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Legal Protection of Creditor's Right Regarding Debtor Assets That is in the Control of Third Parties That Cannot Be Included Into the Bankruptcy Inventory (Study Of Court Decision Number 02 / Pdt.Sus / Pkpu / 2016 / Pn.Niaga.Jkt.Pst Juncto 02 / Pdt.Sus / Actio-Pauliana / 2017 / Pn.Niaga.Jkt.Pst Juncto 888k / Pdt.Sus-Pailit / 2017 Juncto 200pk / Pdt.Sus-Pailit / 2018)

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ABSTRACT
The existence of a debt agreement and creditors must ask for guarantees for certainty of repayment by the debtor. The debtor is negligent, but the confiscation cannot be carried out properly so the creditor begs for bankruptcy. After a debtor goes bankrupt, there is a third party who does not want to surrender their collateral assets, this causes problems related to the legal protection of the creditor's rights. The method used by the author is a normative research method based on Law Number 37 of 2004 concerning Bankruptcy and Postponement of Debt Payment Obligations. The problem raised in this paper is how is the legal protection of the rights of creditors on the property of the debtor who is in the control of third parties that cannot be included in the bankruptcy inventory under Law Number 37 of 2004 concerning Bankruptcy and Postponement of Debt Payment Obligations? The analysis is the existence of bankruptcy makes the debtor loses the right to take care of his property and the curator assigned to take care of it, this is in accordance with Article 24 of the Bankruptcy Law. The curator discovers the debtor's property that is still controlled by a third party and does not want to be submitted for inclusion in the bankruptcy so that the curator submits an application for actio pauliana, namely to cancel the legal action because it is considered detrimental to the creditor. The arrangements are regulated in Article 41 jo. 42 of the Bankruptcy Law. The conclusion is that the creditor can file a cancellation of legal actions made by the debtor with a third party committed by the curator so that there is legal certainty that the debtor's assets can be returned for inclusion in the bankrupt bank loan, this is as stipulated in Article 41 jo. 42 of the Bankruptcy Law.
***Keywords**: Legal Protection, Creditors Rights, Bankruptcy, Bankruptcy Property, Actio Pauliana*

1. INTRODUCTION

This world consists of countries; where each country in order to maintain its existence and sovereignty must have income in order to protect its citizens. It is not excluded from developed countries but it is also intended for developing countries, so in order to make a country able to revive its citizens, the country must conduct economic transactions between countries. However, because transactions between countries take a long time to be done, the country opens up opportunities so that its citizens can trade and help to collect income for the country, so that trade is now the 'backbone' in moving a country's economy. The practice of trade, of course, people or companies certainly won't escape from making agreement. The agreements here include oral and written which give rise to the rights and

obligations of each party making. [1] The existence of loan agreement creditor has the obligation to hand over money in accordance with the agreement and receive back the money lend along with the interest. Debtor is obliged to return the same amount added with the specified interest. In accordance with a predetermined period of time, the party that has the obligation to pay off does not always run as it should, such as a jam in loan payment or delay in carrying out the obligation. [2] For that matter, the guarantee principle will be applied by the creditors as regulated in Article 1131 jo. 1132 Civil Code that regulates the implementation of the distribution of debtor assets among creditors. [3] From these two articles it is considered that this is very detrimental to both the creditor, due to a "race" to seize the assets of the debtor, and also debtors because there can also be events where the receivables are greater than the overall assets of the debtor so as to leave no debtor assets at all or even a shortage. [3]

The alternative choice that can be used is bankruptcy, where the conditions as regulated in Article 2 Paragraph (1) of Law Number 37 of 2004 concerning Bankruptcy and Postponement of Debt Payment Obligations (hereinafter referred to as Bankruptcy Law) namely, "Debtors who have two or more creditors and do not pay off at least one debt which is due and collectible, is declared bankrupt by a court decision, both at its own request and at the request of one or more of its creditors."

Special efforts given by Bankruptcy Law, are Postponement of debt payment obligations efforts which can only be submitted by debtors or creditors [3] whose implementation is regulated in Articles 222 through Article 294 of the Bankruptcy Law. In Article 289 of the Bankruptcy Law which regulates if in the end the peace deed is not approved or the debtor is negligent in carrying out his peace deed, then the debtor will be immediately bankrupt and take over by the curator.

There is also a Bankruptcy Law that provides protection against creditors when debtors do things related to their assets, causing losses to creditors, so that the curator or creditor can file a new lawsuit against the debtor's actions to put his assets in the bankruptcy inventory with verification carried out by those who sued this. This condition is called actio-pauliana which is a right held by the creditor to get the fulfillment of his rights. It is regulated in Article 41 through Article 49 of the Bankruptcy Law. The requirements for filing this claim in Article 42 Bankruptcy Law are within one year before the bankruptcy is declared the debtor has known that it will be bankrupt, and then the property has been transferred to a third party. In practice, a third party does not want to give the object that should belong to the debtor and it's under his control. So, the curator cannot included into the bankruptcy inventory.

This can be seen in the case of PT Sumber Urip Sejati Utama, (hereinafter referred to as PT SUSU). This action began with a financial loan amount of Rp.120,000,000,000.00 (one hundred and twenty billion rupiah) for the purchase of a warehouse which would later be used as collateral. This agreement was made between PT SUSU represented by Sugiarto Hadi and PT Bank ICBC Indonesia (hereinafter referred to as "ICBC Bank"), in July 2015. In September 2015, when ICBC Bank charged PT SUSU, Sugiarto Hadi had stated that the company is unable to pay. With reference from ICBC Bank, Sugiarto Hadi made a factoring agreement with PT Sinarmas Multifinance (hereinafter referred to as "Sinarmas") in November 2015. Following with the signing of this agreement, Sinarmas paid off PT SUSU's debt to ICBC Bank. The warehouse which was originally the collateral of ICBC Bank is now switched and controlled by Sinarmas.

In January 2016, PT SUSU unable to pay all its debts to other creditors such as PT Bank Mandiri (Persero), Tbk. (hereinafter referred to as "Mandiri Bank") and PT Bank QNB Kesawan, Tbk. (hereinafter referred to as "QNB Kesawan") therefore requested that PT SUSU to go bankrupt at the Central Jakarta Commercial Court and it was granted.

When conducting an inventory of PT SUSU's assets (in bankrupt), the existence of assets that were still controlled by Sinarmas and did not want to be surrendered, made the curator submit an Actio-Pauliana application to Sinarmas and ICBC Bank because they were considered to have done something that harmed other creditors within 1 (one) year before bankruptcy happen. This was granted at the first level, namely the Commercial Court with decision number 02 / Pdt.Sus / Actio Pauliana / 2017 / PN.NIAGA.JKT.PST juncto 02 / Pdt.Sus / PKPU / 2016 / PN.NIAGA.JKT.PST dated April 5, 2017. Due to dissatisfaction with the verdict of the first instance, Sinarmas then filed an appeal against the Supreme Court with Decision Number 888K / Pdt.Sus-Pailit / 2017, with the statement that the assets is in the name of Sugiarto Hadi and is not a property of PT SUSU. On October 29, 2018, the Supreme Court Decision number 200PK / Pdt.Sus-Pailit / 2018 also confirmed the decision of the first instance court where the property was the property of PT SUSU and had to be included in the bankruptcy inventory.

Based on this background, the author would like to examine further about the legal protection of creditor's rights regarding the property of the debtor who is in the control of third parties that cannot be included in the bankruptcy inventory in the form of paper with the title "Legal Protection of Creditor's Right Regarding Debtor Assets That is in the Control of Third Parties That Cannot be Included Into the Bankruptcy Inventory (Study of Court Decision Number 02 / Pdt.Sus / PKPU / 2016 / PN.Niaga.Jkt.Pst Juncto 02 / Pdt.Sus / Actio-Pauliana / 2017 / Pn.Niaga.Jkt.Pst Juncto 888K / Pdt.Sus- Pailit / 2017 Juncto 200PK/ Pdt.Sus-Pailit / 2018)". The author limits the discussion of this paper only from the point of view of bankruptcy and postponement of debt payment obligations.

2. FORMULATION OF THE PROBLEM

What is the legal protection of the creditor's rights regarding debtor's assets which are in the possession of a third party that cannot be included in a bankruptcy inventory based on Law Number 37 of 2004 about Bankruptcy and Postponement of Debt Payment Obligations?

3. METHODOLOGY

This type of research used by the author in writing this thesis is to use normative research methods. [4] This writing is deductive, descriptive [4] and evaluative [4] using secondary materials, especially based on Law Number 37 of 2004 about Bankruptcy and Postponement of Debt Payment Obligations.

4. RESULTS

The cause of bankruptcy departs from an agreement between the parties that have agreed and together submit to the agreement they have made themselves. The engagement in this matter also gives a "promise" in which the parties have agreed to do or not do an act. In addition, this agreement is a form of "agreement" between the parties who agree to achieve certain goals. In order for the parties to obtain or achieve their goals, it is better to draw up an agreement in written form which contains the rights and obligations for each party, prohibitions, and procedures for resolving disputes that might occur before the specified goal is reached. Besides the existence of an "agreement" it should also be followed by a "good faith" attitude from the parties in carrying out the agreement that was made between them.

The agreement made between the parties must fulfill the elements in Article 1320 of the Civil Code, namely to acknowledge the existence of an agreement, the parties who are capable of law, the object that is the target of the transaction and does not violate either the general provisions or decency or can be called halal causes. This article is a "base" in making an agreement, so by not fulfilling or violating any of the elements of that article, the agreement is also considered legally flawed and can be nullified.

In this case the agreement which is the main thing is related to the existence of a loan agreement. This loan agreement is an agreement which states that at one party provides a certain amount of money to lend (which is usually termed as a creditor), also added with interest and asks for collateral in the form of stationary objects. The other party is the debtor, that is, the party who must repay the loan principal or money that has been lent by the creditor plus the interest determined by the creditor and hand over stationary property to be used as collateral to the creditor. The demand for guarantees for creditors is to provide a sense of confidence that if a debtor is able to obtain an asset, it can also return the money he has lent. Collateral can also be used to pay off the remaining debt owned by debtors in the future if they have been unable to repay their debts to creditors.

In the event that a debtor has been unable to repay his debt to the creditor, then the creditor based on a loan agreement that has been mutually agreed has the right to execute or confiscate the collateral that has been guaranteed to the creditor. In theory it is easy to apply and do, in fact there are several aspects to be considered by creditors. First, it is not uncommon to find that the value of collateral is smaller than the value of the credit given. Second, the debtor does not want to admit that he is unable to pay. Third, the debtor does not want to submit a physical guarantee to the creditor. Fourth, the guarantee has changed ownership. In addition to this, there are still a number of other things that become considerations or obstacles for creditors to confiscate collateral belonging to the debtor. On this matter, the creditor also has several considerations to be able to carry out this execution, usually the last resort taken is to ask for the help of a third party, namely using the method of dispute resolution. The most commonly chosen dispute resolution is through the court, which is further divided whether the creditor wants to take the civil route (using a default lawsuit) or the path using the commercial court (using the request for bankruptcy). Of these two choices would certainly cause advantages and disadvantages of each, usually the creditor will find out in advance about the position of the debtor related to other creditors.

Other thing that needs to be considered by the creditors is the economic capability of the debtor which can be analyzed through the company's financial statements using techniques from financial ratios. Usually this can be done together with public accountants, so they can see the ability of a company. If the debtor's finances and assets still have a surplus, it is best to do a restructuring without the need to resolve with litigation. This is because even if the debtor is declared bankrupt, there is a possibility that the payment that can be received by the creditor may not be able to return the loan given. As for restructuring, there are several methods, which are rescheduling,

debt equity swap, hair cut, rescheduling or cut of interest, asset sales, equity carve-outs, additional loan.

If there are at least two creditors who still have debts and at least one debt that is due and can be billed, then it has fulfilled the requirements to apply for debtors to be bankrupt. This can be done both by the creditor and the debtor himself. This provision is stipulated in Article 2 of the Bankruptcy Law. In this modern era people demand more on a short, fast and efficient solution. Especially if it is associated with business or commerce, the reason is that the longer a case is, the object of the dispute will change its sale value. These are due to the depreciation of the value or the goods can be damaged and cannot be traded again or so forth. However, not all

objects can shrink in value, there are also other objects that increase in value, such as land, every year the value of land continues to increase due to the increasing number of people and the decreasing amount of land.

Bankruptcy based on Bankruptcy Law provides an illustration that this bankruptcy helps the debtor to pay off his debts to creditors in a "fair" manner which is by making a sale of his assets carried out by a third party (curator). At the time the debtor was declared bankrupt by the commercial court, the debtor had been declared incompetent so the law could no longer take care of all his assets as of 00.00 (GMT+7.00) the following date. The bankruptcy proceedings taken can be said to be short compared to civil cases in district courts, because there are several processes that exist in civil proceedings but are not enforced in commercial court events, such as mediation and declarations of either accuser or defender. This was replaced by the Postponement of Debt Payment Obligations in the commercial court and immediately proved it without answering, so it only needed a settlement period no later than 180 (one hundred eighty) days. This certainly does not include time to submit legal remedies offered in the Bankruptcy Law.

Regarding of issues involving bankruptcy, it is also necessary for a curator to have knowledge besides the law which is important to know about accounting. Because this relates to bankruptcy where the curator must perform the task of recording the assets of the bankrupt debtor which will then be sold by auction and the proceeds will be paid proportionally to the creditor. This may cause problems if the curator sells the assets of the bankrupt debtor, but the sale should not be necessary because all debtors' debts have been repaid. So from this, the curator also needs to have the knowledge to be able to make or read a balance sheet or income statement for the settlement made.

As a result of PT SUSU's bankruptcy, a curator has been appointed to take care of the debtor's bankruptcy assets which are supervised by a supervisory judge conducted by a judge of the case review panel. The curator job, is to inventory all the assets of bankrupt debtors and verify all debts that belongs to the debtor. After bankruptcy, there is a waiting period of 90 (ninety) days in which collateral holder creditors may not confiscate the object of collateral, after passing the waiting period, then it is permissible to confiscate the object of collateral and sell it on their own. But, this does not apply forever by law given a time period in which after passing the time period and failing to sell, then the collateral must be returned back to the curator by auction. The proceeds from auctioning the collateral assets will first be paid in advance to the collateral holder creditor who holds this guarantee. If there is more then it will be paid proportionally to other normal creditors. Another case if there is a lack of the amount of credit held by collateral holder creditors, then they will collect the remainder as a bill from normal creditors. This is because the curator has sold the collateral object of the collateral holder creditor which makes the collateral holder creditor has no collateral anymore, so they will be downgraded to a normal creditor.

In this case, there are creditors who, after a period of time given by the law and do not want to hand over objects that are the property of the debtor to the curator. In addition to this, the acquisition period was one year before PT SUSU was declared bankrupt. Seeing this, the curator in accordance with his authority which has been determined in the Bankruptcy Law to prevent more losses on creditors belonging to the bankrupt debtor, it is permissible to submit an application for actio pauliana to the commercial court at the Central Jakarta District Court.

Actio Pauliana is a legal effort to cancel a transaction made by the debtor of his assets resulting in losses for other creditors. The requirements for submitting applications that can only be made by curators are provided for in Article 41 jo. 42 of the Bankruptcy Law. Initially, this actio pauliana was regulated in Article 1341 of the Civil Code and constituted an authority or right held by creditors. The curator must be able to find a "common thread" in the past (one year before bankruptcy). The reason for a party that does not want to surrender the property of the debtor that has been frozen. This "red thread" certainly originates from the agreement concerning the object. These legal remedies are used to guarantee the addition of assets intended to repay payments to creditors.

Therefore the agreement between Sinarmas and Sugiarto Hadi must be seen again. In this agreement, Sugiarto Hadi's capacity is as a person and not as a director in PT SUSU, so there has been a mistake by the curator in determining the creditors of PT SUSU (in bankruptcy). Although initially it was known that the loan agreement with ICBC Bank was to use the name PT SUSU. So, it can be seen that Sinarmas has no relevance to this case. The reason for this is PT SUSU, which is a legal entity. This type of legal entity is represented in the act represented by an organ called a director who is held by Sugiarto Hadi. Sugiarto Hadi in his position as a person is not bankrupt, but his position as director of PT SUSU is bankrupt.

However, what became a debate was, in the actio pauliana decision, ICBC Bank was made a Defendant and was still registered as one of the creditors of PT SUSU (in bankruptcy). In fact, it was indeed the beginning of the credit agreement between PT SUSU and ICBC Bank with the guarantee of a warehouse. During the second month of billing conducted by ICBC Bank, the debtor had stated that he was unable to pay. For this, ICBC Bank also offered to be taken over by Sinarmas. Sugiarto Hadi also agreed and bound himself with Sinarmas based on the factoring agreement. The existence of this agreement resulted in repayment by Sinarmas to ICBC Bank. Then, ICBC Bank handed over collateral to Sinarmas for control. With the repayment of a debt, the agreement is deemed to have ended. This is in accordance with one of the provisions in Article

1381 of the Civil Code. Secondly, ICBC Bank is more suitable to be a witness or a defendant in the actio pauliana petition, this is because the agreement between PT SUSU and ICBC Bank has been repaid. With the repayment that makes the agreement has been concluded or terminated.

Relating to assets belonging to bankrupt debtors which should be included in the bankruptcy inventory. Previously, it should be known in advance that the bankruptcy inventory is a "place" that contains all the debtor's assets owned when he was declared bankrupt by the commercial court. The bankruptcy inventory is considered as a "savings" owned by the debtor which is managed by the curator to pay off debts owned by the creditors associated with the curator. Objects or assets that can be included in the bankruptcy inventory are objects that have the same name or are owned by the debtor. Meanwhile, for objects that are only controlled, they may not be included in the bankruptcy inventory.

Relating to bankruptcy is a legal entity in the form of a limited liability company. Please note that the legal entity's assets are different from those limited liability company representatives. Assets that are owned by the company representative are their personal property. This asset is certainly separate from assets that are the ownership of legal entities. In the event that the assets are obtained using the money of a limited liability company and the name of ownership in the name of the board of directors, it is not certain that the assets are directly or automatically owned by the limited liability company. This is the task of the curator in this case to find out and strive that this property is indeed owned by the company rather than private property even though the acquisition uses money from the company. In practice, especially in this case, the existence of bankrupt debtor assets is under the control of a third party that cannot be included in the bankruptcy inventory or taken by the curator. Even though this third party is determined by the curator as one of the creditors belonging to the bankrupt debtor. If seen from the agreement made between the debtor and this third party, there has been a mistake in the matter of the curator determining the subject of law.

Regarding this case can be said to be less suitable to use the bankruptcy method to resolve. This is because all existing creditors are collateral holder creditors, where this type of creditor is a creditor who has collateral for the debtor's assets. There is a guarantee that creditors can normatively implement it directly without the need to wait for a court decision. Confiscation of assets that can be guaranteed in an agreement can be carried out without having to ask for approval of the confiscation from the court because the agreement based on Article 1338 of the Civil Code has stated that the agreement that has been made applies to the parties that make and are considered as law among them. So if there are provisions that are violated then sanctions will automatically be obtained based on those specified in the agreement made between them.

Regarding the legal protection of creditors for assets held by third parties that are not included in the bankruptcy proceedings, it must be seen in advance from various aspects.

First, please note that not all assets owned by the bankrupt debtor may be confiscated by the curator. Pursuant to Article 22 of the Bankruptcy Law it has been determined that there are a number of objects that are the property of bankrupt debtors that cannot be confiscated. These objects can be objects needed by the debtor for work, namely: animals; equipment; medical devices; food for 30 (thirty) days; everything obtained from his work wage. However, if the assets of the bankrupt debtor are included in the equipment that have a high sale value, the curator may ask permission from the supervisory judge to request that the assets be included in the bankruptcy inventory from the bankrupt debtor.

Second, the curator must also pay attention to the name of ownership in an object, usually this applies to stationary objects such as land and buildings. This must be examined in advance, whether the name contained in the land certificate is the same as the name of the bankrupt debtor, if it is different than the item must not be included in the bankruptcy inventory. In the case of PT SUSU's bankruptcy, it can be seen that the bankrupt debtor is a legal entity in the form of a limited liability company. A limited liability company is a legal entity in which company assets with separate personal assets and in carrying out all actions is represented by organs called directors. The Board of Directors is represented by one or several people who have the right to act on behalf of the company. So, what enters as a debtor's bankrupt assets in the form of a corporate legal entity is property that has the company's name. A different name from a bankrupt debtor is not necessarily the property of the bankrupt debtor even though in this case obtained from the results of the company's business. Making the curator have to examine more deeply whether the property is really the acquisition is clearly using company money. It is not enough if the curator only uses a statement letter signed by Sugiarto Hadi to make the argument that the property has become the property of PT SUSU.

Regarding the legal protection of the creditor's right to debtor's assets which cannot be included in the bankruptcy proceedings, it can be seen that the legal protection should be given by the state authorities, in this case the government. The government can provide a protection to creditors in this case through regulations made by them namely the law in which this product has a binding force, so like it or not, the Indonesian people must comply with these regulations. In matters relating to bankruptcy, everything related to it is regulated in the Bankruptcy Law. At the Bankruptcy Law it is known that both written clearly and implicitly give legal certainty to the debtor or creditor. The existence of legal certainty guarantees the fulfillment of rights which are duly accepted by both creditors and debtors.

For creditors, there are several rights relating to guarantees that have been regulated in the Bankruptcy Law. The law has given authority by the debtor to carry out an independent execution by assuming that the debtor is as if or not in bankruptcy, although the validity of this right is limited by a period of time that is only for 2 (two) months after the suspension period (90 (ninety) days) since the debtor is declared bankrupt). This provision is regulated in Article 56 of the Bankruptcy Law. In addition to this, the creditor is also given another right that is to cancel the transaction made by the debtor one year before the bankruptcy statement. In order to exercise this right, the creditor cannot directly submit a request to the commercial court, but must go through a representative from the creditor whom is the curator. The curator representing the creditors will submit a request called Actio Pauliana. Another thing related to the protection of creditors is that if the assets that become collateral are successfully auctioned off by the curator, the creditor of the collateral holder has the right to be able to receive payments on his receivables before being given to other creditors. From some of the rights that have been described, it has been seen that the provisions governing debtor rights have been clearly specified in the Bankruptcy Law

However, in practice it is not as easy as what is written in the Bankruptcy Law. There are many obstacles that were found by both creditors and curators in making actio pauliana requests. It can be seen in this case that a third party did not want to surrender the debtor's property to be included in the bankruptcy inventory. The third party does not want to submit it to the curator because it considers that the debtors who are bankrupt with legal subjects relating to them are different parties. Therefore, other creditors who have debts with bankrupt debtors must first ensure that the collateral owned by each of them has been included in the bankruptcy inventory. In practice, it is also very rare to be able to find the value of auctions for collateral assets greater than the loan ceiling provided by creditors.

There are some shortcomings in the Bankruptcy Law, that in filing the petition for Actio Pauliana or related to not wanting to hand over assets belonging to bankrupt debtors by third parties, in this Bankruptcy Law there are no regulations regarding sanctions that can be applied. This result in the failure to fulfill legal certainty for creditors, due to the absence of sanctions, the third parties do not care about the legal consequences of those arising from their actions which are detrimental to the other party. These third parties only think about their personal interests, whereas in fact a good regulation must be able to provide legal protection both preventive and repressive which can make these third parties become deterrent or afraid to do so. In addition, regulations must be able to accommodate to ensure legal certainty over the rights of creditors as a result of a third party that does not want to hand over the assets of the bankrupt debtor by imposing sanctions.

5. CONCLUSION

Based on the results of the research conducted by the Author, it can be stated that the creditor must consider through two aspects that are the economic aspect that can be seen from the financial statement of the debtor and legal aspects whether to go bankrupt or restructure.

As for the legal protection that can be given to the creditor's rights over the debtor's assets in the control of a third party that cannot be included in the bankruptcy inventory is the creditor can submit a cancellation of legal actions made by the debtor with a third party within one year before bankruptcy happen which will be committed by the curator so that there is legal certainty that the debtor's assets can be returned for inclusion in the bankrupt bank inventory, this is as stipulated in Article 41 jo. 42 of the Bankruptcy Law and in accordance with the elements in Actio Pauliana, namely the existence of a debtor that has been declared bankrupt, a third party who controls the debtor's assets, and the agreement made between them will cause losses to other creditors.

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