

GOOD FAITH – IMPLICATIONS REGARDING THE PROPERTY RIGHT AND THE POSSIBILITY OF PARALYZING THE CLAIMING ACTION BY THE GOOD FAITH BUYER

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Abstract: *By law, good faith is presumed, the rebuttable presumption in this regard must be overturned by contrary proof by the party claiming adverse party bad faith. In the absence of contrary evidence, the rebuttable presumption of the existence of good faith produces legal effects often controversial in the current judicial practice. One of these effects is the crippling of legal actions of a claim by the buyer in good faith, to the detriment of the true owner who loses ownership in this manner.*

Key words: *property, good faith, bad faith, constitutive effects, good faith buyer.*

Etymologically, “*good faith*” comes from Latin, from the expression “*bona fides*” which derives from the adjective *bonus* (good; good man, honest man) and the noun *fides* (with the meaning trustworthy, honest, trustful) [1].

As a legal institution, good faith has its origin in the Roman law, being closely connected to the Praetorian property institution, when the development of commerce and, especially of the one with slaves imposed protection of the good faith buyer in these transactions. In the case of these transactions, the seller delivers the goods, and the buyer pays the price. If subsequently, the seller requires the return of the slave on the grounds that the solemnities of the contract were not

respected, and this was a bad faith reason, he was punished for his bad faith. The good faith buyer was able to use the ***exception of the sold and transferred object*** – *exception rei venditae et traditae*. This exception allowed the good faith buyer to keep the slave considering the fact that a prospective return would be contrary to the equity laws [2].

The mechanism of the forming of good faith is a complex one, implying a psychological activity as well as an exteriorization of it in the society under the form of an attitude [3]. Good faith implies values which most often overlap and are interdependent. This seems to be the result of a mental activity which finds its origin in the human conscience – a purely human

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characteristic which implies the mental mirroring of reality [4].

The opposite of good faith is *bad faith*, which presupposes the existence of certain values opposed to the moral ones. Nevertheless, we cannot appreciate that the lack of good faith always and automatically implies bad faith. We advocate the opinion [3], according to which both good faith and bad faith are *autonomous institutions*, these implying different values, specific forming mechanisms.

Contrary to the principle *nemo plus iuris ad alium transferre potest quam ipse* as well as against the principle *quod nullum est, nullum producit effectum*, there can be cases in which the sale of somebody else's objects produces judicial effects, being valid and opposable even to the real proprietor. In certain situations, the transfer of property right is carried out in a valid way between the apparent proprietor and the good faith buyer, to the detriment of the real proprietor, who loses his property right following an operation in which he did not take part [3].

Good faith is not an institution capable of generating judicial effects in itself for the acquirement of a property right. However, there are exceptional situations which have been ingrained in jurisprudence when good faith, together with other legal principles such as the principle of legal status, the principle of superior social interests, the principle of dynamic security protection of the civil circuit or the trust in operations recorded in public registry books allow the good faith buyer to successfully oppose a claiming action, with the consequence of keeping the bought property and rejection of the claiming action [3].

With regard to these aspects, the Constitutional Court [5] held: "*in such situation, the object of the alienation contract consists in a property which did*

not pertain to the seller, consequently being circumvented from the prerogative of its disposition. The recognition of the translative effect of property of such an act interferes with the principle nemo plus iuris alium transferre potest quam ipse habet.

Still, neither practice nor doctrine have denied to admit in all cases the destructive influence of the stated principle in this matter. In the legitimate conflict of interests between the real proprietor and the good faith subpurchaser of his property, the latter was preferred. Acknowledging the prevalence of the good faith subpurchaser's interest was imposed - based on arguments with a larger applicability, which created a real principle - of concern regarding ensuring the security of the civil circuit and of the stability of judicial reports. Judicially, the solution was backed up by pragmatic arguments, embodied by the principle of validity of the appearance of law, whose essence is expressed through the adage *error communis facit ius*. Through the above-mentioned decision, the Constitutional Court has also stated the fact that the application of this principle - *error communis facit ius* - is conditioned by concurrent fulfilling of two conditions: the error regarding the apparent proprietor - the seller must be unanimous, invincible, and the good faith of the subpurchaser must be a perfect one, lacking any guilt or doubt imputable to the latter.

The *appearance* of law and good faith are two distinct institutions. If the *appearance* of law represents a state of facts created by an apparent title (a person is known in a collectivity as having a real right that he/she makes use of but which, in reality, comes in contradiction with the real judicial state of facts - the right in question has another holder, but the error between the state of fact and the one of law is a collective one), the good faith appears

when the apparent proprietor makes a translative contract with a third party, who has the certainty that he/she gains a property from the real owner. From the above, the cumulative assembly of three conditions in order to acquire a property right as an effect of good faith appears as obvious: there must be a judicial translative document of property, an appearance of law must be incident (there has to be a state of fact which, in reality, does not correspond to a state of law) and the good faith of the buyer (his/her belief that the person who bears the property attributes is also the holder of the property right) [3].

Taking into consideration the above-mentioned doctrinaire and jurisprudential assertions, we consider that these find their applicability in the claiming action formulated by the heirs of the former proprietors abusively disinherited between 1945-1989, an action brought up against the Romanian State under the conditions that, in this litigation, the former tenants – good faith buyers based on law 112/1995 intervened in the litigation in their own interest.

Taking into consideration the effects produced by the good faith of the buyer (acquirer with certain obligations), Brasov Court [6] has also ruled in this sense. Through the above-mentioned sentence, irrevocable through lack of appeal, the instance partly admitted the appeal made by the claimant-appealing party (the heirs of the former proprietors, abusively disinherited between march 1945 – December 1989) and admitted against the Romanian State the claiming action expressed by them regarding the building that became state property in the Communist time, without a title, WITH THE EXCEPTION of the apartment (part of the building) that was previously alienated under law 112/1995 to the tenants – the current proprietors, good faith buyers.

Thus, the principles, especially *error communis facit ius* were legally regulated after the appearance of law 10/2001 regarding the species deduced from the judgement, when the legislator decided that under the new law – 10/2001, the buildings that in the meantime have been alienated observing the provisions of law 112/1995, and the buyers were of good faith. The agreement of sale signed by the tenants – good faith buyers, who trusted the titles of the Romanian State and bought from it a building under the provisions of law 112/1995 are valid and cannot be repealed. Regarding these buildings, the former proprietors' heirs or the former proprietors can only obtain damage through equivalent (and not proper refunding as they requested through their claiming action).

According to our assessment, a new claiming action, presently expressed by the same people (the former proprietors' heirs), but directed against the good faith buyer (and not against the Romanian State) – the heirs apparent of the former tenants – good faith buyers, will have the same result.

The new claiming action, expressed this time against the heirs apparent in rights of the former tenants – good faith buyers should be “paralyzed” through the effect of the good faith of the acquirer by onerous title. The principle of the security of judicial reports is also closely related to the one above-stated, which is mentioned in a decision given by the High Court of Cassation and Justice in an appeal in the interest of law [7].

The principle of the security of judicial reports, acknowledged in the European legislation and protected through decision 33/2008 also refers to the fact that a final solution of any litigation must not be rediscussed.

At the same time, in the practice of the European Court for Human Rights it was stated the fact that article 1 of the First Protocol of the European Convention of Human Rights as well as the principle of the security of judicial reports must be respected not only in the case of the former proprietor but also in that of the good faith buyer.

Depending on the concrete circumstances of each case, the courts are to analyze to what extent the internal law comes into conflict with the European convention of the Human Rights. In the case in which law 10/2001 (which according to the above-mentioned decision has priority of enforcement compared to the common law) would come into conflict with the European Convention of Human Rights, The High Court decides regarding this aspect that the latter has priority of enforcement with the exception of the case in which the good faith buyer (the former tenant) also has a property in the sense of the Convention.

The above-mentioned aspects have been taken into consideration by Court of Brasov [7], which has enforced the principle of the security of judicial reports when it dismissed the claiming action expressed by the former proprietors' heirs, expressed against the heir apparent of the former tenants – good faith buyers.

Comparing the property titles of the parts, the court decided that the title of the good faith buyers (the former tenants) and of the subpurchasers for consideration of good faith is preferable to the detriment of the title invoked by the heirs of the former proprietors.

In spite of the fact that the High Court of Cassation and Justice delivered its judgment 33/2008 regarding the irregular practice concerning the admissibility of

claiming actions based on common law and expressed to the former proprietors, it seems that the jurisprudential view is currently not a very clear one, as the interpretation of decision 33/2008 is not uniform either. Thus, we consider that the applicability of principles *error communis facit ius*, the principle of the appearance of law, the principle of superior social interests, the principle of the dynamic security protection of the civil circuit or the trust in the operations registered in the public registry books should find applicability in a uniform practice which should also protect the good faith buyer.

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