

CHAPTER I

INTRODUCTION

1.1. Background

In the era of globalization, human needs to continually advance themselves alongside the advancements of science. The development of science and technology in this era of globalization has an impact not only on primary needs but also on several aspects of life including, the social, economic, cultural, and other fields of the human life.¹ The community's need to develop in the business sector has arisen as a result of economic trends. This is to get a monetary benefit that will allow them to meet both their primary and secondary demands. Humans can survive through engaging in numerous types of business activities, including buying and selling, becoming little entrepreneurs, and starting their own companies.

Entrepreneurs are forced to think of a solution to keep their businesses afloat due to the numerous demands in the business world. One of the techniques employed is to look for additional funding to help them advance. Funds are critical for entrepreneurs to establish and develop their businesses, with the goal that as more

¹ David A. Deese, *Globalization: Causes and Effects*, (Ashgate, Surrey, 2012) p. 34

funds are poured into their development, their businesses would grow and become larger, allowing the entrepreneur to make ends meet.² Funds are the core and heart of a company when it comes to executing its operations. It's analogous to a human being who can't survive without a heart, or a firm that can't survive without funds. Taking out a loan to obtain additional funds is not unusual. Another uncommon occurrence is entrepreneurs who take on more debt than they can repay and end up drowning in it.

When an entrepreneur is unable to fulfill their outstanding debts, they may be forced to file for bankruptcy. It is a method out of the debt crisis that the debtor is trapped in, where the debtor, being said entrepreneur, lacks the financial means to repay his creditors..³ Said bankruptcy begins with a petition filed by either the debtor on behalf of creditors. All assets of the debtor shall be measured and assessed, and the assets may be used to repay part of the outstanding debt. This is ensured by Law No. 37 of 2004 [**'Bankruptcy Law'**] which states that bankruptcy is general confiscation of all of the assets of the bankrupt debtor, to which the arrangement and

² Leo Kanell, *The Business Funding Formula: How Entrepreneurs are Jumpstarting Their Businesses With Powerful Funding Strategies*, (CreateSpace Independent Publishing Platform, California, 2017) p. 25

³ Hadi Subhan, *Hukum Kepailitan :Prinsip, Norma, dan Praktik di Pengadilan*, (Kencana, Jakarta, 2008) p. 3

settlement are to be carried out by the appointed curator under the supervision of the Supervisory Judge as regulated in the law.⁴

The bankruptcy petition itself can be submitted by either the debtor or creditor as regulated under Article 2(1) of the Bankruptcy Law or by a public prosecutor in the interest of the public as regulated under Article 2(2) of the same law.⁵ However, there are certain circumstances where only a specific institution is allowed to file the bankruptcy petition. Firstly, in the case that the debtor is in the form of a bank, the petition may only be filed by Bank Indonesia as regulated under Article 3(3) of the Bankruptcy Law.⁶ Secondly, only the Capital Market Supervisory Board may file a bankruptcy petition if the debtor is in the form of a securities company, stock exchange, clearing and custodian institution, or settlement and depository institution as pursuant to Article 2(4) of the Bankruptcy Law.⁷ Thirdly, only the Minister of Finance may file a bankruptcy petition if the debtor is in the form of pension funds, or state-owned enterprises engaging in the public interest sector as according to

⁴ Article 1(1) of Law No. 37 of 2004 regarding Bankruptcy and Postponement of Debt Payment Obligations

⁵ Article 2(1-2) of Law No. 37 of 2004 regarding Bankruptcy and Postponement of Debt Payment Obligations

⁶ Article 3(3) of Law No. 37 of 2004 regarding Bankruptcy and Postponement of Debt Payment Obligations

⁷ Article 2(4) of Law No. 37 of 2004 regarding Bankruptcy and Postponement of Debt Payment Obligations

Article 2(5) of the Bankruptcy Law.⁸ Lastly, only the Financial Services Authority [**OJK**] may file a bankruptcy petition if the debtor is in the form of an insurance company, Syariah insurance company, reinsurance company, and/or Syariah reinsurance company as according to Financial Services Authority Regulation No. 28/POJK.05/2015.⁹ Yet it is also important to note that the supervisory responsibility of the Capital Market Supervisory Board for Indonesia's Capital Market and OJK is also responsible for Banks in Indonesia.¹⁰

Debtors and creditors are the two primary parties in a bankruptcy case yet there might be multiple legal entities for different parties. Creditors, as defined by the Bankruptcy Law, are those who have receivables that can be invoiced in court due to an agreement or law..¹¹ On the other hand, debtors are people who have debts because of an agreement or law which can be billed in court.¹² In short, debtors are legal entities that owes debt to creditors and a

⁸ Article 2(5) of Law No. 37 of 2004 regarding Bankruptcy and Postponement of Debt Payment Obligations

⁹ Financial Services Authority Regulation No. 28/POJK.05/2015 regarding Dissolution, Liquidation, and Bankruptcy of Insurance Company, Sharia Insurance Company, Reinsurance Company, and Sharia Reinsurance Company

¹⁰ Financial Services Authority Regulation No. 3/POJK.04/2021 regarding Organization of Activities in the Capital Market and Financial Services Authority Regulation No. 12/POJK.03/2021 regarding Banks

¹¹ Article 1(2) of Law No. 37 of 2004 regarding Bankruptcy and Postponement of Debt Payment Obligations

¹² Article 1(3) of Law No. 37 of 2004 regarding Bankruptcy and Postponement of Debt Payment Obligations

bankruptcy case arises when said debtors are unable to pay off their debt towards the creditors. When the debtor is unable to fulfil his obligations, namely in the form of paying the debt until the maturity date to the creditor, an application for a bankruptcy statement can be submitted to the Commercial Court.

The debtor and his property are affected by the issuance of a bankruptcy ruling. For the debtor, the right to manage and control his property has been taken away since the bankruptcy decision was made..¹³ The management and control of the bankruptcy assets will be transferred to the tangent curator, and the curator will act as supervisor. The debtor is still allowed to take legal actions in the field of assets, such as making an agreement, if the legal act will benefit the bankruptcy *boedel* (wealth).¹⁴

Moving on to the definition of marriage, a married person submitting a loan must obtain their spouse's approval in order for the loan to be granted. Furthermore, if one of the parties in the married pair is declared bankrupt, their combined wealth must be distributed to those to whom the debtor owes money, unless otherwise stated.. If before the marriage, a marriage agreement has been made to

¹³ Article 24 of Law No. 37 of 2004 regarding Bankruptcy and Postponement of Debt Payment Obligations

¹⁴ H. Zainal Asikin, *Hukum Kepailitan*, (Chidir Ali Memories Book, Jakarta, 1975) p. 72

which it separates all of the assets between the husband and wife, then when the divorce occurs, each husband / wife will only receive assets registered in their name. However, if a marriage agreement has never been made between the husband and wife, then based on the Indonesian Civil Code, starting from the time the marriage took place, by law there will be a mixture of assets between the two.¹⁵ As a result, the wife's property becomes the husband's property, and vice versa.

Marriage in Indonesia is regulated under Law No. 16 of 2019 [**Marriage Law**] as an amendment of Law No. 1 of 1974 concerning Marriage. Article 1 of the Marriage Law states *'Marriage is a relationship of body and soul between a man and a woman as husband and wife with the purpose of establishing a happy and lasting family (household) founded on belief in God Almighty.'*¹⁶ The Marriage Law, that serves as a *lex specialis* in regards to marriage gave a more specific definition of marriage compared to the Indonesian Civil Code which in Article 26 which recognizes a marriage as merely civil relationship.¹⁷

¹⁵ Article 119 of the Indonesian Civil Code

¹⁶ Article 1 of Law No. 1 of 1974, amended by Law No. 16 of 2019 regarding Marriage

¹⁷ Article 26 of the Indonesian Civil Code

Marriage occurs because there is an urge from within each human being to be with other humans. It is a sacred bond as a link between a man and a woman in forming a family or building a household. But in reality, there are interests from the parties that hinder the marriage. Therefore, there are efforts, namely by making a marriage agreement in accordance with statutory regulations to protect the interests of the parties concerned.

In the life of a family or household, in addition to issues of the respective rights and obligations of a husband and a wife, the problem of property and/or wealth is also one of the factors that can cause various disputes and tensions in a marriage wife in the life of a family. To avoid the foregoing, a marriage agreement between the prospective husband and wife is drawn up before they enter into marriage to separate their respective wealth, in the form of a Prenuptial Agreement. In Indonesia, Prenuptial Agreements are allowed as regulated under Chapter V of the Marriage Law which will be binding to both parties as well as third parties where third parties are concerned.¹⁸

A large amount of married couples in Indonesia either does not wish to create a Prenuptial Agreement or lacks the knowledge

¹⁸ Article 29 of Law No. 1 of 1974, amended by Law No. 16 of 2019 regarding Marriage

that Prenuptial Agreements can be made. Nowadays, already married couples are given the liberty to create a marriage agreement after they have been married.¹⁹ Since the Constitutional Court Decision No 69/PUU-XII/2015, married couples are allowed to make Postnuptial Agreements which will be retroactive unless stated otherwise in said agreement.²⁰

The contents stipulated within the marriage agreement depends on the parties to the prospective husband and wife, as long as they do not contradict law, religion and propriety or morality. The form and content of the Marriage Agreement, as is the case with any agreement in general, is granted to both parties the widest possible freedom or freedom (in accordance with the legal principle of "freedom of contract"). To which, as long as it does not conflict with law, morals or does not violate public order.²¹ This kind of agreement usually contains provisions regarding assets that are obtained during the marriage. Usually in the form of acquiring separate assets, each party obtains what was gained or acquired during the marriage, including gains and losses. This marriage agreement applies as a law for those who make it, also applies to

¹⁹ Agus Purnomo, et.al., *Dinamika Hukum Perjanjian Perkawinan di Indonesia: Kajian Terhadap Lembaga Eksekutorial dan Solusi Permasalahannya*, (Intelegensia Media, Jakarta, 2021) p. 18

¹⁹ Constitutional Court Decision No 69/PUU-XII/2015, page 156

²⁰ Constitutional Court Decision No 69/PUU-XII/2015, page 156

²¹ Article 1320 jo. 1338 of the Indonesian Civil Code

third parties as long as this third party is involved. Formally, the Marriage Agreement is an agreement made by a future husband and wife to regulate the consequences of their marriage on their assets. The issuance of the Constitutional Court Decision No 69/PUU-XII/2015, which states that a marriage agreement can be made not only before the marriage takes place but also during the marriage takes place can cause legal problems. One of the legal problems that can occur is when the joint property from a marriage is used as collateral for loans obtained from third parties.

As the Constitutional Court Decision No 69/PUU-XII/2015 allows marriage agreements to be made during the marriage, the husband and wife who previously pledging joint assets to third parties may make a marriage agreement to separate property after the marriage has taken place so that joint property can be turned into property inherited from one party only. This of course can harm a third party because if it is proven that an act of default, third parties will find it difficult to do execution of assets that have been pledged. In order for third parties not to be harmed, a form of legal protection for third parties are needed.

The author realized an issue that may arise in the case where married couples where one of the parties serves as a debtor in a

Bankruptcy case. The arrangement of the marriage agreement cannot be separated from the law of marital or joint property, the law of marital property has close relationship with the interests of third parties.²² Since the enactment of the Constitutional Court Decision No 69/PUU-XII/2015, the other party of the Postnuptial Agreement can be released from their obligation of paying off the debt. This differs to the purpose of the Constitutional Court decision which aims to ensure the safety and wellbeing of the wealth of respective parties within a marriage. Therefore, the interest of the third party involved in the postnuptial agreement must be protected.

There are legal principles derived from the norms within the Bankruptcy Law. There is the *Paritas Creditorum* principle, which is the principle of equal position of creditors, which means that each creditor has the same rights over all debtor assets. There is also the *Pari Passu Prorate Parte* principle is the principle of sharing the assets of the debtor to creditors proportionally, unless the law provides for an exception. The distribution of debtor's assets to pay off the creditor's rights is carried out in a more equitable manner, namely in accordance with the proportions, not by an equal distribution. Furthermore, another well-known principle in bankruptcy is the principle of Structured Creditors / Structured

²² J. Satrio, *Hukum Harta Perkawinan*, (Citra Aditya Bakti, Jakarta, 1991) p. 21

Prorata which recognizes the status of each creditor to which they are divided into preferred creditors, secured creditors, and unsecured creditors.²³ There are more principles within the Bankruptcy Law. However, in this thesis the author will be discussing more regarding the *Actio Pauliana* principle.

Another realization the Author has is the existence of the principle of *Actio Pauliana* that may be of aid to the Creditors. The principle of *Actio Pauliana* is defined by the Indonesian Civil Code as the Creditor's legal attempt to cancel the Debtor's act which is detrimental to the Creditor through the court as long as it can be proven that when the act is committed, the Debtor or the person with whom the Debtor committed the act, knows that the act may harm the Creditor. This understanding is further defined by the Bankruptcy Law as the *lex specialis* when an issue of bankruptcy is concerned. Article 41(1) of the Bankruptcy Law specified that *Actio Pauliana* may be submitted if it can be established that, at the time of the legal action, the Debtor and the party with whom the legal action was brought knew or should have known that the legal action would result in losses for the Creditor.

²³ Herry Anto Simanjuntak, *Prinsip – Prinsip dalam Hukum Kepailitan dalam Penyelesaian Hutang Debitur Kepada Kreditur*, Justia Vol. 02 (2020) p. 25

The submission of *Actio Pauliana* in bankruptcy law is within the absolute authority of the curator or the *Balai Harta Peninggalan*. *Actio Pauliana* lawsuits filed by curators or *Balai Harta Peninggalan* fall within the jurisdiction of the Commercial Court.²⁴ The Commercial Court has jurisdiction to hear claims for cancellation or *Actio Pauliana* in the debtor's bankruptcy. The purpose of the submission of an *Actio Pauliana* lawsuit in the debtor's bankruptcy is to return the debtor's wealth/assets that has belonged to the other party back to bankruptcy boedel. However, according to the Indonesian Civil Code, all creditors have the right to file a lawsuit *Actio Pauliana* to which it will be submitted to the district court where the debtor or their assets are domiciled in.²⁵ In contrast to the usual district courts throughout Indonesia, there are only 5 commercial courts in Indonesia as according to a Presidential Decree issued in 1999.²⁶

In this thesis, the Author will be focusing on the feasibility of the submission of *Actio Pauliana* for Debtors' Postnuptial Agreement in a Bankruptcy Case. The Author understands the legality of a Postnuptial Agreement as regulated by the

²⁴ Article 41 of Law No. 37 of 2004 regarding Bankruptcy and Postponement of Debt Payment Obligations

²⁵ Article 1341 of the Indonesian Civil Code

²⁶ Presidential Decree No. 97 of 1999 regarding Establishment of Commercial Courts at the Ujung Pandang District Court, Medan District Court, Surabaya District Court, and Semarang District Court

Constitutional Court Decision No 69/PUU-XII/2015. However, the Author also acknowledge the harm that can be caused by said Agreement in a Bankruptcy case where the misuse of this decision by debtors can harm the rights of creditors to receive a just payment and sought to find a legal solution that will not harm the interests of the Creditors to ensure that the repayment of the debt is done in a just manner.

1.2. Formulation of Issues

In regards to the topic of this thesis, the Author will discuss the following formulation of issues:

1. How is *Actio Pauliana* in a Bankruptcy Case regulated according to the Indonesian Legal System?
2. Whether there are specific elements to be satisfied for the submission of *Actio Pauliana* against Debtors due to their Postnuptial Agreement in a Bankruptcy Case as according to Law No. 37 of 2004.

1.3. Research Purposes

The Author's purpose of writing this thesis is to answer the formulation of issues stipulated above, namely:

1. To know how is *Actio Pauliana* in a Bankruptcy Case regulated under the Indonesian Legal System.

2. To know whether there are specific elements to be satisfied for the submission of *Actio Pauliana* against Debtors due to their Postnuptial Agreement in a Bankruptcy Case as according to Law No. 37 of 2004.

1.4. Research Benefits

1.4.1. Theoretical Benefits

Theoretically, the Author hopes that this research will shed a light to the issue that may arise from the creation of Postnuptial Agreements during a Bankruptcy Case. Due to said problem, the Author hopes that this research may also provide a solution to the problem by discussing the feasibility of the submission of *Actio Pauliana* against the Debtor's Postnuptial Agreement.

1.4.2. Practical Benefits

Practically, the Author hopes that the government can establish clear prerequisites for already married couples trying to make a Postnuptial Agreement. These prerequisites can be in the form of laws or regulations to encourage and ensure that notaries have to ensure that the agreement will not harm any third parties. This is a precautionary measure to minimize legal issues arising from voids within the regulations.

In addition, the author hopes that this research may educate Creditors, especially small individual Creditors that may face the aforementioned problem. Lastly, the author hopes that this research may answer some of the Creditor's and/or their legal team's questions when preparing to submit *Actio Pauliana* against Debtors due to the same issue including the question of who can submit the *Actio Pauliana* lawsuit and to which court shall the lawsuit be filed to.

1.5. Framework of Writing

This thesis is arranged into five main chapters that will ease the readers to understand the discussion of this thesis.

CHAPTER I: INTRODUCTION

This chapter consist of the introduction, which is further divided into five parts, which are background, research question, research purpose and research benefits.

CHAPTER II: LITERATURE REVIEW

In the literature review chapter, the Author will divide this chapter into five sub-chapters. First, the Author will determine the laws, regulations and policies that regulates marriage agreements, specifically Postnuptial Agreements and the principle of *Actio Pauliana* in Indonesia. Second, the

Author will elaborate on the definition of marriage agreements, specifically postnuptial agreements and the principle of *Actio Pauliana* along with its legal requirements and consequences towards properties. Next, it will be followed by the definition and regulation on the principle of *Actio Pauliana* in Bankruptcy as regulated by Law No. 37 of 2004. Fourth, the Author will elaborate on the requirements for an act to be submittable on the grounds of *Actio Pauliana* before the court.

CHAPTER III: RESEARCH METHODS

This chapter will discuss in general about the type of research, the type of data, data analysis technique and the type of research approach. Followed by the types of research, data, data analysis technique and research approach that the Author use to discuss the issues in this thesis.

CHAPTER IV: DISCUSSION AND ANALYSIS

The fourth chapter will discuss the research problems along with its solution. This chapter will be divided into two further sub-chapters and each sub-chapter will answer the respective research question as stipulated in chapter two of this thesis. The first sub-chapter will consist of analysis on how *Actio Pauliana* in a Bankruptcy Case is regulated under

the Indonesian Legal System. The second sub-chapter will analyze whether there are specific elements that needs to be satisfied in order for the submission of *Actio Pauliana* against Debtors due to their Postnuptial Agreement in a Bankruptcy Case as according to Law No. 37 of 2004.

CHAPTER V: CLOSING

In this last chapter, the Author will explain the conclusion as an answer to the issues that have been analyzed in chapter four. Aside from giving a conclusion, the Author will also provide answer and understanding on the feasibility of submitting *Actio Pauliana* due to the creation of a Postnuptial Agreement, thus providing legal protection for the disadvantaged party seeking a just payment. This conclusion will also provide answers regarding the parties who are eligible to submit an *Actio Pauliana* lawsuit and the courts that has the jurisdiction to try the case.