

Analysis Legal Certainty of the Use of Article 254 Bill No. 37 Year 2004 Court Case Study (Number : Nomor 141/Pdt.Sus- PKPU/2020/PN.Niaga Jkt.Pst)

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ABSTRACT

In this era of globalization more people are making debt loans. To guarantee the payment the Creditor will ask for an additional guarantee that is individual. Not a few debtors have failed or neglected to pay the repayment of their debts. As a result, many debtors are requested in the Application for Suspension of Debt Repayment Obligations. But in this case, not only the Debtor is requested, but there is also a Guarantor as the legal subject in the application. Regarding this matter is stipulated in article 254 of Law No. 37 Year 2004 which states the Application for Suspension of Debt Payment Obligation is not for Guarantors. But some experts say the Article does not regulate so. Thus, giving rise to the interpretation of this Article. This Article is also often overlooked. So, there is no legal certainty about this matter.

Keywords: Guarantor, Certainty Law, Postponement in debt repayment obligations.

1. INTRODUCTION

At the moment third party guarantees are quite popular in credit life. This third-party guarantee is commonly called an insurer, guarantee, or personal guarantee. An individual guarantee (borgtocht or personal guarantee) is an agreement in which a third party, in the interests of the debtor, binds itself to fulfill the agreement of the debtor while this person does not fulfill it. It is hereby concluded that the individual guarantee was born because of the principal agreement that preceded it, so that this individual guarantee agreement is an Accessor. [1] The Guarantor has the right to have the debtor's property confiscated and sold first only after the guarantor's property when it is first filed before the court and can notify the Creditor of the debtor's property and to be paid in advance the costs of confiscation and auction. This is stipulated in Article 1831 of the Civil Code. Thus, the new guarantor appears its obligations after the Debtor's assets are dealt with. But this is different if the guarantor has relinquished his privileges. With the release of the privilege if in the future the Debtor does not pay his debt or default the creditor can directly collect to the guarantor so that there is no need to deal again with the Debtor personally.[2]

In the event that the debtor is unable to pay the debt there is a dispute resolution line that is usually agreed upon at the time of the signing of the credit agreement. Usually, creditors will go through litigation or litigation. Either a default lawsuit, or PKPU (Suspension of Debt Payment Obligation) and Bankruptcy. Bankruptcy and PKPU (Suspension of Debt Payment Obligation) are stipulated in

Law No. 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations (hereinafter referred to as UUK and PKPU). In this case PKPU is not only requested to the Debtor but also to the Guarantor. Whereas the Insurer is due to the main agreement. And the existence of a Personal Guarantee is to pay the debtor's debt if the debtor is negligent in fulfilling his achievements or the debtor is no longer able. As for what we can know that in the case of PKPU lawsuit the position of the debtor can still run his business which means still able to pay his debt.

Regarding the insurer who has relinquished his privileges can be made the respondent in the PKPU actually violates UUK article 254 which states "The suspension of debt repayment obligations does not apply to the benefit of fellow Debtors and insurers."

In this case there are actually many differences in interpretation what exactly with the release of privileges make the article invalid and guarantors can be requested PKPU. This leads to multi-interpretation and the absence of legal certainty and justice for guarantors. As in the verdict 141/Pdt.Sus-PKPU/2020/PN. Niaga Jkt.Pst. in this application the judge granted the application PKPU even though in it there is a guarantor regardless of the intent and content of article 254. But different from the verdict number 212/Pdt.Sus-PKPU/2019/PN Niaga.Jkt.Pst. where the judge considers the article and the purpose of the PKPU so that the application contained guarantor here is rejected the verdict.

1.1. Related Work

According to the description above, we divided the existed work into Legal certainty regarding the Use of Article 254 concerning Personal Guarantee in the Application for Suspension of Debt Repayment Obligations.

1.1.1. Multi-interpretation about guarantor

This initial problem occurred because of differences in interpretation as well as the release of guarantor privileges. The guarantor's privilege is that he can ask for the Debtor's property to be confiscated and sold in advance and there are several other things such as requesting debt split, using exceptions and being exempt from guarantees. So he can no longer sue for the Debtor's property to be confiscated first.[3]

On this matter there is a debate in his daily practice. There is a View of the Judge, Expert, Jurisprudence who states that the consequences of the release of the Privilege make the Insurer the same as the Debtor. But there is a View of the Judge, Expert, Jurisprudence which states also that the release of privilege does not make him the insurer.

This basic interpretation is very influential with the consideration of The Commercial Judge concerning PKPU in which there is an Insurer as the Respondent. Because one of the bases of the Judge decides to accept or reject the Application is based on the interpretation of the consequences of the position of the insurer who has relinquished the Privilege. So as a result of the absence of legal certainty on the basis of this understanding, also resulted in the absence of legal certainty in the decision of the Judge in this PKPU application. Whereas in the Bankruptcy Law and PKPU concerning Insurers has been regulated an arrangement regarding this guarantor namely Article 254 of the Bankruptcy Law and PKPU which states PKPU is not for insurers.

The basic thing to know is that the purpose of this PKPU is an opportunity for the Debtor to restructure the debt which can be said that he will continue to pay his debts. And that means the insurer's obligations, in this case, have not yet emerged. In the event that this Insurer is made a Respondent Together with the Debtor will be contrary to the terms of the PKPU itself where in PKPU must be proven simply.[4] As for some jurisprudence that differs the judge's legal opinion on the consequences of the release of privileges are:

1. Jurisprudence of the Supreme Court of Indonesia No. 19/PK/N/2000
 "Although there is a waiver of privileges from the Insurer / guarantor as intended in article 1832 BW but does not mean the position of the insurer / guarantor (guarantor) can replace the Debtor, because the provisions of article 1832 BW is only authorized to the Creditor to confiscate the goods of the insurer / guarantor (guarantor) to pay off the debt. In this case the insurer /guarantor loses his right to demand that the debtor's goods be confiscated."
2. Jurisprudence of the Supreme Court of Indonesia No. 35 K/N/2001

"Regarding the guarantee agreement is an accessor agreement of a principal agreement, thus the Guarantor cannot replace the position of the Debtor. The waiver of the privilege means that the Creditor has the right to demand the guarantor's goods to pay off the Debtor's debt."

3. Supreme Court decision no. 43 K/N/1999
 "That with the guarantee agreement which among others contains the Guarantor wails all rights granted by law to a Guarantor, is to replace the position of the Debtor against the Creditor, so that the guarantor can be categorized as a Debtor."

Due to the different interpretations regarding the basic position of the guarantor, this resulted in different interpretations of the judges also in deciding cases for the use of Article 254 of the Bankruptcy Law and PKPU which stated that PKPU was not for the guarantor itself. If the basic interpretation of the judge believes that the guarantor who has relinquished the privilege is the same as the debtor, it will result in him not using article 254.

Based on my Interview Result Data with two Practitioner:

1. Advocate Sandro Hakim Limbong, S.H., M.H.
 Indeed in article 254 of Law No.37 of 2004 states in it that PKPU does not apply to Individual Guarantors. The guarantor exists because of an agreement to guarantee the achievement of the Debtor when the Debtor is negligent in fulfilling his debt. In the event that the Guarantor has relinquished his privilege means that the Creditor may collect to the Guarantor. But He said based on the purpose of PKPU the Judge should direct in the Peace Proposal for debtors who first pay their debts until the time the Debtor's assets have run out will be billed to the Guarantor. The PKPU should not have to include guarantors because actually the ultimate goal of PKPU is the provision of a peace agreement containing the rescheduling of debt payments by the Debtor. terms of many different rulings because the Judge has freedom and each judge has different interpretations and beliefs. Not driven only to the certainty of the Guarantor but the Judge must also guarantee the certainty of debt repayment to the Creditor.
2. Advocate Jamaslin James Purba S.H, M.H.
 If we look at the content of Article 254 of the Bankruptcy Law and PKPU, specifically does not mention that the Personal Guarantee (Insurer) couldn't be used as a Respondent PKPU. We couldn't immediately say that the Insurer cannot be in PKPU right. That in the event that the Insurer has relinquished its privileges as the insurer, then in fact he is in the same position as the Debtor, responsible on a renter basis, so that in the event that the Creditor wants to file a legal action (PKPU or Bankruptcy), then the Respondent could be just the Insurer or it could be just the Debtor, it is up to the Applicant (Creditor). According to our knowledge back to the provisions of Article 1832 of the Civil Code. If the Guarantor has waived his/her Privileges, then the Creditor can directly charge the Insurer. This means that by relinquishing the privilege,

the position of the main Debtor Law with the Insurer becomes the same (renter's responsibility), so that the Creditor has the authority to claim his rights to anyone, including withdrawing the insurer as the Respondent in PKPU.

1.2. The aftermath cause by Multi-interpretation about guarantor

As for the basis of the consequences of the release of the guarantor's privileges varying interpretation, resulting also in the judge decides the case PKPU in which there is a Guarantor also varies. As in:

1. Verdict No. 141/Pdt.Sus-PKPU/2020/Pn.Niaga Jkt.pst
The judge also weighed from the existing evidence in the form of the agreement of The Respondent II and the Applicant who has relinquished his privileges so that the Judge argues that it does not violate the provisions in article 254 of the Bankruptcy Law and PKPU. The Judge considers that Respondent II remains responsible for the debts of The Respondent I for having relinquished his Privileges in accordance with article 1832 paragraph (1) of the Civil Code so that it can be declared as a direct Debtor of the PKPU Applicant who is obliged to pay off the debt of the Respondent I that has been due and can be billed.
2. Verdict No. 212/Pdt.Sus-PKPU/2019/Pn.Niaga Jkt.pst
The Panel of Judges held that the respondent as a guarantor who has relinquished his privileges in connection with the phrase "confiscated and sold" as mentioned in article 1832 of the Civil Code "The insurer cannot demand that the debtor's property be confiscated and sold to pay off his debt". In this case the phrase is not a process and part of the PKPU but bankruptcy at the time of the eradication of property. Thus withdrawing the Guarantor or Guarantee into the PKPU Application as Respondent is wrong. So the Panel of Judges held that the Guarantor should not be withdrawn in the PKPU Application regardless he has relinquished the Privilege and it is also affirmed in Article 254 of Law No.37 of 2004 on Bankruptcy and PKPU.

In the above 2 rulings, it can be seen that there is legal uncertainty regarding the Guarantor's Position in the case of PKPU application and the context of article 254 of Law No. 37 of 2004. There are many differences of opinion both among the Experts themselves and the Judge's Decision. legal certainty is needed so as to create justice and legal protection to the Guarantor. Legal certainty is inseparable from written legal norms. Law without certainty will lose meaning because it cannot be used as a guideline in society.[5]

1.3. Our Contribution

This paper based on the explain above is for Analyzing legal certainty regarding Personal Guarantees in Article 254 of the Bankruptcy Law and PKPU and the factor behind uncertainty about Guarantor in PKPU Application. And

hopefully this research can contribute and useful as the basis of the development of science, especially the science in the field of Bankruptcy Law and Postponement of Debt Payment Obligations.

1.4. Paper Structure

The rest of the paper is organized as follows. Section 2 explained about Legal certainty, Section 3 explained about Guarantor itself in Section 4 explained about PKPU. Section 5 its about conclusion about this research itself.

The type of research used in this writing is normative juridical research, which is research that aims to test the quality of the legal norm itself as an object of research based on the purpose of the law, namely fairness, usefulness and certainty. The approach used is the legal and case approach.[6]

2. BACKGROUND

2.1. Legal Certainty

Certainty is where a situation becomes certain both in terms of the prevailing provisions and regulations. The law must be guaranteed and fair. It must be a guideline of fairness and conduct because the code of conduct must support an order that is considered reasonable. Only because it is fair and carried out with certainty the law can carry out its functions. Legal certainty is a question that can only be answered normatively, not sociologically.[7]

Normative legal certainty is when a regulation is regulated and enacted definitively in order to govern clearly and logically. Clearly what is meant is not to cause doubt (multi-interpretation) and logical. It clearly means that he does not clash with the rule of law of another. Legal certainty means the application of a clear, durable, consistent law, and its application is not influenced by circumstances or subjective aspects. Certainty and justice are not only moral obligations, but also a feature of the law. Uncertain and irrational laws are not just bad laws. Legal certainty is a guarantee that the law will be fair. Norms that promote justice must truly serve as obeyed rules. According to Gustav Radbruch justice and legal certainty are fixed parts of the law. He argued that justice and legal certainty should be considered, legal certainty should be maintained for the security and order of a country.[8]

2.2. Personal Guarantor

The definition of insurer can be seen in Article 1820 of the Civil Code, which reads as follows: "Insurer is an agreement in which a third party is in the interests of the creditor, binding to fulfill the debtor's agreement, if the debtor does not fulfill the agreement."

So from the above definition of Personal Guarantee is an agreement between a creditor (debt) and a third party that guarantees the fulfil lance of the obligations of the debtor

(the debtor). In such individual guarantees, the fulfillment of achievements can only be maintained against certain people, namely the debtor or the insurer. In the provisions of Article 1821 paragraph (1) of the Civil Code specifies that "there is no insurer if there is no valid principal agreement". So the insurer agreement is only an accessor agreement which is an additional agreement rather than the basic agreement that is a credit agreement by the main debtor. The insurer in providing guarantees to creditors also cannot exceed what is the agreement of the debtor concerned (the principle of *nemo plus*), as stipulated in Article 1822 of the Civil Code.

Under the 1831 Civil Code, personal guarantee had the privilege of demanding that debtor assets be confiscated and sold first. In article 1831 of the Civil Code states: "The insurer is not obliged to pay to the debtor, other than if the debt is negligent, while the objects of this debt must first be confiscated and sold to pay off the debt". So it can be concluded that after the insurer relinquishes its privileges it is obliged to pay off the debtor's debt that has been negligent or injured promise. In this case the creditor has access to get repayment from the insurer without the need to confiscate the main debtor's assets first.[9]

2.3. Suspension of Debt Payment Obligation (PKPU)

What is meant in the suspension of payment is an opportunity that by law through the decision of a commercial judge where the debtor can re-discuss the payment of his debt to the creditor either the payment of all or part of the debt, referred to if necessary to restructure the debt. The purpose of PKPU is to allow a debtor to continue his business despite the difficulty of payment and to avoid bankruptcy. So the delay in debt repayment obligation is restructuring the debt with the ultimate goal of regulation. As stipulated in Law No. 37 of 2004 Article 222 paragraph (2), that debtors who cannot or expect will not be able to continue the payment of their debts that have fallen and can be billed, may request a delay in debt repayment obligations, with the general intention to submit a peace plan that includes the offer of all or part of the debt to the concurrent creditors. This provision indicates that in essence the delay in debt repayment obligations (also referred to as PKPU) differs from bankruptcy. The difference with bankruptcy is that it does not aim for bankruptcy (liquidation).

PKPU aims to provide an opportunity for the debtor to delay the obligation to pay his debts, thus providing the possibility for the debtor to continue to carry out his business. If PKPU then all management of assets and assets remain in the hands of the debtor which is useful for the guarantee of debt payments. In addition, it also provides an opportunity for the debtor to restructure his debts, while for creditors, the PKPU that has been given to the debtor is also intended for the creditor to obtain certainty about his bill, the receivables debt will be able to be repaid by the debtor.[10]

The requirements to apply for PKPU are specified in Pasal 222 paragraph (1), paragraph (2) and paragraph (3) of Law

No. 37 of 2004 and should also pay attention to article 8 paragraph (4). Then it can be concluded that the requirements to apply for PKPU are: The existence of debt; Have two or more creditors; The debt is due and billable; The Debtor or Creditor cannot or expects to continue repayment of its overdue and billable debts; It can be proven simply.

Observing Law No. 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations (PKPU) will be found several parties involved in the PKPU, namely. Debtors, Creditors, Supervisory Judges and Administrators. In contrast to bankruptcy, if in bankruptcy the party in charge of managing and dismantling the debtor's bankrupt property is the curator. With regard to the parties in the PKPU it is not explained whether the individual guarantor is referred to in the party namely the debtor. As is known in article 254 uuk states: "The suspension of debt repayment obligations does not apply to the profits of fellow Debtors and insurers." So in this case it can be seen that there is a deficiency in the arrangement in the Suspension of Debt Payment Obligation (PKPU) related to the parties in the Suspension of Debt Payment obligation (PKPU)

3. CONCLUSION

1. In this case on the basis of the consequences of this waiver of privilege varies. There is an expert opinion that the waiver of privileges makes the position of Guarantor the same as the Debtor so that the Guarantor is responsible in parallel with the Debtor, and the Guarantor is also referred to as the Debtor. But there is an expert opinion that the release of privileges does not make the Guarantor the same as the Debtor, the context of the release of privileges is only the context of the seizure of the Guarantor's property. So in this case also resulted in differences in the Interpretation of Judges that affect the results of the Judge's Decision related to the Guarantor in the case of PKPU.
2. So in the verdict there is a different interpretation of the law between one judge and the other. There are judges who agree and grant the application of PKPU with the consideration that the insurer has waived the Privilege, but there are Judges who reject the application and consider the content of the provisions of Article 254. So it can be seen in this case the absence of legal certainty regarding the Guarantor. Even among Practitioners, Experts, Judges of both jurisprudence also vary. But this will also cause injustice for the Guarantor himself. Whereas the Guarantor only reserves against the debtor's debt. This can adversely affect the guarantor's position later, because this gives a gap to a Debtor who has bad faith. Because it could be that the debtor does not want to pay instead of not wanting to pay.

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