

**BONA FIDE PURCHASER AND THE SALE OF A PROPERTY
BELONGING TO ANOTHER. QUESTIONS ON
THE EVOLUTION OF JURISPRUDENCE IN THIS FIELD
UNDER THE NEW CIVIL CODE**

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Abstract *Unlike the previous Romanian Civil Code (1864) which did not regulate the sale of the property belonging to another, according to the evolution of the other laws on European level and on the recitals of harmonizing European regulations, the new Romanian Civil Code, which entered into force on 1 October 2011, expressly regulates in Article 1683 the institution of selling another's property, which marks a change intended to clarify the way this institution functions in the legal practice. This article discusses the way the legal practice will receive the new regulation and raises a number of questions about the vision of the bona fide purchaser who did not know about the lack of ownership of the seller and the ability to implement in these conditions the solutions provided by Article 1683 of the new Civil Code on the sale of the property belonging to another.*

Keywords: *sale of property belonging to another, bona fide, jurisprudence, the new Romanian Civil Code.*

INTRODUCTION. GENERAL CONSIDERATIONS

The issue of selling the property of another arises only in the cases where a determined individual asset is alienated by a person who does not have the capacity of an owner, and in the absence of an express regulation in the previous legislation have determined the existence of certain solutions and different interpretations in doctrine and legal practice.

The absence of an express regulation regarding the institution of selling the property belonging to another in the previous Romanian Civil Code (1864), led to different opinions and controversies about its validity in the legal literature and practice. The specific regulation of the institution of selling the property belonging to another in Article 1683 of the new Civil Code marks a change in vision regarding this institution of the Romanian legislator, with the mention that although this option is commendable, it remains to be seen and analyzed the way this rule will be perceived in the legal practice

and how it will be applied (The New Romanian Civil Code – Law no. 287/2009 was published in the Official Gazette of Romania no. 511 of 24 July 2009, it was amended by Law no. 71/2011 and rectified in the Official Gazette of Romania no. 427 of 17 June 2011 and in the Official Gazette of Romania no. 489 of 8 July 2011. Law no. 287/2009 was published in the Official Gazette of Romania no. 505 of 15 July 2011– based on the Article 218 of Law no. 71/2011 for the enforcement of the Law no. 287/2009 regarding the Civil Code, published in the Official Gazette of Romania no. 409 of 10 June 2011- and rectified in the Official Gazette of Romania no. 246 of 29 April 2013).

THE SALE OF THE PROPERTY BELONGING TO ANOTHER – INTERPRETATION. THE ABSENCE OF AN EXPRESS PROVISION IN THE PREVIOUS CIVIL CODE V. THE EXPRESS REGULATION IN NEW CIVIL CODE

The one who buys an asset from a person with no ownership over it, not even apparently, will be able to invoke in his defense the principle of bona fide (good faith) which contradicts other principles of civil law: *nemodat quod non habet* or *nemo plus juris ad alium transferre potest quam ipse habet* (Codrea, 1998: 28).

In case the seller, with no capacity of an owner, does not communicate to the purchaser his capacity, his action is a deceptive action violating the principle of bona fide (Herlea, 1990: 32).

Until the implementation of the new Civil Code, in the absence of an express regulation of the institution, the solutions adopted in doctrine and practice for the issue of selling a property belonging to another were different, a distinction being made as the consent of the parties was affected by the defect or error or the conclusion of the contract was made by informed consent (Deak, 2001: 55-57; Chirică, 2008: 64-73; Dogaru, Olteanu, Săuleanu, 2009: 68-69; Macovei, 2006: 41-43; Sanilevici, Macovei, 1975: 33; Cârpenaru, Sănciulescu, Nemeş: 2009, 27-29).

Thus, when the parties, or at least the purchaser was deceived about the ownership of the seller, it was considered that the sanction of partial invalidity intervened for the vitiation of the consent by error (*error in personam*), and if the parties had known the seller's lack of ownership, although the issue is controversial, the solution promoted in theory and in practice would have been that of the absolute invalidity for the case of fraud, parties of bad-faith having the intention to produce a damage to the real owner.

In practice, the absolute invalidity of the sales-purchase contract was noted as it was held the existence of bad faith of the parties because the administered evidence showed purchaser's knowledge regarding the legal situation of the apartment in question and the fact that this apartment is in the possession and service of the plaintiff, from the date of purchase; therefore, if the sold asset is the property of another person, the contracting parties being informed, the agreement has an illicit ground, thus being void (Court of Appeal - Pitesti, Civil Decision no. 254/R/08.02.2002 in Pivniceru, Protea, 2009: 56).

A different opinion asserted that the foundation of the sales contract cancellation must start from deception because the purchaser acting in good faith, was misled by the

seller of bad faith on his capacity as owner, while others have expressed the idea that the selling of a property belonging to another would mean deception by omission or reluctance, the problem in this case being the breach of a contractual obligation namely information (Stănciulescu, 2008: 37).

A decision of the High Court of Cassation and Justice held that the sale of the property of another does not justify the application for a declaration of absolute invalidity for an illicit act because in the civil law it is not forbidden as it is neither illegal nor contrary to good morals or public order (High Court of Cassation and Justice, Civil and Intellectual Property Section, Decision no. 5801/21.10.2004 in the Journal Dreptul, no. 10, 2005: 224-225).

Prior to the implementation of the new Civil Code, if the owner drafted an action for the invalidity of the act on the grounds that the sale was made by fraud, aiming to remove the property from his ownership, as a true owner of the property, the action would be admissible (Court of Appeal – Iasi, Civil Decision no. 1201/20.10.1998 in Pivniceru, Protea, 2009: 58), on the ground that the sale made by fraud against the ownership right is a case of absolute invalidity according to the principle *fraud corrupts everything (fraus omnia corumpit)*, a solution that can no longer be accepted in present as the new Civil Code recognizes the validity of the institution regarding the sale of a property belonging to another, speaking here about the postponement of the ownership transfer.

As a novelty, the new Civil Code expressly provides in Article 1672 among the main obligations of the seller also the obligation to transfer the ownership of the property. This changes the way we should analyze the condition required in the previous doctrine and legal practice that the seller should be the owner of the determined individual sold property, a condition which currently is not required, the seller holding the obligation to transfer the property subsequently otherwise being engaged in a contractual liability.

With regard to the provisions of the new Civil Code regarding the sale of a property belonging to another, it is considered that Article 1683 determines the ending of an era in which the sale of the property belonging to another opened a wide open field for doctrinal discussion and diverse and innovative jurisprudential solutions (Moțiu, 2011: 111).

By express regulation of the sale of property belonging to another in Article 1683 NCC, the legislature recognizes its validity and tries to eliminate the previous controversies by introducing the obligation of the seller to transfer the ownership of the determined sold individual property from its true owner to the purchaser (Gheorghiu in Baias, Chelaru Constantinovici, Macovei, 2012: 1757-1758; Boroii, Stănciulescu, 2012: 355-357; Stănciulescu, 2012: 128-130; Florescu, 2011: 36-37). Thus, he does no longer require the seller to have the capacity of ownership of the sold determined individual property at the conclusion of the sale.

If the law or the will of the parties does not indicate otherwise, the property is shifting to the purchaser at the moment of the asset acquisition by the seller or at the moment of the ratification of the sales contract by the owner, according to the obligations within the original sales contract initially concluded between the non-proprietary seller and the purchaser.

The obligation of the seller to transfer the property shall be deemed accomplished either by the seller's acquisition of the asset or by ratification of sale by the true owner or by any other means by which property of the buyer is obtained, directly or indirectly, *ie* by any means which result in obtaining the right of property by the purchaser (Dumitru in Atanasiu, Dimitriu, Dobre et al, 2011: 624).

Unlike the solution of absolute invalidity of selling the property belonging to another admitted prior to the implementation of the new Civil Code in doctrine and in legal practice for the case where both the seller and the purchaser had knowledge about the lack of seller's ownership, according to Article 1683 paragraph (4) NCC, if the seller does not provide transfer of ownership to the purchaser, termination of the contract may be requested and, as a consequence, the refund of the price paid by the buyer, and, where appropriate, the recovery of damages may be requested.

WHAT WILL THE PROCEEDING BE IN PRACTICE IN CASE A BONA FIDE PURCHASER IS MISLED BY THE SELLER?

Both on the level of interpretations in doctrine and the way in which it will be proceed in legal practice, the question arises on to the solution to be applied in case of a bona fide purchaser who does not know the fact that the seller is not the true owner and who was misled about the ownership of the seller, being led to believe that the seller is the true owner.

Different opinions have already been expressed, although there are no specific solutions in legal practice to confirm a direction of interpretation. On the one hand it was considered that in this case, in the case of the seller's failure to transfer the real ownership from the owner to the purchaser, the purchaser cannot request cancellation of the sales contract only its termination (Dumitru in Atanasiu, Dimitriu, Dobre et al, 2011: 624), although we believe that this solution is questionable as the provisions of Article 1683 paragraph (4) NCC become applicable only to the assumption that both parties knew about the seller's lack of ownership, the buyer was informed in this regard and agreed on postponing the transfer of ownership.

On the other hand there is the interpretation according to which, in this case, the solution admitted until the implementation of the new Civil Code will be applied, *ie* the solution of partial invalidity for vitiating the consent of the buyer by error regarding the seller's capacity of ownership (Dobrilă, 2014: 286).

To be entitled to seek the partial invalidity of the sales contract under these conditions, according to Article 1208 NCC the error shall not be forgivable, because the sales contract cannot be canceled by the fact that in certain circumstances the error was known, by reasonable diligence, by the purchaser. Furthermore, according to Article 1211 NCC it is necessary the invocation of the error to be made by the bona fide purchaser, and not contrary to the requirements of good faith.

Bona fide requires the obligation of the purchaser to make all the necessary verifications on the capacity of the seller's ownership, including documents that the seller uses to justify in his right. Bona fide is based not only on the existence of the capacity but also on the demanding verification of the capacity of the owner to remove any doubt

about the validity of the capacity of the seller and according to this, we can determine whether his diligence were likely to prevent him ending up in an error (Cîrstea, 2011; Court of Appeal – Constanta, Civil Section, minors and family, labor disputes and social security, Civil Decision no. 13/C/18.01.2010 in Jurindex).

According to the roman definition, “bona fide is the consciousness, the sincere belief of a person who believes an asset belongs to him” (*Bona fides est illaessa putantis rem suam esse*). Thus, the significance of our behavior centered on trust (*fides*) must be sought in good faith (Ciucă, 2009: 23).

When selling the property belonging to another, the place of bona fide is between the false faith (ignorance) in a certain state of facts, faith that is strong enough to be conclusive for both parties or at least for one of them and the misleading appearance, which sincerely convinces everyone or almost everyone. Anyway the foundation of bona fide cannot be constituted by the indifference or lack of action to verify the consistency between the state of facts and the law (Cotea, 2007: 425-426).

SELLING THE PROPERTY BELONGING TO ANOTHER – THE POSSIBILITY TO HOLD LIABLE A PERSON FOR THE OFFENCE OF DECEPTION

In the legal practice, in terms of criminal responsibility, the selling property belonging to another is relevant also under the terms of deception offence, governed by Article 244 of the new Criminal Code, regulated in the chapter of crimes committed against property by disregarding the trust, which means that in certain situations transition may occur from the sphere of civil law in the sphere of criminal law.

The demarcation between criminal and civil liability is unclear traced, and this is reflected in the legal practice which found a way to solve such problems but not in all cases (Pătulea, 2003: 119).

The deception offense is held in those situations where the seller, without the capacity of ownership for the property sold, misleads the purchaser in concluding the sales contract, that is when the seller falsely presents the real situation and misleads the purchaser about his capacity as owner, presenting himself as the real owner of the property in order to arrogate to himself or to another an unjust property or when this brings damages to the purchaser (Dobrilă, 2014: 289-297; Dobrilă, 2011: 281-293).

Regarding the existence of the deception offence in certain cases of selling the property belonging to another (Bogdan, 1999: 115; Ciucă, 1990: 29; Diaconescu, 1990: 28), it is considered that by falsely asserting that the seller is the real owner of the property sold is a deception because induces the purchaser a false representation of reality (Jakab, Halcu, 2005: 251; Bocşan, Bogdan, 1999: 50).

Although the institution of selling the property belonging to another is allowed and expressly regulated in the new Civil Code, the possibility of admitting the existence of the deception offence for certain situations where there is a sale of property belonging to another refers not to the institute itself, but to those cases in which there is the intent to deceive through this operation, ie when the bona fide purchaser is misled by the seller.

CONCLUSIONS

The new Civil Code comes to correct the lack of an express provision of the institution of selling the property belonging to another, which have led to solutions and different interpretations in doctrine and legal practice prior to the implementation of this code.

Although the new Civil Code marks a change of vision regarding this institution, in that it acknowledges its validity, it remains to be seen the way this institution will be perceived and how it applies in legal practice, taking into account that not all the aspects (eg the bona fide purchaser misled by the seller) were clarified. Although on the level of legal literature certain views were expressed on issues that are still unclear, the solutions from the legal practice (missing for now) are the ones that will come to confirm a direction of interpretation.

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