BONA FIDES PRAESUMITUR – IN THE SUBJECT MATTER OF THE ACQUISITION PRESCRIPTION

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Abstract

The distinction between honesty (honestum) and good faith (bona fides) finds in the matter of usucapion a special significance that leads to the acquisition of the property right or its dismantling. The analysis of the concept takes place on the basis of the contemporary legislation of Romania and the Republic of Moldova, but it takes the vision and the experience of the French and Canadian authors, all in the context of access to the legal systems of France and Canada. The essence of those presented we find it at Philippe Malaurie (MALAURIE, 1997), who said that "possession (...) occupies a place comparable to that of state ownership in the matter of filiation: the law tends to face when the latter is significant."

Keywords: *good faith, possession, proprietary right, presumption, usucapion*.

The essential condition of the short-term usucapion as it is regulated by the Civil Code is represented by the subjective position of the usucapion who is asked to be in good faith.

According to the Civil Code of Romania (LEGISLATIE, 2017) and the Civil Code of the Republic of Moldova (CARTIER, 2015), good faith is the misrepresentation of the possessor regarding the inexistence of any cause of lack of validity of its title that could be invoked by another person, for usucapion despite the fact that the ownership condition of the transmitter is not fulfilled.

Going back in time, it is important to highlight the fact that good faith is a concept firstly encountered in the Roman law with the purpose of offering the county chief good mechanisms in order to offer legal protection to different newly born situations, in dependence with the normative and judicial contemporary realities, especially in the situations referring to the translative acts of ownership, lease or mandate.

Regarding the use of the concept of good faith towards the *possessionem* we can say that it has taken the form of a real role of judicial protection with all its purely subjective character, in the sense that it was appreciated as being essential especially for this character, mostly abstract in offering protection measures for a real right obtained under certain conditions. In its development, the concept of good faith gains in Europe, starting from the 11th century, a high significance due to the influence of Christianity and of its pure morale marks, a significance that led to its recognition as the basis of contractual law. This vision goes beyond the post-classical period of the Roman-Byzantine Law and it could be found in the *praxis* of the Middle Ages, where, when it comes to possession and contract, it occupies a position with high judicial and ecclesiastic influences (COTEA, 2007).

We find good faith also consolidated in the modern theories of the contract, especially in the French contractual solidarity or the movement of the German liberal law.

In the second part of the 19th century scholars presented a significant interest in the analysis of the concepts of good and bad faith, when it comes to the institution of possession. The French jurist Auguste Joseph's PhD thesis was therefore highly appreciated. The paper was published in Paris in 1857 under the following title: *"De la prescription acquisitive en droit romain et en droit français"* (MERLIN, 1857).

Therefore, the concept of good faith in the Roman Law - *bona fides* – appears here as a relative legal assumption, *juris tantum*, with a correlative effect of the possibilities of the one

interested of proving the contrary, using everything as a proof.

Coming back to the stage of our contemporaneity and to the subject of good faith we notice that the Roman Civil Code (MERLIN, 1857) , in art. 14, paragraph 2, and in that of Republic of Moldova (MERLIN, 1857), in art. 9, paragraph 1, together with art. 221, paragraph 3 and with art. 333, statutory that under these conditions, the burden of proof to the opponent of the possessor, in the legal action of this person who pretends to be the true holder of the real right.

Literature and jurisprudence consecrated the theory that according to which when it comes to usucapion it is not necessary to prove the conviction of the possessor that he obtained from the true owner, but the fact that this conviction takes on this appearance that the possessor was entrusted that the possession of the transmitter was itself based on good faith, meaning that it had all the traits required by the law in order to be able to send the property (*Let's look at art.27 from the Decree-law no.115/1938* (LEGISLATIE, 1938), *art. 1898 ad 1899 Civil Code 1864* (LEGISLATIE, 2011), *931 New Civil Code, art. 332 and the following Civil Code of Republic of Moldova, respectively the Advisory opinion of the Plenary of the Supreme Court of Justice on the application way of the provisions of art. 332 from the Civil Code of Republic of Moldova, from15.04.2013* (JURISPRUDENȚA CURȚII SUPREME DE JUSTIȚIE, 2013).

Under the concept of comparison law we find the affiliation condition to art.921 of the civil code of Quebec which states that "possession represents the exercising by the owner itself or by other people of a right to which he intends to become owner" (LEGISQUBEC, 2017). This proves that the Canadian lawmaker, as well as the Romanian and the Moldavian one, grounded his norm on intentional appearance.

The majority doctrine considers that the most common situation in which we are faced with good faith are those that refer to the achievement of some translative propriety documents which do not present the real owner which it has the appearance of an owner, certificate which can be considered *just titlu*, under the condition of good faith, the putative title not being enough (GHERASIM, 1981).

This specificity of good faith, in the subject matter of usucapion essentially distinguishes the concept of good faith *sui generis* and the notion of good faith in the field of usucapion.

An antagonism of the specific condition of good faith is represented by the possessor's conviction that the obtained from the real owner, but in this situation he will be considered of bad faith if he proves that he knew the fact that the his transmitter did not have the legal possibility to properly send his proprietary right because, for example, he was underage or injudicious.

We notice that good faith gains in the analysed mater, specific and particular tones, different from the general ones, as a result of the severe effect of fulfilling the possession requirements: sanctioning the owner who is not diligent with the attributes of the proprietary right: *usus, fructus* and *abusus*, therefore the possessor's tendency to gain the proprietary right.

The Romanian legislative system is in total congruence with that of Republic of Moldova and it expressively states that when it comes to usucapion, the faith of the possessor in the owner quality of the transmitter has to be completed, and therefore any doubts that the possessor might have regarding the owner quality of the one from whom he gained a certain good represent clear judicial impediments when it comes to the possibility of usucapying a good, in the virtue of the dispositions referring to short term usucapion, situation in which the possessor is conditioned by good faith (BÂRSAN, 2007).

Possession is in good faith every time the one who exercises it has the firm and intimate conviction that he is the owner of a real right, having an authentic behaviour towards a similar good to its real possessor (see D. Alexandresco: *"the intention to keep a product exactly like his own")* (ALEXANDRESCO, 1900), to the detriment of an objective judicial reality, unknown or unconscious by him, objectified in the existence of another individual or entity of that real right, but the latter one has a passive, not interested and foreign conduct in exercising his recognized attributes and this make the existence of the intentional element of the possessor possible *(animus)*.

Simple speaking, good faith could be characterised as being that state in which the possessor has the title on a good whose vices he doesn't know anything about, but he obtained the advantages of that good, context in which the gathering of the fruits represents an indirect justification of its representation.

Therefore, jurisprudence is full of cases that present situation in which, for example, the possessor is of bad faith when he buys an immovable good from only one co-owner, although he knows the fact that over the good a indivision is manifested or, for example, those situation in which the possessor who buys an immovable good from a husband, although he knows the fact that the seller is subject to the regime of the legal good community, either being in the exclusive propriety of the other husband.

A straightforward and clear solution in accordance with the practice of the former Supreme Court was pronounced by the Appeal Court of Iasi in 2002 (civil ruling no.221/08.02.2002) (C.H. BECK Publishing House, 2010) which stated that the one who sealed a sale contract is not in good faith with the father of the owner, as long as that particular document does not stipulate the transferring of the good and of its possession. The fact that the owner gets into the possession of the good represents only a permission of the seller, aspect which does not equalise with the transmission of possession or with the appearance of a twisted representation of the buyer on its quality (DRĂGUŞIN, 2012).

An intrinsic dissection of good faith regarding the moment in which it has to manifest this attribute, therefore good faith has to exist in the moment in which the good was taken under possession and it is not interesting whether or not the possessor found out about the vices of its title.

Therefore, another existential trait specific to good faith in this subject matter is that good faith must not subsist during the entire possession, the legislator presenting the condition of existence for the good faith only when the good enters under possession.

This reason presents the hypothesis in which the usucapiont finds out later then the moment in which possession begins – of gaining the good, gaining it from a *non dominus*, situation in which he himself can prevail from the short term acquisition prescription, according to the adagio from the Roman law *mala fides superveniens non impedit usucapionem*.

The exclusive and absolute character of good faith is also manifested when it comes to the judicial documents completed *inter vivos*, situation in which good faith has to be present at the moment of their completion.

The same rule doesn't apply for *mortis causa* documents, such as the situation of the private bondholder, when good faith has to be present at two distinct moments:

1. at the death of the testator;
2. at the acceptance of the bound.

The doctrine stated that good faith has to exist at the moment of the bound's acceptance since the obtaining of the good through bounding becomes effective only when the bound clearly states his acceptance will (STEINAUER, 1990).

At present, the concept of good faith gains in the case-law of the European Contentious Court, respectively of the national constitutional courts different accents in regarding the sovereign legislative authority of the states, as well as of the community statues on legal uncertainty, all these occurring due to a continuous preoccupation regarding the European law systems in connection to the security of the judicial relations and their predictability.

References

ALEXANDRESCO, D. (1900) *Explicațiunea dreptului civil român*, vol. I-XI. National Publishing House, Iaşi.

BÂRSAN, C. (2007) *Drept civil. Drepturile reale principale*. Hamangiu Publishing House, Bucureşti. DRĂGUŞIN, C. (2012) *Comentariile Codului civil. Uzucapiunea*. Hamangiu Publishing House, Bucureşti.

C.H. BECK Publishing House (2010) *Buletinul Curților de Apel - Drept civil*. 3-4, p. 41.

CARTIER (2015) *Codul civil al Republicii Moldova*. Available from: http://shop.cartier.md/files/pdf/1449742689.pdf . [22 September 2017]

COTEA, F.S. (2007) *Buna-credință. Implicații privind dreptul de proprietate*. Hamangiu Publishing House, Bucureşti.

GHERASIM, D. (1981) *Buna-credință în raporturile juridice civile*. Socialist Republic of Romania Academy Publishing House, Bucureşti.

JURISPRUDENȚA CURȚII SUPREME DE JUSTIȚIE (2013) *Avizul consultativ al Plenului Curții Supreme* de Justiție. Available from: http://jurisprudenta.csj.md/search_avize_csj.php?id=5 . [1 September 2017]

LEGISLATIE (1938) *DECRET-LEGE Nr. 115 din 27 aprilie 1938*. Available from: http://legislatie.just.ro/Public/DetaliiDocument/25. [10 August 2017]
LEGISLATIE (2011) *CODUL CIVIL din 26 noiembrie 1864 (*actualizat*)*. Available from: http://legislatie.just.ro/Public/DetaliiDocument/1. [1 September 2017]
LEGISLATIE (2017) *Codul civil. Codul de procedura civila. Actualizat 8 iunie 2017*, Hamangiu Publishing House, Bucuresti.
LEGISQUBEC (2017) *Civil Code of Québec*. Available from: http://legisquebec.gouv.qc.ca/en/showdoc/cs/CCQ-1991 . [10 August 2017]
MALAURIE, P. (1997) *Antologia gândirii juridice*. Humanitas Publishing House, Bucuresti.
MERLIN, A.J. (1857) *De la prescription acquisitive en droit romain et en droit français*, Imprimerie de Moquet, Paris.
STEINAUER, P.H. (1990) *Les Droits reels*. Staempfli, Berne.