Responsibilities of Personal Guarantors in the Event of Dispute of Bankruptcy between Creditors against Debtors

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***Abstract:-*Many problems faced in business interactions between creditors and debtors in practice e.g. the debtor cannot fulfill its obligations to the creditor. One of them is through the bankruptcy application mechanism at the Commercial Court regulated in Law No. 37 of 2004 concerning Bankruptcy and Delaying Obligations to Pay Debt. Munir Fuady terms bankruptcy to insolvent when the company (or private person) is unable or unwilling to pay its debts. Therefore, rather than the creditor scrambling over the debtor's assets, the law considers it necessary to regulate it so that debtor debts can be paid in an orderly and fair manner. The type of research in this thesis is including the type of normative legal research. Normative legal research is studies of law that are conceptualized and developed on the basis of the doctrine adopted by the conceptor and / or the developer. There are various legal doctrines developed, ranging from classical doctrine/natural law flow, positivism, historicism, to functionalism realism. This doctrinal method in Indonesia is commonly referred to as a normative research method. The conclusion of this study is that the Personal Guarantor can be bankrupted if the debtor is unable to repay the debt to the creditor on terms and conditions, namely, first, when the personal guarantor does not release his privileges, the bankruptcy request to the person Guarantor can only be done after the creditor has made legal remedies related to the debtor's assets but the existing assets are not sufficient to repay the debt and the position of the personal guarantor becomes the legal subject of the bankruptcy petitioner who can repay the remaining debts. However, if the personal guarantor has waived his privileges and if the debtor is unable to pay off his debt either legally or non-legally, the Personal Guarantor can be used as a legal subject for the bankruptcy respondent because he has the same position as the debtor in the debt-receivable agreement with the creditor.**

I. INTRODUCTION

Many problems faced in business interactions between creditors and debtors in practice e.g. the debtor cannot fulfill its obligations to the creditor. This, of course, raises legal problems by the parties so that a settlement mechanism is needed. One of them is through the bankruptcy application mechanism at the Commercial Court regulated in Law No. 37 of 2004 concerning Bankruptcy and Delaying Obligations to Pay Debt. Bankruptcy is a joint effort to get payments for all people who are in debt fairly by paying attention to the comparison of the amount of each debt. Munir Fuady terms bankruptcy to insolvent when the company (or private person) is unable or unwilling to pay its debts. Therefore, rather than the creditor scrambling over the debtor's assets, the law considers it necessary to regulate it so that debtor debts can be paid in an orderly and fair manner. Accordingly, bankruptcy is a general confiscation imposed by a special court, with a special request, on all debtor assets (legal entity or private person) who have more than 1 (one) debt/creditor where the debtor is in a state of debt repayment so that the debtor immediately repays the debts[1]. The purpose of bankruptcy is[2]:

1. Protect concurrent lenders to obtain their rights in connection with the application of the guarantee principle, that "all Debtor assets, both movable and immovable, both existing and new, will be available at a later date, becoming a guarantee for the Debtor's engagement", that is, by providing facilities and procedures for them to fulfill their bills against the Debtor. According to Indonesian law, the principle of guarantee is guaranteed by Article 1131 of the Civil Code. Bankruptcy law avoids the occurrence of scrambling between Creditors against the assets of the Debtor regarding the principle of the guarantee. Without the Bankruptcy Law, there will be a stronger creditor who will get more shares than a weak creditor.
2. Ensure that the distribution of Debtor assets among Creditors is in accordance with the principle of paripassu (proportional division of the assets of the Debtor to the concurrent or unsecured creditors of Creditors based on the balance of the number of the respective creditor's bills). Under Indonesian law, the principle of paripassu is guaranteed by Article 1132 of the Civil Code.
3. Prevent the Debtor from taking actions that could harm the interests of the Creditors. With a bankrupt Debtor declared, the Debtor becomes no longer authorized to administer and transfer the assets that are subject to bankruptcy from the Debtor's assets to bankrupt assets.

From the definition and purpose of bankruptcy, it can be seen that the bankruptcy mechanism is one of the mechanisms for resolving a debt with the conditions of the summit, which is easily proven. The main objective of

bankruptcy is to divide the creditors over the debtor's wealth by the curator. Bankruptcy is intended to avoid separate seizure or separate execution by creditors and replace them by holding joint confiscations so that the debtor's wealth can be distributed to all creditors in accordance with their respective rights.

According to Adrian Sutedi, bankruptcy in Indonesia is based on:

1. Balance Principle

This Law regulates several provisions which are the embodiment of the principle of balance, namely on one side there are provisions that can prevent the occurrence of abuse of institutions and insolvency institutions by dishonest debtors; on the other hand there are provisions that can prevent misuse of institutions and insolvency institutions by creditors who are not in good faith.

2. Business continuity principle

In this Law has provisions that allow prospective debtor companies to continue.

3. Principles of Justice

In Bankruptcy, the principle of justice implies that the provisions concerning bankruptcy can fulfill a sense of justice for the parties concerned. This principle of justice prevents the arbitrariness of collectors who do not care about other creditors.

4. Principle of Integration

Principle Integration in bankruptcy implies that the formal legal system and its material law constitute an integral whole of the civil law system and national civil procedural law.

When a debtor company experiences financial difficulties that interfere with debt repayment, the company's creditors often look for ways and guarantees to repay the debt by holding company employees and directors and outside advisers of the debtor company to take responsibility for creditors' losses. Over the past few decades, creditors have sought to expand their ability to carry out these actions on the grounds that creditors have fiduciary and/or derivative rights whenever the debtor enters "around" or "bankruptcy" zones. In Indonesia, creditors in demanding repayment of debtor debts through the bankruptcy mechanism expand their way by involving other parties involved in bankruptcy disputes in order to fulfill the guarantee of payment of debtor debt through the bankruptcy mechanism of Personal Guarantor.

Personal Guarantor is a guarantee in the form of a commitment statement given by a third party person, to guarantee the fulfillment of debtor obligations to the creditor if the debtor is in default. According to Djuhaendah Hasan with individual guarantees, creditors will feel safer than there is no guarantee at all because with the guarantee of individual creditors can charge not only to the debtor but also to third parties who guarantee that sometimes consists of several people. Individual guarantees are collateral for debts submitted by the debtor to the creditor and contained in a legal deed or agreement and cannot be separated from the principal agreement. The guarantee was intended to have the debtor's debt underwritten for the achievements agreed upon by the creditor if the debtor failed to fulfill the agreed performance. Underwriting agreement (borgtocht) is contained in article 1820 of the Civil Code which states that underwriting is the agreement of a third party in the interest of the creditor to commit themselves to fulfill the debtor's engagement if the debtor does not fulfill his / her agreement. Individual guarantees are regulated in articles 1820 to article 1850 of the Civil Code.

Basically, the underwriting agreement is divided into two parts, namely the personal insurance that can be referred to as a Personal Guarantor and the coverage carried out by the corporation or which can be referred to as the Corporate Guarantor. Basically, the two guarantors are the same, the only difference between the subjects is personal and corporate.

Standard Chartered Bank when disputing with PT. Handalan Putra Sejahtera carried out this mechanism. Standard Chartered Bank as a creditor on July 1, 2008, provided a facility agreement No.PK/SME/195/VII/08 to PT Handalan Putra Sejahtera (HPS) as a debtor with a contract value of Rp1.5 billion. Obligations of PT. Handalan Putra Sejahtera as a debtor in fulfilling the achievements of the creditor was personally guaranteed by Tundjung Rachmanto Setyawan and Rudi Syahputra each amounting to Rp. 750,000,000.00 (Seven Hundred Fifty Million Rupiah). In addition, the debtor provided collateral in the form of a mortgage deposit in the name of debtor amounting to Rp. 312 500,000.00 (Three hundred and twelve million five hundred thousand rupiahs).

However, on the way, the debtor had problems or obstacle related to the fulfillment of the debt payment obligations to the creditor. In the process of resolving these problems, Standard Chartered Bank as a creditor had agreed to the Debtor to make a debt restructuring agreement. In this debt restructuring agreement, Tundjung Rachmanto Setyawan and Rudi Syahputra again acted as guarantor / Personal Guarantor. But PT. Handalan Putra Sejahtera, which acted as a debtor on its journey, was unable to fulfill its obligations to the creditor as agreed in the debt restructuring agreement. Under these conditions, Standard Chartered Bank submitted a bankruptcy request to the Commercial Court in the Central Jakarta District Court, but with the bankruptcy respondent, it was precisely Guarantor's personal guarantor from PT. Handalan Putra Sejahtera namely Tundjung Rachmanto Setyawan and Rudi Syahputra. In the Cassation Decision No. 868 K / Pdt.Sus / 2010, Tundjung Rachmanto Setyawan and Rudi Syahputra as Personal Guarantor were declared Bankrupt by the Supreme Court.

Almost similar cases related to Personal Guarantor as a bankruptcy respondent also occurred in the case of bankruptcy dispute between PT. Orix Indonesia Finance (creditor) against Sindu Dharmali who was a Personal Guarantor from PT. Palur Raya (Debtor) won by PT. Orix Indonesia Finance as in the decision of the Supreme Court Cassation Decision No. 570 K / Pdt.Sus / 2012. This dispute arose when the creditor had agreed to provide a lease financing facility 8 times to the debtor stated in the lease agreement with option rights. Along with the agreement, followed by a guarantee statement (Personal Guarantor) by Sindu Dharmali. However, on the way, the debtor had defaulted or was unable to fulfill its obligations under the lease agreement because it is in a condition of being bankrupt by another party as stipulated in the Semarang Commercial Court No. 05 / PKPU / 2010 / PN.Niaga.Smg jo no.l5 / Bankruptcy / 2010 / PN.Niaga.Smg dated February 10, 2010, with the bankrupt applicant of PT Gresik Cipta Sejahtera. In the list of bankruptcy assets distribution PT. Palur Raya issued by the curator, PT. Orix Indonesia Finance did not get the payment for its debt bills. Therefore PT. Orix Indonesia Finance submitted a bankruptcy application with the Personal Guarantor bankruptcy respondent.

Personal Position Guarantor in bankruptcy disputes when looking at the two cases described above can mean that the scope and boundaries of Personal Guarantor accountability with the main debtor become unclear and do not fulfill the sense of justice. Legal certainty and clarity of bankruptcy mechanisms are instruments of business certainty in Indonesia. Based on a survey conducted by the Global International Finance Corporation / World Bank Group team on the ease of doing business for MSMEs with a regulatory comparison, Indonesia, in general, is ranked 91 in 190 countries in general. However, if measured by the parameters of the bankruptcy settlement in Indonesia, Indonesia is ranked 76th out of 190 countries. In the previous year, in 2015, Indonesia was slightly better, ranked 73 out of 190 countries. Even based on the results of the survey conducted there are indications of bankruptcy process misuse to harm creditors or debtors, for example avoiding payment obligations even the guarantor. Such conditions naturally disturb Indonesia's economic acceleration if the bankruptcy system and regulatory framework in Indonesia are not immediately amended and refined by adjusting the development of economic conditions.

II. PROBLEM STATEMENT

Can the Personal Guarantor be bankrupt by the creditor without the bankruptcy request being made beforehand to the debtor?

III. RESEARCH PURPOSES

Knowing the position of Personal Guarantor as a bankruptcy respondent by a creditor without a bankruptcy request first to the debtor.

IV. RESEARCH METHODS

The type of research in this thesis includes the type of normative legal research. Normative legal research is studies of law that are conceptualized and developed on the basis of the doctrine adopted by the conceptor and/or the developer. There are various legal doctrines developed, ranging from classical doctrine / natural law flow, positivism, historicism, to functionalism realism. This doctrinal method in Indonesia is commonly referred to as a normative research method. This study uses a Case Approach, a Statutory Approach, and a Comparative Approach.

A normative study must, of course, use the legislation approach, because what will be examined are various legal rules that become the focus as well as the central theme of a study in this case Law No. 37 of 2004 concerning Bankruptcy and Postponement of Obligations to Pay Debt and the Civil Code (KUHPerdata). For this reason, the researcher must look at the law as a closed system which has the following characteristics:

a. Comprehensive means that the legal norms in it are logically related.
b. All inclusive that a collection of legal norms is sufficiently able to accommodate existing legal problems, so there is no shortage of law.
c. Systematic means that in addition to linking with one another, the legal norms are also arranged hierarchically.
d. This writing uses deductive legal material analysis techniques. Deductive logic or often referred to as an analytical way of thinking is a way of thinking that starts from the notion that something that applies to the whole event or group/type, also applies to each element in the group's events. In its use, this deductive logic requires a tool called syllogism. A syllogism is an argument that consists of 3 (three) pieces of propositions in the form of statements that justify or reject a symptom. The proposition is called the major premise, minor premise, and conclusion. The major premise is a general rule, minor premise is specific facts, and a conclusion is an attempt to draw a conclusion between the minor premise and the major premise.

V. DISCUSSION

The birth of a guarantee agreement can also be said to be the formation or has been carried out by a guarantee either by individuals (personal guarantor) or a business entity (corporate guarantor). The form of the Guarantee Giving Agreement is free, not bound to certain forms, can be made oral or written or in a deed. However, it is usual for the underwriting agreement to be made in a written form for the sake of verification in court.

Personal Guarantor as a third party who is a legal subject in the guarantee agreement between the debtor and

creditor if referring to Article 1831 of the Civil Code which confirms that the guarantor (Personal guarantor) is not required to pay to the creditor, other than if the debtor fails to fulfill his achievements and his debts have fallen time/maturity and can be invoiced, while the debtor's assets must be confiscated and sold to repay the debt. So, in this case, the provisions of Article 1825 of the Civil Code must guide us, that is, if the guarantee is not limited to the principal agreement, the guarantor's personal responsibility as a guarantor includes the debtor's obligation. In the event that the company is declared bankrupt and after the debtor's assets have been confiscated and auctioned will still not be able to pay off the debtor's debt, the guarantor personal will pay it off and if the guarantor personal remains unwilling to repay it, the creditor can submit an application so that the guarantor is bankrupt. In this individual or borgtocht guarantee, the guarantee given by the debtor is not in the form of an object but in the form of a statement by a third party (guarantor / guarantor) who does not have any interest in either the debtor or the creditor, that the debtor can be trusted to carry out the agreed obligations; provided that if the debtor does not carry out his obligations then the third party is willing to carry out the debtor's obligations. With individual guarantees, the creditor can sue the guarantor to pay debtor debt if the debtor is negligent or unable to pay the debt.

However, a personal guarantor is not obliged to pay the creditor but if the main debtor is negligent (breach of contract) while the debtor's property must be confiscated and sold to repay the debt. Only if there are no principal debtor's assets that can be confiscated and auctioned, but the results are insufficient to pay the debt to the creditor, in the sense that there are still creditors' receivables, then the guarantor personal can be billed to pay the principal debtor's debt or the remaining outstanding debt.

Based on Article 1 number 1 and Article 2 paragraph (1) of Law Number 37 of 2004 concerning Bankruptcy and Delaying of Obligations to Pay Debt, the requirement to be bankrupt is a debtor, then what needs to be discussed is whether a personal guarantor is a debtor who can be bankrupt. Personal guarantor must meet the bankruptcy limitation requirements and can be said to be a debtor in civilization because that is all very important if you want to bankrupt the guarantor considering that in Law Number 37 of 2004 concerning Bankruptcy and Postponement of Debt Payment Obligations are only debtors, namely debtors who have two or more creditors and do not pay at least one debt that has matured and can be billed. Then the main requirement if you want to bankrupt the guarantor / personal guarantor is the bankrupt / applicant must be able to prove that the guarantor's personal status has changed to become a debtor because only the debtor can be bankrupt, this can be seen in the guarantee agreement. After that, the bankrupt applicant must prove that the personal guarantor has two or more creditors and does not pay at least one debt that has matured and can be billed.

When the debtor is unable to repay the debt to the creditor and if the bankruptcy request is made to the personal guarantor who does not waive his privileges, the creditor must sue the principal debtor first, after the principal debtor's property has been confiscated and auctioned but not enough debt to pay off all debts so there is still remaining unpaid debt or has proven that the main debtor has no more assets or the main debtor has been declared bankrupt by another creditor, then the creditor can collect new debtor debt and the creditor can collect the principal debtor's debts to personal guarantor because of the privileges granted by the Civil Code Article 1831, Article 1839, and Article 1840 have the authority given to personal guarantor namely, Petama, the right to claim in advance so that the assets of debtors who must be confiscated first to fulfill the implementation of the agreement, so that confiscation of Guarantor's personal property can be done only to fulfill the obstacle if it turns out that the assets of the debtor do not adequately fulfill their obligations. If the debtor's assets are sufficient to pay off the bill, Personal Guarantor's assets must be free from confiscation and sale. Second, the right to divide debts (vorecht van schuldsplitsing) if there is more than one guarantor for a debtor, where Personal Guarantor can advance the right to divide debtors' debts which they guarantee together to the guarantor (including Personal Guarantor). The things that need to be considered in this debt distribution are:

1. If one of the guarantors (including Personal Guarantor) is unable to pay the part determined to him, the guarantor who is sufficiently capable is not obliged to pay the payment;
2. If the debt division comes on his own accord from the creditor, then it turns out that one of the guarantors is in a state of incapacity, the creditor remains bound for the share he has done;

Third, the right to be dismissed from the guarantee is to ask the creditor to be dismissed or released from his position as a guarantor on the grounds that Personal Guarantor may not be able to use subrogation rights. Subrogation rights arise after the Personal Guarantor pays for debtor debts. Subrogation rights cannot be implemented because Personal Guarantor has investigated that the guarantee has been deleted or no longer exists because the creditor allows the debtor to sell or eliminate guarantees, so the guarantor Personal who has released his privileges means declaring himself liable jointly with the principal debtor against the principal debtor's debt to the creditor then the creditor can directly apply for bankruptcy against the personal guarantor. Personal Guarantor who does not give up his privileges can change his position to become a debtor that can be bankrupt if the personal guarantor after being billed does not want to pay the debtor's main debt, but with the following conditions:

1. The creditor / bankrupt applicant has billed/sued the main debtor first but apparently, the main debtor has no assets at all; The principal debtor's assets are not

enough to repay the debt; The main debtor is bankrupt;
2. Personal Guarantor as a debtor has more than 1 creditor;
3. That one of the debts falls due and can be billed;

The three things mentioned above are limitation requirements that must be fulfilled by the creditor / bankrupt applicant and can be proven in summit if they want to submit a bankruptcy request to the personal guarantor who does not give up his privileges.

But Article 1832 of the Civil Code provides an exception to the provisions of Article 1831 of the Civil Code so as to provide an opportunity for creditors to be able to sue directly to a guarantor / personal guarantor to carry out their obligations to pay off debtor debts that have been transferred to him in its entirety without having to sell debtor assets first, in the event that the guarantor has waived his privileges to demand an auction of seizure in advance of the object of the debtor.

Personal guarantor, if he relinquishes his privileges, then becomes a debtor. In this case, the guarantor can be bankrupt if the guarantor fulfills the elements of bankruptcy, namely, the existence of a debt, has 2 (two) or more creditors, the debt is due and can be billed. However, this is not enough, there must be a simple proof that there is a clause for the release of the privilege of the guarantor in the debt guarantee agreement by the main debtor. At least in filing bankruptcy with a debtor who has waived his privileges, the creditor must be able to show the following conditions:

1. Credit / debt-receivable agreement between the principal debtor and the creditor;
2. Agreement to cover debtor's credit/credit by guarantor's personnel who clearly and clearly has a clause in the debt underwriting agreement to waive his privileges and declare jointly responsible for the debt/credit of the main debtor;
3. Personal Guarantor has the debt to other creditors;
4. One of the debts has matured and can be billed. (One of the debts in question is the principal debtor's debt that is not paid by the personal guarantor after proper payment has been made but personal guarantor does not fulfill the debt payment of the principal debtor);

According to the law, a personal guarantor can waive his privileges by expressly agreeing in a guarantee agreement made between the guarantor and the creditor which results in the guarantor's personal guarantor being unable to demand that the principal debtor's property is confiscated and auctioned to repay the debt. Even a personal guarantor can bind himself together with the main debtor or debtor who is borne by his debt to be jointly and severally liable for the debtor's debt which implies that the Guarantor Personal who has released his privileges has the same position as the debtor and can be bankrupted if eligible limited bankruptcy. It has become the main principle in the treaty law, that the parties are free to determine the contents of the agreement themselves and the law that is to be used in their agreement. This is indeed supposed to be the case, meaning that what has been determined by the parties in the agreement is valid and binding as a law for those parties, then the law chosen will be used, and such a choice of law must be respected. This legal choice can be made explicitly as stated in the agreement.

A personal guarantor can be a bankrupt debtor in a bankruptcy dispute between the debtor and the creditor if he sees in the context of the debt security agreement. When viewed from the point of view of John Rawls, the choice of personal guarantor to release his privileges as in the Civil Code which is part of a legal instrument that has been agreed upon by the community (social) which contains a conception of justice which can also be said to have chosen a constitution and laws to enforce the law in this case, namely the regulations related to the agreement between the guarantor and the debtor and creditor, then the position of personal guarantor that can be bankrupt has fulfilled formal justice or according to Rawl termed justice as regularity. Because the position of Personal Guarantor can be a bankrupt debtor is substantive justice (material) because personal guarantor subjects themselves to the Civil Code as a system of legislation that has been agreed upon and guarantees legitimate public expectations of justice and submission to formal law.

The bankruptcy of the guarantor personal for a bankruptcy dispute between the creditor and the debtor is part of the legal liability that must be fulfilled. This is related to the guarantor's personal legal obligations that relinquish his privileges over the debtor's debt against the creditor. That a person is legally responsible for a particular act or that he has a legal responsibility, meaning that he is responsible for a sanction if his actions are contrary to the applicable regulations. According to Hans Kelsen in his theory of legal responsibility states that a person is legally responsible for a particular act or that he has the legal responsibility, the subject means that he is responsible for a sanction in the event of a contradictory act. In line with the personal bankruptcy of the guarantor who has waived his privileges in a legally responsible manner that has been agreed upon and contained in the underwriting agreement to bear all debtor debt payment obligations to the creditor if the debtor has been negligent and or unable to complete all of his debts.

VI. CONCLUSION

Personal Guarantor can be bankrupted if the debtor is unable to pay the debt to the creditor on terms and conditions, namely, first, when the personal guarantor does not waive his privileges, the bankruptcy request to the personal guarantor can only be made after the creditor has made legal remedies related to the debtor's assets but the assets are insufficient to repay the debt and the position of personal guarantor becomes the legal subject of the bankruptcy respondent who can repay the remaining debt. However, if the personal guarantor has

waived his privileges and if the debtor is unable to pay off his debt either legally or non-legally, the Personal Guarantor can be used as a legal subject for the bankruptcy respondent because he has the same position as the debtor in the debt-receivable agreement with the creditor. Regulatory changes must be made regarding bankruptcy conditions because bankruptcy requirements only require conditions in the form of debts due to 2 or more creditors and the debt can be billed. This is a condition that is very irrelevant to the development of the current business situation so as to facilitate the conduct of bankruptcy applications, including for debtors who are actually financially capable. Furthermore, it needs to be given its own comprehensive regulation related to the position of guarantor in bankruptcy regulation. This is to answer the need for bankruptcy law that must be able to identify the good faith of the parties in the debts of the creditor and debtor because the regulation regarding the release of this privilege makes the position of personal guarantor directly as the subject of a bankruptcy respondent without a mechanism to prove in advance the debtor's financial ability to return the debt.

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