

PARENT COMPANY BANKRUPTCY AND CONSEQUENCES FOR INDEPENDENCE SUBSIDIARIES

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Abstract: Provisions in the regulations No. 37 of 2004 on Bankruptcy of the Parent Company has not set either specifically or generally. The absence of this rule results in the absence of a request suspension of obligation for payment of debts of the Parent Company have been granted by the Commercial Court. to protect the rights of creditors of the Holding Company is declared bankrupt by not reducing the independence of subsidiaries that are not directly involved with the bankruptcy Holding Company, also to find out about the extents to which the principle of *Actio Paulina* in protecting the legal rights of creditors against the interests of holders of the parent company is declared bankrupt.

Keywords: Bankruptcy, Holding, Company, *Actio Paulina*

A. Background Problem

There are Some factors which are needed for bankruptcy regulation: ¹

1. To prevent illegally claiming the debtor's assets when there is more than one creditors at the same time
2. To prevent creditors holding security

¹ General explanation on law number 37 about bankruptcy and suspension of obligation for payment of debts.

Law No. 37 of 2004 about bankruptcy and suspension of obligation for payment of debts in indonesia it is known as *UU No. 37 Tahun 2004* tentang Kepailitan dan Penundaan Kewajiban Pembayaran Utang (PKPU)

right in respect of assets from selling the debtor's property without considering the interest of both the debtor and other creditors

3. To Avoid fraudulence perpetrated by some of creditors or debtors, for example, the debtors tries to give advantages to one or more creditors so the other creditors feel aggrieved, or existence of fraudulent deeds of debtors to escape all of the company assets with intention to relinquish the responsibility towards the creditors.

Bankruptcy made lossing the rights of debtors to claim their assets. Those rights are assigned to the crediors under the supervision of judges. During bankruptcy period, the debtor is not permitted to make agreements which can bind the wealth of Bankrupt de-

btors. Because the purpose of bankruptcy is to make division on the bankruptcy estate for creditors benefit.

In bankruptcy, there are important issues on parent company. those are legal relation between parent companies with its subsidiary, responsibility of Parent Company to its creditor, legal consequences if occurred connections subsidiary in parent company and the absence of law which specifically regulating bankruptcy on parent company.

The law in Indonesia does not regulate Parent Company specifically either Parent Company in general or in specific. The absence of regulation is compounded by the weakness of the legal system of the Civil Law which adopted by Indonesia. Jurisprudences is only referring to regulations which exist. The legal issues that do not have regulation will become difficult to resolved even neglected.

The principle of limited liability is often used as a tool by parent company for negative intentions. This could be occurred when the Parent Company made debt agreements and contractual agreements. When the period of payment is already overdue, Parent company deliberately does not do its obligation to pay the debts by using reason that the company has already failed. After that parent company or its affiliate applying their selves as a bankrupt to the Commercial Court. But, before they request as a bankrupt company, the parent company usually diverts almost of the assets to the Subsidiary or affiliate of the subsidiary. Many creditors did not receive some of benefits from the parent Company's trading because on the other side, the creditors fate is often threatened because the assets of the parent company that used as guarantee was not belonging to the parent company but

rather belonged to its subsidiary or its affiliate. however, it is hard to be executed.

B. Research Questions:

1. How does regulation set about bankruptcy of Parent Company and its subsidiaries in the law of bankruptcy and suspension of obligation for payment of debts ?

C. Regulation about Bankruptcy of parent company And its subsidiary under the bankruptcy law and suspension of obligation for payment of debts.

1. Legal relation Between Parent Company With its Subsidiary

Subsidiary of parent company that is a legal entity, independent, and separated from other legal entity, it is also generally a corporate, which also have autonomous positions. As a legal entity, subsidiary has rights, obligations, and also owing its own assets, which is separated in juridical with stock to other stockholders. There is no exception about stockholder whether the It is holding company or not.

In other words, companies in Indonesia are using "separate legal entity principle" as a law on its regulation. Because each Subsidiary or each parent company (Holding Company). however, if there are lawsuits to some companies, those demands could not be addressed to Subsidiary or to its holding company²

In other case, legal status on legal entity of subsidiaries Group can be seen as holders which have rights and obligations including legal connection between companies in the

2 Rudhi Prasetya. 2001. *Kedudukan Mandiri Perseroan Terbatas; 3th edition*. Bandung: Citra Karya Bhakti Co. p. 58.

group with third parties which the company is responsible for its business activities.

Legal relations created within the company group / group can make a condition where group leader sit, representing the interests of the group as a one-unity and has a tend to not pay attention to the interests of third parties related to the each company who were in the group, so it is complicated for a third party to prove the attitude or actions of group leader which has caused losses to them. Although from the economic perspective, the company of Group is one-unity, but in juridical side, each company has its own characteristics in sense that each of the companies that joined group company is the legal entities that stand on its own.

2. Relevancy on Parent Company Bankruptcy With its Subsidiaries

1. Bankruptcy shall mean general confiscation of all assets of a Bankrupt Debtor that will be managed and liquidated by Curator under supervision of Supervisory Judge as provided for herein; as referred in chapter I paragraph 1 law of bankruptcy and suspension of obligation for payment of debts. new debtors can be said and asked bankruptcy if he has two or more creditors and unable to pay their debt which is already overdue and can be billed and were declared bankrupt by adjudication, either at his own petition or at the request of his creditors.
2. However, if parent company fell into failed, it could be impacted to its subsidiaries. As contained in the provisions in article 21 of law number 37 of 2004 about bankruptcy and suspension of obligation for payment of debts that is bankruptcy which involved

to all of its assets at the time of the adjudication declare as bankrupt and everything earned during bankruptcy. However, in this case the whole of the property of the debtor in bankruptcy will be seized by orphan's courts, but not all of the debtor property in bankruptcy will be confiscated, toward his exclusion has been regulated in article 22 of Bankruptcy law.

Because the parent company as majority shareholder in each of its subsidiaries, which it means that the parent company also receives dividends from the profits which acquired from subsidiaries, then the dividends also means that the property will be belonging to parent company. Moreover, for a subsidiary, bankruptcy which happened by the parent company will surely have a huge effect. The activities of the subsidiary will be hampered by parent company bankruptcy and it will not has many assets as much as it before to be bankrupt, subsidiary shall be able to be more independent in managing the company.

3. The position of bankruptcy law and suspension of obligation for payment of debts in bankruptcy on parent company and its subsidiary

In Indonesia, as formal law, bankruptcy law is already exist by existence of Faillissement Verordening (FV) Staatblad 1905 Number 217 JIS Years 1906 Number 348, however, it has Amandemented with government regulation in lieu of Law Number 1 Years 1998 about replacement on Bankruptcy regulation (FV) then assigned as Legislation with law Number 4 Years 1998 About Bankruptcy, years 2004 and it being Amandemented again by Law Number 37 Years 2004 about Bankruptcy and suspension of obligation for payment of debts, as one of law transportation

which is becoming reference for the solution of debts.

The provisions on law of bankruptcy and suspension of obligation for payment of debts that applied in Indonesia is not regulated separately with Bankruptcy law, either in period of Faillissement Verordening (FV) Staatblad 1905 Number 217 juncto jis. Year 1906 Number 348, or After occurrence of the crisis Monetary in Indonesia on July 1998, then modified as Government Regulation in Lieu of Law No. 1 of 1998 About Amendment on Bankruptcy law, September 9th of 1998 (State Gazette of Republic of Indonesia Years 1998 Number 135) and replaced with law Number 37 Years 2004 About law of bankruptcy and suspension of obligation for payment of debts. law Instrument will be required for facilitating the problems of payment debt and statement of bankruptcy.

Bankruptcy is not releasing someone who declared as a bankrupt from obligation to pay his debts, because verdict on bankruptcy statement aims for treasure debtor bankruptcy expected can be used to pay back the entire debt debtor in fair.

Provision in Bankruptcy No. 37 Years 2004 Article 222 paragraph (2) said:

Debtors who are unable, or expect that they will be unable, to continue paying those debts which have matured and must be paid, may request a suspension of obligation for payment of debts, with the general intention of presenting a composition plan that includes an offer to pay all or part of their debts to unsecured Creditors

By giving an opportunity for debtor to delay his obligations of payment of its debts will be probably make an effort for debtor to continue his liability to pay the debts. All of the Assets will managed by debtor. however,

it can give a guarantee for repayment debts to the all of his creditors. In addition, it can give opportunity to debtor for restructure its debts, for Creditur, a suspension of obligation for payment of debts that has given to debtor also intended expected for the Creditur gain the certainty of about the invoice, so the debts would be paid off by debtor.

D. Legal Protection toward Creditors In The Bankruptcy Of Parent Company

1. The legal status and responsibilities of parent company in bankruptcy.

The absence of regulations regarding the bankruptcy of parent company should be addressed with consistency and seriousness of the commercial court judge to dig the values that live in the community as defined in article 28 paragraph (1) of law No. 4 of 2004 concerning Judiciary powers.

The principle of separate legal entity or corporate personality arrange that a company has rights, obligations and has the assets that separated with other shareholders, Commissioners and directors. This principle can be analogous that a subsidiary company which has assets in the parent company which declared bankrupt does not mean the subsidiary is also bankrupt. Since either the parent Company or its subsidiaries have rights and obligations and have assets which separated with shareholders who were regarded as the founder of the company as well as with the Commissioner and the Board of Directors as the body of the company.³

Subsidiary accountability through shareholders and commissioners and and Subsidiary directors can only happen when it actually occurred Subsidiary involvement in the bankruptcy of the Parent Company. The

3 This provision is regulated in article 3 paragraph (1) law no. 37 of 2004

forms of engagement for example through mixing properties and assets of Subsidiaries with parent company even the decision making which lead to authority abuse that perpetrated by the shareholders, Commissioners and directors.⁴

2. The Principle Of The Independence Of The Subsidiaries That Are In Line With Legal Protection toward Creditors

Rudhi Prasetya claims that one of some perspectives which is easy to get trouble from the company is limited liability. The creditor not be able to claim his assets of parent company more than the assets of company has. Form of Law company is not a monopoly by the law in Indonesia, but a form of law that is universal. Indeed the existence of legal forms limited liability company by share bring many benefits, ease, and fluency of the corporates world.⁵

The principle of piercing the corporate veil is not regulated in commercial code but simply set in article 3 paragraph (2) of company law. In connection with the bankruptcy of the parent company, the principle piercing the corporate veil is applicable toward the Company based on the responsibility of the Subsidiary as part of a group of companies and the responsibility of the parent company as a shareholder.

Introduction of the principle of piercing the corporate veil aim to avoid things that are not fair especially for the parties outside of the company from arbitrary action or is not

worthy of being done on behalf of it, whether emerge from transactions with a third party or arising out from the act of misleading or act against the law.

The principle of piercing the corporate veil It has been formulated in the company law clearly but with limited as set forth in article 3 paragraph (2) of the company law.

If bankruptcy of parent company related or caused by a shareholder at both parent company and its subsidiary, the shareholders is still be able to requested their responsibility based on article 3 paragraph (2) of company law concerning the piercing the corporate veil. When the parent Company assets have been transferred to its Subsidiary then petition Actio Paulina can be filed by the curator to the Court of Commerce as regulated in article 41 of law of Bankruptcy and suspension of obligation for payment of debts up to article 42 of law of Bankruptcy and suspension of obligation for payment of debts. When legal action of parent Company did not meet the elements Actio Paulina. However, the creditors who feel aggrieved be able to request lawsuit to District Court based on the existence of the Action against the law or breach of agreement that caused the loss under article 1365 KUH-Perdata.

3. The Implementation Of The Principle Of The Institution Actio Paulina to Protect The Interests Of Creditors In The Company Principal bankruptcy

Petition Actio Paulina related to bankruptcy should be reviewed by the Court of Commerce. Basically there are two (2) provisions in the law of Bankruptcy and suspension of obligation for payment of debts, those are:

1. Article 2 paragraph (1) of law of bank-

⁴ This provisions are regulated in article 3 paragraph (2) law of bankruptcy, also known as *piercing the corporate veil principle*.

⁵ Rudhi Prasetya. 2001. *Kedudukan Mandiri Perseroan Terbatas; 3th edition*. Bandung: Citra Karya Bhakti Co, P. 2.

ruptcy and suspension of obligation for payment of debts.

“A decision on a bankruptcy petition and other related issues as intended by this Law, shall be rendered by the Court having jurisdiction over the region in which the domicile of the Debtor they live.

2. Article 280 paragraph (1) of law of bankruptcy and suspension of obligation for payment of debts.

“A Petition for shall be filed as referred in chapter I and chapter II shall be verdicted by the Commercial Court which is located in General Court”.

Actio Paulina is an effort of laws for Sue a cancellation of law actions of debtors that are adversed them. The provisions of Actio Paulina in article 1341 of Civil Code.

The main purpose of Actio Paulina act is to requested cancellation of all actions that has done by Bankruptcy debtors. Law action of debtors can be cancelled is a law action that is done in one years before the existence of the verdict bankruptcy by Court Commerce which rated and proven has adversed creditor in something to do with bankruptcy stock According Article 41 in law bankruptcy and suspension of obligation for payment of debts.

Theoretically Actio Paulina instruments also known in civil law on article 1341 of civil code. The first opinion probably build is argument with a leveler of Actio Paulina Instruments in general civil law with Actio Paulina on bankruptcy law. If it is so, then the bankruptcy make it must be distinguished from Actio Paulina in General Civil Code, namely the petition Actio Paulina only arise as a result of the bankruptcy and insolvency process will depend on its own, for example:

1. Actio Paulina in bankruptcy will be fall-

ing if the bankruptcy ends in arbitrate court (unless the peace that contains a waiver of property in bankruptcy).

2. Actio Paulina on bankruptcy can only be done by a curator or the lender based on reasons which are taken from article 41 to article 47 of law of bankruptcy and suspension of obligation for payment of debts.

Provisions on Actio Paulina which is regulated on article 1341 of the civil code probably relevant with cancelation proposal that requested by the curator who arranged in article 42 law of bankruptcy and suspension of obligation for payment of debts. Basically according in article 1315 and 1340 of civil code, an agreement is only binding on the parties that is make it and therefore do not carry any consequences for third parties. Nevertheless to guarantee protects the interests of creditors in each Alliance, and that the provisions of article 1131 of the civil code and article 1132 civil code can be fully implemented so provisions of article 1341 of the civil code better known by Actio Paulina.

E. Closing

Conclusion

1. The law of bankruptcy and suspension of obligation for payment of debts giving less guarantee about legal protection to creditors. This weakness caused there is no provision in the law of bankruptcy and suspension of obligation for payment of debts which governing bankruptcy of parent company. In addition, for further effect of the absence of the regulation is emergence the difference perception between the Commercial Court regarding the legal relationship between the parent company with its subsidiary.

implementation of the principle of the independence of the subsidiaries does not reduce the legal protection of creditors. all principles are implemented consistently. The parent Company in bankruptcy if proven involvement of Subsidiaries in the parent company's bankruptcy either through asset or Subsidiary organ then any Subsidiaries may be subject to liability. So any implementation of Actio Paulina, is not protecting the interests of creditors of parent company in bankruptcy because the curator difficult to applying claim Actio Paulina on company measures which detriment the creditors. That issue based on does not has equality perception among Commercial Court judge regarding the criteria Actio Paulina the company's principal measures to the detriment of creditors as well as the jurisdiction of the Court which is authorized to handle application Actio Paulina.

1. Advice

- 1) Legal protection for creditors in the bankruptcy of the parent company need to be made arrangements specifically concerning the bankruptcy of the parent company. The existence of special legislation governing parent company resulted in a difference of perception does not need to happen again. Creditors can also believe that their rights are always protected by law. The judge should always refer to article 28 paragraph (1) of law No. 4 of 2004 concerning the powers of the Judiciary, that the judge is obliged to dig the values that living in the community.

implementation of independence principle of the subsidiaries and the upholding of the principle of Actio Paulina should not reduce legal protection to creditors and the

bankruptcy of parent company shall be more effective with the holding of consolidation in the environs of the District Court includes the Court of Commerce regarding the authority to handle the matter of Actio Paulina. One way that is capable of achieving this is by special arrangement in the company law regarding legal connection between parent company with Subsidiaries that are based on either the stock or ownership based on managerial control. The law of bankruptcy and and suspension of obligation for payment of debts also need to define the specifics regarding Actio Paulina criteria in the bankruptcy of parent Company.

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