Collective Bankruptcy of Cooperative, Management, and its Supervisors (A Study of the Verdict of the Supreme Court Number 78 K/Pdt.Sus-Pailit/2014)*

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Abstract

This juridical-normative study aims to analyze position and responsibility of cooperative organization in bankruptcy case based on the effective Indonesian laws and regulations. It also covers the application of a simple burden of proof principle to the Verdict of the Supreme Court number 78K/Pdt.Sus-Pailit/2014. The decision declares bankruptcy of a cooperative together with the boards of management and supervisor. The decision is based on the consideration that cooperative debt is a shared responsibility of management and supervisor.

Keywords: simple burden of proof**,** cooperative bankruptcy, cooperative organization.

Analisis Kepailitan Koperasi yang Dipailitkan Bersama-Sama dengan Pengurus dan Pengawas (Studi Putusan Mahkamah Agung Nomor 78 K/Pdt.Sus-Pailit/2014)

Abstrak

Penelitian ini bersifat yuridis-normatif yang bertujuan untuk menganalisa kedudukan dan tanggung jawab perangkat organisasi koperasi dalam perkara kepailitan berdasarkan peraturan perundang-undangan yang berlaku di Indonesia dan penerapan asas pembuktian sederhana terhadap Putusan Mahkamah Agung Nomor 78 K/Pdt.Sus-Pailit/2014 yang mempailitkan koperasi bersama-sama dengan pengurus dan pengawas koperasi dengan dasar utang koperasi merupakan tanggung jawab bersama dari pengurus dan pengawas koperasi.

***Kata kunci**: asas pembuktian sederhana, kepailitan koperasi, perangkat organisasi koperasi.*

A. Introduction

Cooperative has organizational chart that consists of members, managers, and supervisors. Meeting of members is the highest forum in determining cooperative policy. In conducting cooperative business affairs, members appoint an administrator in a meeting of members. The board of managers includes members that are appointed by other members in a meeting of members to organize the cooperative. The board managers and the board of supervisors work together to maintain the stability of the cooperative. Article 20 of Law Number 25 of 1992 on Cooperatives (Cooperative Law of 1992) stipulates that each member has an obligation to

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participate in business activities organized by the cooperative. This illustrates that all members, not only the managers, should work together to help the sustainability or the existence of their cooperative.

In 2013, the Commercial Court (*Pengadilan Niaga*) of Semarang by the Decision Number 07/Pailit/2013/PN.Niaga.Smg adjudicated the bankruptcy petition made by Chandra Wijaya Tan, as the appellant, who pleaded for the respondents: Titian Rizqi Utama Cooperative, Ismayudi as the Cooperative Supervisor, and Sri Rejeki as the Cooperative Manager. In the decision, the Panel of Judges of the Court decided: (1) to accept and grant the petition for bankruptcy filed by the appellant; (2) to declare the respondents' bankruptcy with all legal consequences; (3) to refer the curator; (4) to appoint and assign a designated judge from the Semarang District Court; and (5) to sentence all respondents to pay all costs incurred in the case amounting to Rp2,311,000 (two million three hundred and eleven thousand rupiah).

The interesting part in the decision is that the cooperative managers and supervisors are declared bankrupt together with the Titian Rizqi Utama Cooperative. Considering the evidences of debt in the *a quo* verdict, the debts that arise are in the name of the cooperative, not the manager and/or supervisor. In other words, the established legal relationship is between the appellant and the cooperative. Therefore, manager and supervisor cannot be declared bankrupt personally unless they are proven to have debts to the appellant. Article 8(4) of the Law Number 37 of 2004 on the Bankruptcy and Postponement of Debt Obligation (Bankruptcy Law), stipulates that an appeal for bankruptcy statement must be granted if there are facts or circumstances that the requirement of bankruptcy has been fulfilled. Taking note of the article, the bankruptcy regime in Indonesia adheres to the simple burden of proof principle (*asas pembuktian sederhana*). The respondents had appealed bankruptcy case Number 07/Pailit/2013/PN.Niaga.Smg to the higher level of court. However, in the Supreme Court Decision Number 78 K/Pdt.Sus-Pailit/2014, the Supreme Court had strengthened the previous bankruptcy decision.

It should be noted that if the reason for making the cooperative organizers declared bankrupt is due to a default by the cooperative resulting from the negligence of the manager and the supervisor, referring to the simple burden of proof concept, such negligence cannot be proved in bankruptcy proceedings. Thus, the Verdict of the Commercial Court of Semarang Number 07/Pailit/2013/PN.Niaga.Smg and the Decree of the Supreme Court Number 78K/Pdt.Sus-Pailit/2014 is contrary to the principle a simple burden of proof.

Based on the above description, then this study is focused to answer some questions as follows: (1) How is the position and responsibility of cooperative organization in the case of cooperatives declared bankrupt? (2) How did the Panel of Judges consider the principle of simple burden of proof in the Verdict of the Supreme Court Number 78 K/Pdt.Sus-Pailit/2014, which declared the cooperative together with the manager and the supervisor bankrupt?

B. Position and Accountability of Cooperative Organization in Bankruptcy of Cooperative

There are two types of legal subjects in Indonesian Code of Civil Law (Civil Code): personal and legal entity.[1] Cooperative is a legal entity as defined in Article 1(1) and (9) of the Cooperative Law of 1992. A cooperative is an association consisting of persons or bodies that provides a freedom of membership by cooperating in a familial way of doing business to enhance physical welfare of its members.[2] Cooperative, as a means of joint efforts of its members to achieve prosperity, has many different definitions. In essence, all of the definitions still have similar characteristics. Etymologically, the word 'cooperative' comes from the Latin word *Cum,* which means 'with', and *Aperari,* which means 'to work'. Cooperative as a legal entity cannot run its business without a cooperative organization.[3]

Article 21 of the Cooperative Law of 1992 regulates that cooperative organization's consists of meeting of members, managers, and supervisors. Article 29 and Article 38 of the Cooperative Law of 1992 principally explain that managers and supervisors are members that are appointed by other members in a meeting of members. Taking into account the provision, it can be concluded that basically a cooperative is a collection of members who then appoint some among themselves to manage the cooperative as managers and supervisors of the cooperative where the highest decision is on the hands of the members through meeting of members.

The Bankruptcy Law does not specifically regulate the provisions that differentiate bankruptcies of individual and legal entity. Article 1(1) of the Bankruptcy Law explains that bankruptcy is a general confiscation of all the debtor's assets. A bankrupt debtor, under Article 1(4) of the Bankruptcy Law, is a debtor that has been declared bankrupt by a court decision. Then, paying attention to Article 1(4) of the Bankruptcy Law, a debtor is defined as a person who has debt because of an agreement or a law where the repayment of the debt can be billed in a court. A creditor, in a bankruptcy case, may apply a cooperative, as a legal entity, for bankruptcy. As discussed earlier, cooperative has an organization that is a personal subject or, possibly, legal entity subject if the bankrupt cooperative is a secondary cooperative whose members are also cooperatives.

Article 21 of the Bankruptcy Law explains that bankruptcy covers the entire wealth of debtor at the time of bankruptcy statement is pronounced as well as everything gained during bankruptcy. Cooperative, as a legal entity, has an organization that will certainly get the effect of bankruptcy of a cooperative. After a cooperative is declared bankrupt, the authority of the cooperative organization will be switched to a curator. It is stipulated in Article 16(1) of the Bankruptcy Law, that the curator has the authority to carry out the task of handling and/or ordering bankruptcy property

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1 Subekti, *Pokok-Pokok Hukum Perdata*, Jakarta: Intermasa, 2008, pp. 19-21.

2 Nindyo Pramono, *Beberapa Aspek Koperasi Pada Umumnya dan Koperasi Indonesia di dalam Perkembangan,* Yogyakarta: TPK Gunung Mulia, 1986, p. 10.

3 R.T. Sutantya Rahardja Hadhikusuma, *Hukum Koperasi Indonesia,* Jakarta: Raja Grafindo Persada, 2000, p. 1.

since the date of the bankruptcy is pronounced even if the decision is appealed for a cassation or review. Moreover, this study also discusses the position and responsibility of each organizational position in the case of cooperative bankruptcy.

C. Position and Responsibility of Cooperative Personnel in the Case of Cooperative Bankruptcy

1. Position of Cooperative Manager after Bankruptcy

As explained earlier, when a cooperative is declared bankrupt, cooperative manager's authorities will be turn to a curator, who is assigned by a court. When the cooperative is declared bankrupt, then the curator act for and on behalf of cooperative, replacing the managers. Thus, any legal action taken by the post-declared bankrupt cooperative is valid only if it is performed by the curator. Article 16(1) of the Bankruptcy Law stipulates that the curator has the authority to perform the task of handling and/or ordering of bankruptcy property since the date of the bankruptcy decision is pronounced even if the decision is appealed or reviewed.

Further, the explanation of Article 16(1) of the Bankruptcy Law explains that the order means the disposal of assets to pay or pay-off debts. The explanation does not provide the purpose of the task of handling. Thus, it can be concluded that the management task of a curator is limited to bankruptcy, not the management of the cooperative. Bankruptcy of cooperative does not diminish authority and skills of its personnel. Bankruptcy does not touch upon the legal status of cooperative as a legal entity. Bankruptcy is only related to the assets of the cooperative.[4] The bankruptcy of a cooperative gives effect to its members so that they can no longer legitimately commits a legal act binding the bankruptcy of the cooperative, since the authority has been transferred to the curator. The transfer of authority to the curator does not necessarily make the curator to replace the organizational position of the cooperative personnel, either as manager, supervisor, or meeting of member.[5]

Article 144 of the Bankruptcy Law stipulates that a bankrupt debtor has the right to offer a settlement to all creditors. When the cooperative is declared bankrupt, the cooperative is still given a chance by the law to propose a settlement plan to the creditors as regulated in Article 144 to Article 177 of the Bankruptcy Law. The process of offering settlement by the cooperative after the verdict of bankruptcy must be the authority of the cooperative management since they have the authority to represent the cooperative inside and outside the court. Cooperative management has a duty to seek and to achieve the purposes and the goals of the cooperative. Therefore, cooperative manager should seek to achieve settlement with creditors. Although the authority of the personnel has been transferred to the curator in the cooperative management, in the submission of the settlement plan, the management

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4 Polak and Wessel in M. Hadi Shubhan, *Hukum Kepailitan: Prinsip, Norma, dan Praktik di Peradilan,* Surabaya: Kencana, 2008, p. 212.

5 Asser in M. Hadi Shubhan, *Op.cit.,* p. 213.

is still the representative of the cooperative.[6] In the settlement process proposed by a cooperative that has been declared bankrupt, the manager has a duty to draw up a settlement plan. The settlement plan shall be provided no later than eight days before the debtors' matching meeting at the court registry to be accessible to any interested parties.[7] Based on the provisions of Articles 144 to 177 of the Bankruptcy Law that regulate settlement, a bankrupt cooperative management still has the authority to represent the cooperative. This provision further confirms that in the event of a legal entity bankruptcy, the task of management undertaken by the curator is limited to the management of property.

Post-bankruptcy position of cooperative personnel is certainly needed by the curator in the process of handling and treasuring cooperative property. A curator needs cooperative personnel in the process of handling the following:[8]

1. Cooperative personnel has sufficient experience in running the cooperative before the cooperative is declared bankrupt. It can assist the curator who may not understand the cooperative management.
2. Cooperative personnel knows clearly about the total assets of cooperative both in the form of net assets and liabilities. It can prevent the fictitious creditors from entering verification of debt.

Based on the above description, post-bankruptcy cooperative personnel have important positions and roles in the post-bankruptcy settlement process, debt verification process, and completion process that assist the curator.

In addition to the previously described authority, based on Article 215 of the Bankruptcy Law, after the termination of bankruptcy, a debtor has the right to apply for rehabilitation to a court that has declared bankruptcy. Cooperative as a legal entity certainly cannot necessarily apply for rehabilitation to court. The personnel of cooperative must be the party who has the position to apply for rehabilitation after the bankruptcy. The cooperative management can submit the rehabilitation because the act is not an act related to the property as the exclusive right of the curator.

2. Responsibility of Cooperative Manager after Bankruptcy

Manager is a part of cooperative organization that has the authority to represent the cooperative inside and outside the court. Manager is also authorized to perform actions and efforts for the interests and the benefits of the cooperative in accordance with responsibilities and the decision of the meeting of members.[9] According to the organism theory of Otto von Gierke, manager is the organ or equipment of a legal entity. Just like a human that has organs, any movement or activity of a legal entity

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6 Fred B.G. Tumbuan in M. Hadi Shubhan, *Op.cit.*, p. 212.

7 *Vide* Article 145 of the Law Number 37 of 2004 on the Bankruptcy and Postponement of Debt Obligation (Bankruptcy Law)

8 M. Hadi Shubhan, *Op.cit.*, p. 214.

9 Abdul Kadir Muhammad, *Hukum Perusahaan Indonesia,* Bandung: Citra Aditya Bakti, 2010, p. 152.

is desired or governed by the organ itself. Therefore, manager is a personification of a legal entity itself.[10]

Article 29(1) of the Cooperative Law of 1992 explains that the manager is a member of the cooperative selected from and by members of the cooperative in meeting of member. Article 31 of the Cooperative Law of 1992 states that a manager is responsible for all activities of cooperative management to meeting of members or extraordinary member meetings. Based on the Article 31 of the Cooperative Law of 1992, it may be concluded that the transfer of management responsibility to the cooperative is determined in the meeting of members. If a meeting of members approves a legal action to be taken by the manager, all legal consequences by the manager shall become the responsibility of the cooperative. If the manager accountability is denied, then it can be interpreted that the manager can personally bear the legal action. This interpretation is in line with the provisions of Article 34 of the Cooperative Law of 1992 as follows:

(1) The personnel, whether jointly or individually, are responsible for losses incurred by the Cooperative, because the acts that has been done, either in purpose or negligence.
(2) In addition to such settlement, if the acts are done in purpose, it is not possible for the prosecutor to prosecute.

Article 34 of the Cooperative Law of 1992 confirms the position of manager in the case of personal accountability when the manager takes actions that may cause harm to the cooperative. The norms of the article do not specify the types of loss that should be the responsibility of the cooperative personnel. The article formulates generally, as long as the personnel creates an adverse legal act intentionally or unintentionally, it is a personal responsibility. The Cooperative Law of 1992 also does not explain the mechanism of accountability of a personnel action that causes loss to the Cooperative. The provisions of the Cooperative Law of 1992, which regulates the personnel, substantially, apply the principle of accountability as adopted by the Law Number 40 of 2007 on the Limited Liability Company (Limited Liability Company Law). The Limited Liability Company Law regulates to board of directors in a company. It mentions about the principle of fiduciary duty and duty to skill and care, indoor management rules, the principles of *ultra vires* and piercing the corporate veil.

The principle of fiduciary duty accountability of a manager is the legally binding task of a fiduciary relationship between a manager and a cooperative so that a cooperative manager must have the concern and ability, goodwill, loyalty and honesty towards the cooperative.[11] A fiduciary duty accountability of a cooperative manager is implicitly regulated in Article 30(2) of the Cooperative Law of 1992. The article stipulates that the manager is authorized to take action and efforts for the interests and benefits of the Cooperative in accordance with the responsibilities and based

[10] Nindyo Pramono in M. Hadi Shubhan, *Op.cit.*, p. 226.
[11] *Ibid*, p. 227.

on the decisions of the Meetings of Member. The principle of indoor management rule explains that outsiders of a company with good-faith are not burdened with responsibility for internal validity of the party representing the company. However, on the contrary, the company has a responsibility for the validity of its actions.[12] The principle of indoor management rule towards cooperative personnel is reflected in Article 30(2)(b) and (c) of the Cooperative Law of 1992.

The *ultra vires* principle is a principle governing the effect of the law on the actions of the personnel for and on behalf of the cooperative. However, it actually exceeds what is stipulated in the articles of association of the cooperative.[13] The principle of *ultra vires* accountability for cooperative personnel is reflected in Article 34(1) of the Cooperative Law of 1992. It regulates that the personnel, whether jointly or individually, are responsible for losses incurred by the cooperative, because the acts that has been done, either in purpose or negligence. The phrase "either in purpose or negligence" (originally sounded as *tindakan yang dilakukan kesengajaan atau kelalaian*) may be interpreted as a form of applying the principle of *ultra vires* in the rule, although the article emphasizes the consequences of causing a loss or not. The principle of piercing corporate veil is the process of imposing responsibility from a company to the company's personnel on legal actions conducted by the company organs without considering that the action is actually done by/on behalf of the company. This principle of accountability is reflected in Article 34(1) of the Cooperative Law. After discussing the accountability of the cooperative management, the part discusses the relationship between the accountability and the bankruptcy process of a cooperative.

As discussed earlier, there are circumstances in which managers may be personally responsible for the conduct of the management. Relevance between the accountability of the personnel and bankruptcy lies in the element of debt and creditors as regulated in Article 2(1) of the Bankruptcy Law. Article 1233 of the Civil Code explains that the source of the debt arises from an agreement or the law. It is also regulated in Article 1(6) of the Bankruptcy Law. It defines debt arising from an agreement or the law.

One source of debt arising from the law is the obligation to make compensation in the event of an act against the law. The provisions concerning unlawful acts are regulated in Article 1365 of the Civil Code, which in essence explains that any violation, which carries loss to others, requires an offender to indemnify. Taking into account the provisions of Article 34 of the Cooperative Law of 1992, manager act, which causes the loss, constitutes a form of unlawful act. Thus, giving the obligation for the cooperative management to provide compensation. However, it cannot necessarily be requested to the cooperative managers. It necessarily needs to make a lawsuit mechanism based on unlawful acts registered in the general court.

A cooperative member may file a lawsuit if the cooperative has not been declared

[12] Sutan Remy Sjahdeni, *Sejarah, Asas dan Teori Hukum Kepailitan,* Jakarta: Kencana, 2016, p. 572.

[13] M. Hadi Shubhan, *Op. cit.*, p. 228.

bankrupt by the court. If the cooperative has been declared bankrupt, then pursuant to Article 83 of the Bankruptcy Law, the filing of lawsuit against the manager shall be done by the curator. The filing of a lawsuit by the curator to manager that commits an action against the cooperative is an effort to increase the property of bankruptcy. Thus, it can be concluded that to declare a personnel is responsible, as mentioned by Article 34 of the Cooperative Law of 1992, must be proven in a civil court.

D. Position and Responsibility of Cooperative Supervisor after Bankruptcy

1. Position of Cooperative Supervisor after Bankruptcy

Supervisors are members elected from and by members in meeting of members. Supervisors have the duty to supervise the implementation of the policy and management of cooperatives and make a written report of supervision process.[14] As the responsibility for the performance of their duties, supervisors shall prepare and submit a written report of the supervision to the meeting of members.[15] The duties and authorities of supervisors are not interfering the managers but rather represent the members in overseeing the cooperative management. The position of supervisor in a cooperative organization equals to the manager, like commissioners in a limited liability company.[16]

As discussed earlier, management of bankrupt debtor by a curator under Article 16 of Bankruptcy Law can be interpreted that the arrangement made by a curator is limited to bankrupt property, not the management of the cooperative. Therefore, there is no transfer of supervisory function from the cooperative supervisor to the curator. In the previous discussion, there is a transfer of authority from the cooperative manager to the curator in terms of representing the cooperatives inside and outside the court after declared bankrupt. Taking note of this, it can be concluded that the cooperative supervisor can supervise the performance of the curator in managing the bankruptcy property of the cooperative.

In supervising cooperatives that have been declared bankrupt, supervisors have the right to file a lawsuit against the curator as stipulated in Article 72 of the Bankruptcy Law. The article stipulates that the curator shall be responsible for mistake or negligence in performing the management and/or settlement duty that causes the loss on bankrupt property. Thus, in a post-bankruptcy cooperative, the supervisor as a cooperative organ still has authority in terms of supervision on the performance of the curator in the management of bankruptcy property of the cooperative.

2. Responsibility of Cooperative Supervisor after Bankruptcy

The Cooperative Law of 1992 does not clearly stipulate the accountability of the cooperative supervisor. However, there is a limitation of the supervisor authority

[14] Abdul Kadir Muhammad, *Op.cit.,* p. 160.
[15] Revrisond Baswir, *Koperasi Indonesia,* Yogyakarta: BPFE, 2015, p. 122.
[16] *Ibid.*

stipulated in the Cooperative Law of 1992. Therefore, the principle of accountability that can be imposed on the cooperative supervisor is the principle of *ultra vires*. Article 39 of the Cooperative Law of 1992 regulates duties and authorities of a cooperative supervisor. Then Article 38(2) of the Cooperative Law of 1992 stipulates that supervisor is responsible to the meeting of members. In view of Article 38(2) and Article 39 of the Cooperative Law of 1992, if the supervisor is unable to be responsible for the legal action he/she performs in the meeting of members, the legal consequences arising from the act shall be the personal responsibility of the cooperative supervisor.

Based on the principle of *ultra vires*, if the supervisor performs an action outside the authority that make loss to the cooperative, the supervisor can be declared to have committed the act against the law as intended in Article 1365 of the Civil Code. In principle, after the cooperative bankruptcy, any acts, like filing a lawsuit against a particular party, is the authority of the curator. Thus, if the curator feels and/or considers it necessary to sue the cooperative supervisor due to unlawful act, it is possible. However, it should be in accordance with the rules provided in Article 83 of the Bankruptcy Law.

E. Position and Responsibility of Cooperative Members after Bankruptcy

1. Position of Cooperative Members after Bankruptcy

Article 17(1) of the Cooperative Law of 1992 provides that members of cooperative are the owners and users of the cooperative services. Under the Cooperative Law of 1992, members are not a cooperative organizer but members are the part of the meeting of members that are the highest organ of the cooperative. Meeting of member is the highest authority in a cooperative. Meeting of the members becomes the highest institution because the meeting of members is a formal institution that accommodates all cooperative members as the owner.[17] As defined in Article 23 of the Cooperative Law of 1992, the authorities of meeting of members include:[18] (1) establishing the articles of association; (2) establishing the general policies in the field of cooperative organization, management, and efforts; (3) establishing election, appointment and dismissal of manager and supervisor; establishing work plan and budget plan of cooperative income and expenditure; (5) establishing legalization of responsibility of managers in performing their duties; (6) determining the distribution of the remaining results of operations; and (7) establishing merger, consolidation, division, and dissolution of the cooperative.

Concerning the authorities of meeting of members, there are strategic policies that can affect the cooperative that has been declared bankrupt. As discussed earlier, Article 16 of the Bankruptcy Law can be interpreted that in the management of a bankrupt cooperative, the management is limited only to bankruptcy property. Regarding the transfer of member's authority in meeting of members,

[17] *Ibid.,* p. 107.
[18] *Ibid.*

it is necessary to distinguish between *vermogensrectelijke rechten* (rights related to the law of property), such as the remaining amount of business proceeds, and *zeggenschapscrecten* (rights related to ownership) such as the right to present at the meeting of members and to vote.[19] Article 17 of the Cooperative Law of 1992 provides that members of cooperative are the owners and users of the cooperative services. Voting in a meeting of members is individual right of a cooperative member. It is clearly stipulated in Article 20(2) of the Cooperative Law of 1992.

The Bankruptcy Law does not provide specific provisions for the curator to be able to change the composition of cooperative personnel, both managers and supervisors. Since the provision does not regulate it, it must refer to the purpose of the change of manager or supervisor of the cooperative. Although not specifically regulated, it cannot be done by the curator since the Bankruptcy Law limits the curator's authority in handling the bankrupt debtors' property, not the management. There are two types of tasks in running a cooperative: the task to run the management (*daden van beheer*) and the task to own the cooperative or to run the mastery job (*daden van eigendom* or *daden van beschikking*).[20] The task to run the management is to carry out daily activities in connection to the purpose of the cooperative. The task of ownership does not directly in connection to field of business.[21] Thus, after a cooperative is declared bankrupt, members of the cooperative still have the right to vote in a meeting of members, to replace the manager and the supervisor of the cooperative. However, it cannot be applied to policies about cooperative assets, in accordance with the provisions of Article 17 of the Bankruptcy Law.

2. Responsibility of Cooperative Members after Bankruptcy

The Cooperative Law of 1992 does not regulate the responsibilities of cooperative members in the event of bankruptcy. If members of cooperative do not take actions that cause a loss in the process of running the cooperative, then they do not have to be responsible.

F. Analysis of the Verdict of the Supreme Court Number 78 K/Pdt.Sus-Pailit/2014 that declared the Bankruptcy of Cooperative and its Manager and Supervisor Based on Burden of Proof Principle

The Verdict of the Supreme Court Number 78 K/Pdt.Sus-Pailit/2014 is the decree of appeal from the Verdict of the Commercial Court of Semarang Number 07/ Pailit/2013/PN.Niaga.Smg. The appellant in the case is Chandra Wijaya Tan, also known as Tang Ing Bho. There are three respondents in the appeal. They are Titian Rizqi Utama Cooperative as Respondent I, Ismayudi as Respondent II, and Sri Rejeki as Respondent III. The verdict decided to grant bankruptcy against the Titian Rizqi Utama Cooperative, together with the chairman of the supervisory board and the

[19] Fred B.G. Tumbuan in Hadi Shubhan, *Op.cit.,* p. 215.
[20] Rudhi Prasetya in Hadi Shubhan, *Op.cit.,* p. 217.
[21] *Ibid.*

chairman of the management board. Before analyzing the Supreme Court Verdict, the decision of the Commercial Court of Semarang is discussed in this paper.

Article 8(4) of the Bankruptcy Law explains that the appeal for declaration of bankruptcy shall be granted if there is a fact or condition which can be proven simply that the requirements for declaring bankruptcy as referred to in Article 2(1) of the Bankruptcy Law are met. Then the explanation of Article 8(4) explains that what is meant by fact or circumstance that is proven simply is the fact that there are two or more creditors and facts that the debt has fallen and are not paid. Interpreted grammatically, the meaning of the word "shall be granted" (originally sounded as "*harus dikabulkan"*) is that whenever all conditions of bankruptcy as stipulated in Article 2(1) have been fulfilled and that such conditions can be proven in a reasonable manner by the appellant. Therefore, the provision is forcing the judges to accept an appeal for bankruptcy if it meets such circumstances. However, interpreted by *argumentum a contrario*, if one of the two conditions are not met, then the judges are also obliged to reject the request. Then, the difference in the amount of debt requested by the appellant and the respondents cannot prevent the declaration of bankruptcy.

Furthermore the thing to note is the phrase "can be simply proven" (originally sounded as *dapat dibuktikan secara sederhana*). The phrase provides an obligation to the appellant to be able to prove the arguments in a simple request-petition for bankruptcy statement. Proving, in a logical sense, means giving absolute certainty since it is applied to everyone and does not allow the existence of contrary evidence.[22] In the conventional sense, proving consists of some levels, from certainty based on mere feelings or called *conviction in time* to certainty based on reason and considerations or called *conviction raisonnee*.[23] Furthermore, the word *to prove* (originally sounded as *membuktikan*) in procedural law has a juridical meaning. In the science of law, it is not possible if there is a logical and absolute proof that is applied to everyone and closes all possibilities of opposite proof. It is rather conventional evidence with special natures. Juridical proof leads to a historical proof that attempts to establish what has happened concretely.[24] Taking into consideration the meaning of *prove*, the concept of proving in Article 8(4) of the Bankruptcy Law is rather to prove in a logical meaning, in which the evidence provided by the appellant must be absolute so that it cannot be resisted by the respondent.

Based on the Article 8(4) of the Bankruptcy Law and its explanation, there is no specific clarity regarding the circumstances of what is meant "simple/summary" or what kind of circumstances to be able to declare a simple burden of proof. It certainly opens up opportunities for the judges in determining whether a case has been proven simply or in summary based on their own judgment. *Bewijskracht,*

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22 Lilik Mulyadi, *Putusan Hakim dalam Hukum Acara Perdata Indonesia: Teori, Praktik, Teknik Membuat dan Permasalahannya,* Bandung: Citra Aditya Bakti, 2009, p. 94.

23 Eddy O.S. Hiariej, *Teori dan Hukum Pembuktian,* Bandung: Erlangga, 2012, p.6.

24 Sudikno Mertokusumo, *Hukum Acara Perdata Indonesia,* Yogyakarta: Liberty, 2010, p. 95.

or the evidentiary power of each evidentiary instrument in the proven series of a bankruptcy petition, becomes the authority of the panel of judges. The Bankruptcy Law applies a system of evidence based on Indonesian civil procedural law that is *positief wettelijk bewijs theorie.* It is not in line with levels of proof but an authentic deed has a strong value of proof.[25] The position of authentic deed as probation plena or having a perfect evidentiary power certainly can facilitate a judge in assessing the elements of bankruptcy as regulated in Article 2(1) of the Bankruptcy Law–whether it has been proven in summary or not. In the Verdict of the Commercial Court of Semarang Number 07/Pailit/2013/PN.Niaga.Smg, the judges argue that there are some facts as follows:

1. The Respondents offered an investment with the percentage obtained by the Appellant within a period and then the Appellant's investment would be redeemed by Bank Mandiri and Bank Bukopin cheque giro/cheque. However, the withdrawal of bilyet giro/check was not able to perform because the accounts of Respondent II and Respondent III are not enough.
2. The panel of judges is of the opinion that the acts committed by Respondent II and Respondent III have complied with Article 60 of Law Number 17 of 2012 on Cooperatives so that the management must be responsible.
3. Respondent I and Respondent III in their answer acknowledged the appellant's investment but argue that the appellant as a member of the cooperative did not meet the requirements set forth in Article 2(1) of the Bankruptcy Law.

Based on the facts considered by the panel of judges, the judges stated that in the *a quo* case of the provisions of Article 2(1) of the Bankruptcy Law can be proven with a simple burden of proof. Furthermore, this paper discusses the elements of Article 2(1) of the Bankruptcy Law and matches them with the evidences presented by the parties in the court.

Firstly, concerning the debtor who has two or more creditors. considering the evidences from data gathering up to the completion of information, it is evident that Respondent I, the Titian Rizqi Utama Cooperative, is the debtor of the Appellant. In addition, based on evidence I and II as well as witness statements presented by the applicant, it can also be proven that I and II are the creditors of Respondent I. However, it should be noted that the creditors of Respondent I is also the creditors of Respondent II and the Respondent III. Based on the statements of witnesses presented by the Appellant, the investment and auctioning system followed by witnesses is an activity of Respondent I as a cooperative. Cooperative as a legal entity certainly cannot run its activities by itself so that the legal act of cooperatives will be done by the personnel, in this case Respondent II and Respondent III. Considering evidence from the information gathering to the report, order of investigation, and appointment of prosecutor, the cheque giro and the cheque are forms of payment made by the cooperative for its products. Although the cheque giro and the cheque is on behalf of Respondent II or Respondent III, this paper concludes that it does not

[25] Eddy O.S. Hiariej, *Op.cit.,* p.25.

necessarily make the appellant as the creditor of Respondent II or Respondent III. Legal relationship of the Appellant is only with Titian Rizqi Utama or the Respondent I. If the action carried out by Respondent II or Respondent III conducts an auction system and investment that is not in accordance with the cooperative budget, then based on the principle of *ultra vires* it becomes personal responsibility of Respondent II and Respondent III. If it is the responsibility of Respondent II and Respondent III then Respondent I cannot be declared bankrupt.

Basically, to be able to declare that creditors of Respondent I is also creditors of Respondent II and Respondent III, it must be proven that the creditors also have legal relations with Respondent II and Respondent III. In its legal considerations, the judges cited Article 60 of Law Number 17 of 2012 on the Cooperative (Cooperative Law of 2012) which has been canceled by the Constitutional Court (*Makhamah Konstitusi*) based on the Decision of the Constitutional Court Number 28/PUU-XI/2013.[26] In essence, the article is similar to Article 34 of the Cooperative Law of 1992, which imposes personal accountability to cooperative managers. At the time of the appeal filed to the respondent, there has not been a civil court verdict stating that Respondent II and Respondent III perform acts that cause a loss of the cooperative or are responsible for the cooperative debts. Therefore, the case of two or more creditors against Respondent II and Respondent III cannot be proven in summary.

The second point concerns the elements that debtor does not pay off at least one debt. Paying attention to the appellant's argument, the basis for the occurrence of debt is that there was no payment to the appellant as the winner of auction. In addition, the debt is also debt that appeared from the investment. The evidence presented by the appellant is debtor's debt, in this case the debtor is Respondent I. Respondent II and Respondent III as the cooperative personnel are the parties who run the Program of the Respondent I. In the simple burden of proof consideration, the judges used Article 60 of the Cooperative Law of 2012 (which has been canceled by the Constitutional Court) which in essence is the same article as Article 34 of the Cooperative Law of 1992. The article imposes personal responsibility to the cooperative management. To be stated simply, the appellant should file a civil lawsuit against Respondent II and Respondent III first in a civil court. The verdict of the court may serve as evidence in the bankruptcy court to explain that Respondent II and Respondent III also have debts or are responsible for the debts of Respondent I. The judges at the commercial court level cannot declare or decide that Respondent II and Respondent III are responsible of the debts of Respondent I, unless the appellant can prove by written proof that Respondent II and Respondent III are responsible for the debt of the Respondent I.

Thirdly, there are debts that have been mature and can be collected. As previously discussed, the evidence, which is proposed by the appellant and other creditors, is the debts of the Respondent I. Respondent II and Respondent III is different legal

[26] *Vide* of the Decision of the Constitutional Court Number 28/PUU-XI/2013.

subjects. They are only the administrators of Respondent I. They cannot necessarily be considered to have the same debt as Respondent I. In order to prove it in summary, Respondent II and Respondent III should be sued first in a civil court.

After analyzing the basic consideration of the simple burden of proof of the judges in the Verdict of the Commercial Court of Semarang Number 07/Pailit/2013/PN.Niaga.Smg, the Verdict of the Supreme Court Number 78 K/Pdt.Sus-Pailit/2014 needs to be analyzed. According to the Supreme Court's opinion, the Commercial Court of Semarang was not wrong in applying the law. The Supreme Court declared that *Judex Facti* decision, where the decision of the Commercial Court of Semarang was valid and had given considerable considerations. The facts proposed in the trial show that the appellant, with evidences presented, had successfully proved the panel of judges where the respondent to two or more creditors and did not pay the debts. It can be proven through the simple burden of proof principle, as provided in Article 2(1) in connection with Article 8(4) of the Bankruptcy Law. Based on these considerations, it appears that the Supreme Court's appeal did not give any opinions. The Supreme Court only strengthened the commercial court judges' considerations.

Article 8(4) of the Bankruptcy Law has explained that to declare bankruptcy of a debtor, there must be simple burden of proof to prove the elements of Article 2(1) of the Bankruptcy Law. Considering the previous discussion, the appellant cannot prove in summary the legal relationship between Respondent II and Respondent III with the debts of the Respondent I. The debt of Respondent I as a cooperative cannot necessarily be the obligation of Respondent II and Respondent III. The Appellant must be able to prove by a letter or witness explaining that Respondent II and Respondent III are responsible for the debt of Respondent I in the form of proving that there was no payment for auction system and investment after the money was submitted by the creditors to Respondent I.

As the explanations above, this paper shows that the panel of judges in the Commercial Court of Semarang does not have the authority to declare Respondent II and Respondent III to have responsibility as meant in Article 34 of the Cooperative Law of 1992 and Article 60 of the Cooperative Law of 2012, which had been canceled by the Constitutional Court. Article 300 of the Bankruptcy Law stipulates that the Court has the authority to examine and decide on other matters in the field of commerce which have been stipulated by law. The article affirms that the Commercial Court decides and examines bankruptcy statements and other commercial fields such as intellectual property rights disputes. The Commercial Court cannot decide the decision of the cooperative management accountability, since it belongs to an authority of the District Court (*Pengadilan Negeri*). Where there is a fact which cannot be proven with a simple burden of proof, as in *a quo* case, the Commercial Court should invite parties to request a decision of a the Court of First Instance (*Pengadilan Negeri*) regarding the facts and circumstances of the case.[27] When the appellant can prove a decision stating that Respondent II and Respondent III, as the

[27] Sutan Remy Sjahdeni, *Op.cit.,* p. 265.

personnel, are responsible for the debt of the Respondent I, as a cooperative, then there is a fact that it can be proven with a simple burden of proof.

G. Conclusion

Based on the description of information and discussion previously, it can be concluded several things as follows:

Firstly, cooperative organization, in this case the managers, the supervisors, the members, and the meeting of members still have the authority as provided by the Law Number 25 of 1992 On the Cooperatives. However, their authorities shall not be applied to the authorities relating to the management and the preservation of cooperative assets.

Secondly, the Verdict of the Commercial Court of Semarang Number 07/ Pailit/2013/PN.Niaga.Smg and the Verdict of the Supreme Court Number 78 K/Pdt. Sus-Pailit/2014 have applied the principle of a simple burden of proof incorrectly against the respondents. This was caused by the element of Article 2(1) of the Bankruptcy Law against Respondent II and Respondent III, which are parts of cooperative management, a civil suit must be made firstly to the Court of First Instance.

In addition, the author suggests that firstly, it is necessary to make a legal product of either the Supreme Court or the Supreme Court Circular, which gives the same interpretation to all judges regarding the determination of simple burden of proof. Secondly, the provisions of Article 8(4) of the Bankruptcy Law concerning a simple burden of proof need to be clarified in order to avoid different interpretations of the judges who examine bankruptcy cases.

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