

Kedudukan penjamin perorangan dalam kepailitan berdasarkan undang-undang nomor 37 tahun 2004 tentang kepailitan dan penundaan kewajiban pembayaran utang = The status of personal guarantor in the bankruptcy in accordance of law number 37 of 2004 concerning of paying debt obligation

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Abstrak

Jaminan merupakan suatu tanggungan yang diberikan oleh debitur atau pihak ketiga kepada kreditur untuk menjamin pelunasan utang debitur. Lembaga jaminan ini diberikan khusus untuk kepentingan kreditur guna menjamin piutangnya melalui perikatan khusus. Jaminan terbagi menjadi dua, yaitu jaminan kebendaan dan jaminan perorangan yang masing-masing memiliki ciri dan sifat tersendiri. Jaminan perorangan (Penanggungan) diatur di dalam Pasal 1820 sampai dengan Pasal 1850 KUHPerduta.

Dari ketentuan pasal 1820 KUHPerduta, dapat diketahui bahwa dalam suatu skema penanggungan terdapat tiga pihak, yaitu debitur sebagai pihak yang berutang, kreditur sebagai pihak yang berpiutang, dan terakhir adalah penanggung sebagai pihak yang menjamin terpenuhinya prestasi debitur berupa utang-utang debitur kepada kreditur.

Pengajuan permohonan pailit terhadap penanggung merupakan hal yang cukup lumrah terjadi, khususnya apabila penanggung merupakan penanggung perusahaan (Corporate Guarantee). Namun tidak demikian halnya dengan permohonan pailit terhadap penanggung pribadi (Personal Guarantee). Hanya sedikit sekali permohonan pailit yang diajukan kepada penanggung pribadi, karena secara umum ada kecendrungan bahwa kreditur enggan berurusan dengan debitur untuk alasan praktis.

Dalam suatu skema penanggungan utang, terdapat dua perjanjian yang berbeda, yaitu perjanjian pokok antara debitur dan kreditur dan perjanjian penanggungan antara kreditur dan penanggung. Perjanjian penanggungan itu sendiri bersifat *Accessoir*, jadi pada dasarnya jika perjanjian pokoknya hapus maka perjanjian penanggungannya turut hapus. Perjanjian penanggungan sifatnya mengikuti perjanjian pokok sehingga suatu perjanjian penanggungan tidak dapat melebihi perjanjian pokoknya.

Seorang penanggung memiliki hak istimewa, salah satunya hak untuk menuntut supaya harta benda debitur terlebih dahulu disita dan dijual untuk melunasi utangnya. Hak ini dapat dilepaskan oleh penanggung dalam perjanjian penanggungan, yang membuat kreditur dapat memilih harta mana yang harus disita dan dijual terlebih dahulu.

Collateral was a guarantee given by a debtor or third party for a creditor to guarantee of paying debt. Collateral institution was specially given for the significance of the creditor in order to guarantee the debt through a special bond. It was divided into two, they were property collateral and personal collateral in which each one had its own features and characteristics. Personal collateral was regulated in the Article 1820 to Article 1850 Civil Code.

In the regulation of Article 1820 KUHP Perdata, it could be understood that in the scheme of there were three parties, they were a debtor as the party who was in debt, a creditor as the party who gave debt, and the last, a guarantor as the party who guaranteed fulfillment of achievement that was debts of debtor to creditor.

Submission of Act of Bankruptcy toward the guarantor was a common thing, especially if he was a corporate guarantor. However, it would not happen to Act of Bankruptcy for personal collateral. It was only few of Act of Bankruptcy proposed by personal collateral since generally there was tendency that creditor was reluctant to have a deal with debtor for practical reasons.

In scheme of debt collateral, it was included two different agreements, they were main agreement between debtor and creditor and collateral agreement between creditor and guarantor. Collateral agreement itself was accessoir so that basically, if main agreement was removed, it was also the collateral agreement. It was based on main agreement so that it could not exceed its main agreement.

The person who guaranteed owned special rights, one of them was to insist so that properties of debtor, firstly, was confiscated and sold to pay the debt. The right could be undone by him in collateral agreement in order to make the creditor can choose which property had to be confiscated and sold first.</i>