creditor obtains bankrupt property allocation based on the amount of money they owe or appropriate percentage. It means that the allocation is determined by the size of debt owned by each creditor, from the existing property. In order to guarantee creditors in obtaining bankrupt property allocation, curator has responsibility to collect all bankrupt property through general foreclosure.⁶

⁵ Retnowulan Sutantio, (1996), *Kapita Selekta Hukum Ekonomi dan Perbankan, Seri Varia Yustisia*, Bandung: Mandar Maju, p. 85

⁶ Siti Anisah, (2008), *Perlindungan Kepentingan Kreditor dan Debitor Dalam Hukum Kepailitan di Indonesia (Studi Putusan-Putusan Pengadilan)*. Yogyakarta : Total Media, p.299

A bankruptcy case in commercial court of Surabaya Number 26/Pailit/2010/PN.Niaga.Sby, the debtor is a company named PT. Royal Fisheries Indonesia (Bankruptcy defendant) claimed to be bankrupt by its creditors Ir. Badrus Soleh and Ir. Hery Sudarmono (Bankruptcy plaintiff).

In that case, the Bankruptcy plaintiffs in their claim explained that the Bankruptcy defendant had overdue debt IDR 435.507.518,- for each of them and IDR 190.014.067,-.

Beside having the overdue and enforceable debt as mentioned above, the Bankruptcy defendant also had another debt from the other creditors. During the bankruptcy proceeding, the Bankruptcy defendant confessed that they had the overdue debt as claimed by the bankruptcy plaintiffs, and the defendant agreed on the existence of several debts with other creditors stated in bankruptcy claim.

Then, based on the consideration in judges's verdict who asses and adjudicate the Bankruptcy claim, the bankruptcy defendant was found bankrupt under all legal consequences. In the verdict, the judges appointed one of the curators to undertake and settle bankruptcy case of the defendant and appointed a supervisory judge in that case.

Several stipulation are enacted after the verdict given, started from the stipulation concerning creditor's meeting decision, debtor's property liquidation and finally, the stipulation on bankruptcy termination after all the bankrupt property fully divided to the creditors who listed in the claim filed by curator and legalized by supervising judges.

In that case, the amount of all creditor's charge during debt's verification and reconciliation meeting is IDR 49.459.123.189,905, while the selling result of bankrupt property is IDR 10.000.000.000,-. Surely, the result of bankrupt property is far less than the charges of all creditors. It is difficult to realize the allocation of payment to all creditors.

The amount of IDR 10.000.000.000,- was obtained from property, for example : land and many kind of company equipment and laboratory material of the bankruptcy defendant. It is actually the immovable object such as 28.230 m2 of land including the building above with certificate of SHGB number 3 on behalf of the bankrupt defendant. The land is the object of mortgage taken by one of the separate creditors/creditor who have mortgage which will be the priority by law to be executed when the company/debtor is secured at him.

In the payment realization done by curator and supervisory judge as mentioned above, all creditors stated as legal creditor of bankrupt condition of this defendant get payment in certain proportion. Although the amount of payment does not match with the agreed and verified charge in verification and reconciliation credit meeting done by creditor, curator and

supervisory judges. Especially the concurrent creditors, which 2 of 35 creditors recognized as concurrent creditors. 2 of them are bankruptcy plaintiffs who are entitled of debt payment IDR 435.507.518,- for each of them, and IDR 190.014.067.

In the consideration written in payment report delivered by curator, and after considering the basic principles used to draft Bankruptcy Act, the regulation concerning bankruptcy has to be equitable for interested party. In this case, the principle of justice, used to avoid the despotism of collector who try to get payment of their charge to debtor regardless the other creditors. Curator assumes that if the selling result of bankrupt property only paid to one of the creditors/group of creditors, that won't be equitable for the other creditors.⁷

Taking a look on this case, I agree with the supervisory judge and curator consideration concerning principle of justice used in determining the percentage of credit amount of the creditors. Refer to research on this case, if it is seen from the amount of debtor's property foreclosed by curator, it will not be enough to pay all creditor charges. Even the entire bankrupt debtor's property is not enough to pay 1 creditor like PT. CIMB Niaga Tbk which is classified into separate creditor.

In that case, separate creditor as the party who holds mortgage on the land from bankrupt debtor who is willing to give the guarantee to be collected and generally foreclosed by curator. Surely, based on Bankruptcy Act, creditor who hold certain guarantee can execute the object of mortgage by him self, as if there is no bankruptcy occurred.

Debt payment process to creditor in this case is far from the creditors expectation. But generally, aside from inequitable amount, this sharing process is consistent with the principle of justice in bankruptcy law, where all creditors obtain percentage for each of them, even if the amount of the payment accepted is not appropriate. The principle of sharing to all creditors without one creditor doing foreclosure to debtor's property named general foreclosure, is consistent with the definition and principle of bankruptcy itself (general foreclosure of debtor's property) and consistent with Creditors Bargain theory which all creditors has equal rights of payment apart from creditor classification and consistent with Value Based Account theory that identified what makes bankruptcy law different.⁸

Legal Effort Of Concurrent Creditor In Bankruptcy

Every debtor recognized bankrupt should have at least more than one creditor. It means that the debtor can not pay one promised and overdue debt, and not showing good faith to pay

⁷ Sumber: Pengadilan Niaga Surabaya

⁸ *Ibid.*

the debt to creditor. To this kind of debtor, we can file bankrupt claim under debtor's request or under the creditor's request to be continued to commercial court in state court.

Legal actions that can be filed by creditor in bankruptcy after commercial court's verdict given are:

Appeal

Appeal is legal action against the verdict that contradict and disserve one party. (Article 58 paragraph (3) Act number 37 of 2004 jo. Article 56A paragraph (12) Act number 4 of 1998).

"against the supervisory judge's stipulation, creditors or other third parties who file the bankruptcy claim as mentioned in article 57 paragraph (2) or curator can submit appeal to the court in five days after the verdict given and the court is required to make decision on the appeal in ten days after the appeal accepted. Article 56A Act Number 4 of 1998, that stated :

"against the supervisory judge's, creditors or other third parties who file the bankruptcy claim as mentioned in paragraph (6) or creditor can submit appeal to the court in five days after the verdict given and the court is required to make decision on the appeal in ten days after the appeal filed".

This kind of appeal to supervisory judge's stipulation is not classified to any kind of objection, but it is clearly stated that the stipulation and supervisory judge's decision can be appealed by creditors if they don't accept the verdict.

In article 138 Act number 37 of 2004, it is stated that creditor whom debt is guaranteed by lien, fiduciary guarantee, mortgage, and collateral rights of the other material wealth, or who has privilege over certain material in bankrupt property and who can prove that part of debt will not possibly be paid by using secured property selling result, can ask to be given the concurrent creditor's rights, without decreasing the rights to be priority over the property as their debt's collateral.

If we read that article, it shows a very strong position of separate creditor. If the guarantee they own is not enough or not in the same amount with the debt, the difference can be asked to supervisory judge/curator to be recognized into concurrent rights.

In this case, concurrent creditor can file the objection if the application is granted due to concurrent creditor's rights will be weakened by the concurrent rights owned by separate creditor if the material guarantee is not enough or not in the same amount

with the debt they have.

Cassation

After bankruptcy statement stated, bankrupt debtor or bankrupt creditor can file cassation as stated in article 11, 12 13 Act number 37 of 2004, stated that :

- (1) legal action that can be filed against the verdict of bankrupt claim is cassation to supreme court.
- (2) Cassation application as mentioned in paragraph (1) should be filed in eight days after the date of verdict given, by registering to registrar of the court that made decision on the bankrupt claim.
- (3) Cassation application as mentioned in paragraph (2) can be filed by debtor and creditor as the party in first level trial. It can also be filed by other creditor who were not the party in first level trial and can't accept the verdict of bankrupt claim.
- (4) Registrar of the court register the cassation application on the date when it is registered and to the applicant is given a receipt signed by registrar on the same date.

Following are the reasons of cassation application on bankrupt statement that doesn't have significant difference with the reasons of general cassation application in civil case, as stated in article 30 Act number 14 year 1985 concerning Supreme Court :

- a. Unauthorized or exceeded the authorized limits,
- b. Misapplied or brake the applicable law,
- c. Failure to fulfill the conditions required by the legislation which threatens negligence by cancellation of the decision.

After the Commercial Court has verdict on the request for bankruptcy, the legal remedy may be filed against the verdict is a cassation to the Supreme Court. Legal remedy in the form of an appeal is regulated by Article 11 through Article 13, that the parties can request the cassation of the verdict of the bankruptcy declaration be seen from Article 11 paragraph (3), which reads: Cassation as referred to in paragraph (2), in addition to be filed by the debtor and the creditor who are the party to the trial first level, can also filed by another creditor who is not a party in the trial first level are not satisfied with the verdict on the request for a declaration of bankruptcy.

Of Article 11, it can be concluded that the parties can request the cassation of the verdict of the bankruptcy statement, as :

- a. debtor who is a party to the trial's first level.
- b. creditor who is a party to the trial's first level.
- c. Other creditors are not a party in the trial first level are not satisfied with the verdict of the commercial court.

Review

When the cassation is unsuccessful, the debtor or applicant of the cassation may still attempt to undertake another remedy, namely by review, as regulated in Article 14, Article 295, Article 296, Article 297 and Article 298 of the Act No. 37 of 2004 on Bankruptcy and Postponement of Debt Payment Obligation jo. Article 11, Article 286, Article 287, Article 288 and Article 289 of the Bankruptcy Act No.4 Of 1998.

Article 14 of the Act No 37 of 2004 on Bankruptcy and Postponement of Obligation of Debt Payment:

1. (1) That the verdict on a request for bankruptcy declaration has obtained permanent legal force, a review may request to the Supreme Court.
2. (2) The provisions referred in Articles 12 and 13 shall apply *mutatis mutandis* for review.

Article 295 of The Act No 37 of 2004 on Bankruptcy and Postponement of Obligation of Debt Payment :

1. Toward the verdict which has legal force, can request review to the Supreme Court, unless otherwise provided in this Act.
2. An application for review may be filed :
 - a. After the case was found a new and decisive evidence was found at the time the case was process in the Court, but not yet; or
 - b. That The verdict of the judge concerned found a real fallacy.

When the review request cause on the first reason, it must submitted no later than 180 days from the date on that the verdict is request for a review of legal force (*incracht*). Meanwhile, if the review request based on the second, it must submitted no later than 30 days from the date of the verdict of the Review.

The Request for Review may also revoked as long as it not yet convicted and in the event that it has been revoked of the request for Review not longer submitted.

The revocation of Review, the judge who terminate bankruptcy will set the cost of bankruptcy and substitute the services for the curator and charge it to the debtor. The Cost and compensation for services must take precedence over all the debt that is not secured by collateral and the determination of costs and fees of judges can not proposed remedy.

In addition to efforts were mentioned above, there are two that can cultivate and made by creditors including concurrent creditors, cancel of the accord that has been approved if the debtor fails to fulfil the contents of the accord. The accord is an efforts made by the debtor with the concurrent creditors use as a medium and effort for the settlement of bad debts because the main objective of accord with debt restructuring to give opportunity to the debtor able keep trying quietly, so that the debtor can pay its debts and avoid bankruptcy. The creditor may cancel of the accord when the debtor fails to comply content of the it.

What the differetiate of accord in the context of bankruptcy law, when accord make after the verdict of bankruptcy is declare, whereas in the context of the Civil Procedure Code, accord is sought in early proccess, even in the proceedings before the verdict.

Then, the next effort is Actio Pauliana, that is legal act by the Debtor made before it is declared bankrupt, the act is not required, and the debtor knows that the act is disadvantageous of the creditor interest.

The creditor have right to request the cancellation to the Court against a legal act by the Debtor before being declared bankrupt that resulted loss of creditors. The Request of cancellation of legal act by the debtor filed in the context to bankruptcy property settlement. The goal is to multiply the bankruptcy property, so that creditors get the maximum payment in accordance with the amount of receivables owned by the creditors.

Based on the description, it can be seen how the efforts of the remedy of creditors concurrent in the process of bankruptcy in a phase of insolvency (a condition the debtor is unable to pay the entire Debts), starting when the bankruptcy request and before the verdict declaration of bankruptcy by the Court for the debtor until the process after the judgment and the set the Supervisory Judge against the determination of the amount of bankruptcy property to the realization of receivable payment to all creditors. In case, the value does not match to the amount of

receivables, creditors concurrent may appeal to the Commercial Court which the bankruptcy cases are handled in order to promote justice and equity in accordance with the principle of justice in bankruptcy law.

Basically, the remedy by all creditors in the process are the same, but especially to the concurrent creditors have limitations because they do not have mortgage of their receivables, for example in terms of determining the distribution of amounts, the concurrent creditor will earn a smaller percentage than any other creditor, and it is difficult to resist because it is essentially limited in principle and indeed other more privileged creditors. Unlike the case with the separatist creditor when the mortgage that has lower than the receivable, still seek the concurrent right upon lack of the mortgage, in terms of the right to separatist creditor obtained, as creditors concurrent can also be obtained by the Article 138 of the Act. No. 37 of 2004 on Bankruptcy and Postponement of Obligation of Debt Payment.

CONCLUSION

Legal Protection of the Concurrent Creditor of Bankruptcy in Indonesia that the form of a refund of the creditors receivables rights has not been specifically regulated in the Act No. 37 of 2004 on Bankruptcy and Postponement of Obligation of Debt Payment, even that said the creditors concurrent in a weak position, because it has no mortgage on its debt, and if the amount of receivable creditor is more than the assets of the debtor bankrupt and only able to pay creditors separatist and preference will injustice to the concurrent creditor.

Remedies can handle by concurrent creditors when bankrupt is basically the same with the other creditors : Resistance, can refuse/promote accord, *actio paulina*, as well as cassation and review of the Court's verdict, but in principle mark off the efforts by the concurrent creditor limited due to lack of mortgage, as well as receivables may be concurrent when the mortgage is not worth the receivables amount, although in the Act. 37 of 2004 on Bankruptcy and Postponement of Obligation of Debt Payment has justified, concurrent creditors can resist and objection when the rights as concurrent creditors are also taken by separatist creditor.

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