Successive Transfers Relating to Movable Tangible Assets and Acquisition of Property under Article 937, Paragraph (1) of the Civil Code

Mara IOAN[1]

Abstract: Apparently article 1275, paragraph (1) of the Civil Code covers all situations that may arise in practice, without making a distinction for the constituent or transferring contracts if they are of the same or of different nature. However, we appreciate that article 1275 of the Civil Code does not apply in all situations of successive transfers relating to movable tangible property granted by the same legal subject. Corroborating this text with the norms in article 937 paragraph (1) of the Civil Code and article1273 paragraph (1) of the Civil Code it leads to the solution according to which article 1275 of the Civil Code regards only the cases where the transfer of successive property are of the same nature, the onerous primary act has not resulted in immediate transmission of real previous right of the document with the free subsidiary title and when the primal act is free, and the alternative is onerous. It is excluded, thus from the application of the rule in question when the primary onerous act had as effect the immediate transmission of the real right and then, but without having occurred the delivery of the asset by the acquirer, it was concluded a document with a free title, subsidiary.

Keywords: tangible movable asset; property; possession in good faith; successive transmissions

1. By article 937, paragraph (1) of the Civil Code[2] it was established a legal absolute presumption of property (Luţescu, 1947; Boroi, Anghelescu & Nazat, 2013) according to which "a person who, in good faith, concludes with a non-owner a document of ownership transfer with onerous title, concerning a movable asset he becomes the owner of that property at the moment of taking it into his possession".[3]

[1] Associate Professor, PhD, "Alexandru Ioan Cuza" Police Academy of, Bucharest, Romania, Address: 1 A Privighetorilor Str., sector 1; Tel.: +40213175523; Fax +40213175517. Corresponding author: marayoan@yahoo.com.

[2] (Boroi, Anghelescu & Nazat, 2013): the applications of this provision are found in article 1275, paragraph (1) and article 2121 of the Civil Code.

[3] To the contrary opinion see (Stoica, 2013).

Given that the text of the law expressly states that it is an "ownership transfer document" we consider that this rule does not operate also in the case of acquiring other real rights.

Of course, the good faith possessor of a movable asset has the right to elect, he may invoke into his benefit the acquisition of ownership in terms of article 937, paragraph (1) of the Civil Code, without being obliged to acquire this right (Stoica, 2013).

Claiming movable asset becomes impossible as the non-possessor owner cannot prove its right as a result of absolute presumption of ownership of which the current owner is enjoying (Toma, 2000). In other words, the effect of the acquisition of property for the benefit of the holder in good faith based on article 937 of the Civil Code is accompanied by the extinguishing effect of property on the initial owner (Stoica, 2013).

Invoking article 937 of the Civil Code (Stătescu, 1970; Bîrsan, 2013; Stoica, 2013) implies the fulfillment of the following conditions:

a) The provisions of article 937, paragraph (1) Civil Code applies in principle only to tangible movable property considered individually, which is likely to be owned in its materiality (Boroi, Anghelescu & Nazat, 2013; Bîrsan, 2013; Stoica, 2013). Exceptionally, also to certain categories of intangible movable property, namely bearer of securities (article 940 of the Civil Code), which represent documents that record the right to a claim of the person who has it, without having to be forced to prove the existence of the claim (banknotes, stocks and bonds issued by state banking units or territory-administrative units), subject to the provisions of article 937, paragraph (1) of the Civil Code.

The article 937, paragraph (1) of the Civil Code does not apply to the universalities of assets, movable assets that are taken out of the civilian circuit, movable assets that are accessories to the property [article 937, paragraph (4) of the Civil Code] which retain the same quality, although they are only accessories to the property (e.g. the furniture from an apartment) property subject to registration (ships, aircraft, etc.) (Boroi, Anghelescu & Nazat, 2013) or cultural assets that were removed illegally from the territory of a European Union State (article 63-67 of the Law no. 182/2000 on the protection of national cultural movable patrimony[1]) (Bîrsan, 2013; Stoica, 2013).

[1] Republished in the Official Monitor no. 259 of April 9, 2014.

b) The provisions of article 937 paragraph (1) of the Civil Code may be invoked only by the good-faith third parties who acquired the property from a non-owner, who, in turn, had received the property from the owner. The action of claim brought by the owner in this situation will be paralyzed under article 937, paragraph (1) of the Civil Code.

For the third party acquirer to invoke the provisions of article 937 paragraph (1) of the Civil Code the owner of the property must be relinquished voluntarily of the property in favor of the alienator (temporary holder of the receivables[1] or owner[2]), and he may have alienated the movable property without the will of the owner to a third party purchaser in good faith by an onerous document (Bîrsan 2013) [representing the just title (Stoica, 2013)]. When the third party has received the free asset it is no longer justified the solution of strengthening its rights over the asset against the interests of the real owner (Lula, 2000).

The article 937, paragraph (1) of the Civil Code does not apply to persons holding the property directly from the owner, because they are bound by the obligation of giving it back (Boroi, Anghelescu & Nazat, 2013) or they even acquired the property rights; nor when the withdrawal of the owner's case from the court was achieved without his will, the asset was stolen or lost [in which case there are applicable the provisions of article 937, par. (2) or (3) of the Civil Code, as applicable].

The owner may bring against the non-proprietary alienator, in case the asset is in his possession, a personal action, but also an action for recovery (Bîrsan, 2013), in which case he must prove ownership and the precariousness of the temporary holder of the receivables (Filipescu & Filipescu, 2000).

The interest in bringing the proceedings for recovery, rather than the personal action, lies in:

- Asset is out of contest for the other creditors of the debtor for the restitution obligation;
- Action for recovery is imprescriptible, but not the personal one;

[1] For example, the tenant, the lessee, the depositary, the pledgee.

[2] For example, it is the one that concluded with the owner a document for transferring property with a cause of inefficiency that he does not know or it is the beneficial owner [which is the temporary holder of the receivables compared to the owner, but the owner compared to all the other people, according to art. 918 par. (1) b) of the Civil Code]. In the same sense we have: the "temporary holder of the receivables or person assimilated to it" (Stoica, 2013).

- In case of usufruct and bare property established by two bonds, coming from the same person, there is no personal action, only the action for recovery of the bare owner and the confessing action (corresponding to the action for recovering the property) of the usufruct (Filipescu & Filipescu, 2000).

c) In order to be applicable article 937, paragraph (1) of the Civil Code, the possession of the third party acquirer to be real, i.e. to contain both elements: animus and corpus, to be useful, that is uncorrupted[1], and in good faith (Boroi, Anghelescu & Nazat, 2013; Bîrsan, 2013) at the entry into possession of the property, that is the possessor does not know, nor could have known, according to the circumstances, that he had acquired the asset from a non-proprietary (article 938 of the Civil Code). The Good faith of the third-party is presumed to be [article 14, paragraph (2) Civil Code] and it must be at the moment of entry into the possession of the asset (Oprişan, 1990)[2], no matter if later, the owner becomes in bad faith. If the third party acquirer is in bad faith at the moment of entry into possession of the property, knowing that he did not deal with the owner or had doubts about its quality, the provisions of article 937, paragraph (1) of the Civil Code are no longer applied.

In accordance with article 1275 of the Civil Code in the case where a person sells his asset successively to two buyers, the first contract transfers ownership to the first purchaser. Continuing to keep the asset, the seller no longer has the ownership quality, but a simple temporary holder of the receivables; he holds the asset with the will of the first purchaser, who became the owner. Assuming that the seller - the temporary holder of the receivables - sells the second time to another second buyer, to whom he gives the asset, thereby the provisions of article 937, paragraph (1) of the Civil Code are applied. This second buyer has, in reality, the quality of third-party purchaser, who acquired an asset from a temporary holder of the receivables (seller) to whom the true owner (first purchaser) entrusted in good faith, by not taking the asset immediately after purchase (Botea, 1996).

2. Possession of good faith on movable property is in compliance with article 937, paragraph (1) of the Civil Code, a way of acquiring ownership. If these conditions are fulfilled for the defendant, the action for recovery must be dismissed as unfounded. If these conditions are not met and the defendant does not prove that he

[1] It can no longer be a question of possession continuity (Barsan, 2013).
[2] TS, col. civ., decision no 1120/1966, in CD 1966, p. 90.

has acquired ownership through another way, the action for recovery may be allowed (Boroi, Anghelescu & Nazat, 2013; Stoica, 2013). In conclusion, the movable assets may be claimed from the third party acquirer of bad faith, the thief or finder from the third party acquirer with title, and under the terms of article 937, paragraph (2) and (3) of the Civil Code.

The owner is in bad faith when he knew that the asset that he acquired had been lost or stolen (thieves and finders[1]) or he has known that he has acquired the property from a non-owner. To them and to the third party purchaser in good faith and in clear title or whose title was abolished, there are not applied the provisions of article 937, paragraph (1) of the Civil Code and movable property in their possession may be claimed by the plaintiff owner, the action for recovery in this situation being, as a rule, extinctive imprescriptible, as the ownership right is perpetual and it is not lost through non-use (Stoica, 1998; Bîrsan, 2013; Stoica, 2013)[2]. However the defendant may invoke the *usucapio* of 10 years (article 939 of the Civil Code).

Article 935 of the Civil Code establishes a legal presumption relative to ownership title in the favor of the holder of a movable asset if its possession is real and useful (Stoica, 2013): "whoever is at a time in possession of a movable asset is presumed to have a title of gaining ownership over the asset." This presumption can be rebutted if the person that claims the asset proves that: its property title and the precariousness of the one having the asset; that the asset has been stolen or lost; the possession of the defendant is vitiated at the moment of recovery action (Stoica, 2013).

Except the cases provided by the law [when movables are subject to advertising formalities (Stoica, 2013)], the possession of good faith movable asset ensures the enforceability against the third parties of the constitutive legal acts or transferring real rights (article 936 of the Civil Code). Thus, if the hypothesis of concluding successive contracts, constitutive or of transferring real rights on the same movables asset, the acquirer would have preferred to came into the actual possession of that property.

This norm must, however, be analyzed and also by the corroboration with article 1275, paragraph (1) of the Civil Code it provides: "*If someone has transfered successively to several people the ownership of a movable tangible asset, the*

[1] They have the obligation to comply with the provisions of art. 941-945 of the Civil Code.
[2] TS, s. civ., decision no 144/1982, in CD 1982, p. 13.

person who in good faith acquired the actual possession of the property is the holder of the right, even if its title has a later date."

In the specialized literature (Zamsa, 2012; Boroi, Anghelescu, & Nazat, 2013) it was shown that article 1275 of the Civil Code represents the general rule, while article 937 of the Civil Code represents the special norm, but "the relationship of the general rule type (article 1275 Civil Code) – the special rule (article 937 of the Civil Code) does not imply, in this case, a derogatory regime of the special rule, as it only details the basic rule of successive transmission of a movable asset established in article 1275".

Apparently, article 1275, paragraph (1) of the Civil Code covers all situations that may arise into practice, irrespective of whether such constitutive or of transfer contracts are of the same nature (all with onerous or free title) or of a different nature (some with onerous, others with free title).

Such an interpretation would thwart, in our opinion, the applicability of article 937, paragraph (1) of the Civil Code. Thus, we suppose that the owner of movable tangible asset concludes a sales contract followed by a contract of donation made in favor of a person, other than the purchaser, both on the same property of the alienator. If the first person who came into possession of the property in good faith would be the donee, from the logical interpretation of article 1275, paragraph (1) of the Civil Code it would result that the latter should be considered to be entitled of the transferred asset (*ubi lex non distinguit, nec nos distinguere debemus*).

We appreciate that the above highlighted solution does not take into consideration the provisions of article 937, paragraph (1) of the Civil Code and the practical consequences of the application of article 1273, paragraph (1) of the Civil Code.[1] Specifically, concluding a sales contract on an individual movable tangible asset determined individually, in the absence of express contrary stipulation, the transfer of ownership is achieved at the very moment of the will agreement [article 1273, paragraph (1) and article 1674 of the Civil Code]. This means that when the act of donation, the transmitted right is not found in the donor's patrimony but in that of

[1] Article 1273 of the Civil Code "The constitution and transfer of real rights": "(1) The real rights are established and transferred by the agreement of the parties, even if the goods have not been delivered, if this agreement bears determined assets or by individualizing the assets, if the agreement bears assets of a certain type. (2) The fruits of the assets or the transmitted right belong to the acquirer of ownership of the asset since the date of the transfer or, where appropriate, of the transfer of the right, unless the law or the will of the parties provide otherwise. (3) The provisions on the land registry and the special provisions relating to the transfer of certain categories of movable assets remain applicable."

the buyer. By applying article 937, paragraph (1) of the Civil Code we notice that the donee, even in good faith when taking into the possession of the property, the owner cannot be regarded owner as the transfer act which is concluded has a free title.

Based on these aspects, we must note that article 1275 of the Civil Code does not apply in all situations of successive transmissions relating to tangible movable assets consented by the subject of law, but only when:

- The successive acts are of the same nature (whether with onerous or free title)
- The primary act, although with onerous tile, had not as effect the immediate transfer of real right, this act being performed subsequently to the subsidiary act with free title, namely (Bîrsan, 2008):
    - When the transfer of the real rights is affected by a precedent term or condition. According to article 1400 of the Civil Code, the condition is suspensive when its fulfillment depends on the effectiveness of the obligation, and the term is suspensive, according to article 1412 Civil Code, when until it if fulfilled, it is deferred by the falling due of the obligation;
    - In the case of the future assets, the transfer of real rights shall be achieved at the moment of achieving the asset. Thus, according to article 1658, paragraph (1) thesis I of the Civil Code, if the object of the sale is a future asset - excluding constructions - the buyer acquires a future property at the moment where the property was achieved;
    - for the goods of its kind, transferring the real right occurs at the moment of individualization. Thus paragraph (2) of article 1658 of the Civil Code states: "In the case of sale of assets of a limited type that does not exist at the moment of concluding the contract, the purchaser acquires the property at the moment of individualization by the seller of the sold assets";
    - when the law provides for certain categories of assets, such as, for example, the real estate [article 557, paragraph (4)[1] in conjunction

[1] Art. 557, paragraph (4) of the Civil Code "Acquiring the property right": "(4) Except as specifically provided by the law, in the case of immovable property the ownership title is acquired by registering in the real estate register, complying with the provisions of art. 888".

with article 855 of the Civil Code[1]], the transfer operates at the time of operating certain formalities;

- The primary act is free, and the subsidiary one with onerous title.

Consequently, in the situation where it has been signed a document transferring the property with onerous title which had as effect the immediate transmission of the real right and subsequently concluded an act free of charge and the asset had been handed in to the acquirer, it has not acquired ownership because it would breach the provisions of article 937, paragraph (1) of the Civil Code, the special rule in relation to article 1275 of the Civil Code.

Of course, in all cases it is necessary for the secondary acquirer to be in good faith - not to have known nor could have known the assumed obligation previously alienated - and to be first to be in possession of the property. In the case of applying the article 937 of the Civil Code, it is considered in good faith the owner who did not know or should have not known, according to circumstances, the lack of ownership of the alienator [article 938, paragraph (1) of the Civil Code].

7. References

Baias, Fl., Chelaru, E., Constantinovici, R. Macovei, I. (coordonatori) & Zamşa, C. (2012). *Noul Cod civil. Comentariu pe articole. Art.1-2664*/ *The New Civil Code. Comment on articles. Art.1-2664.* Bucharest: C.H. Beck.

Bîrsan, C. (2013). *Drept civil. Drepturile reale principale*/*Civil law. Main real rights.* Bucharest: Hamangiu.

Bîrsan C. (2008). *Drept civil. Teoria generală a obligaţiilor/Civil law. The general theory of obligations*. Bucharest: Hamangiu.

Boroi, G., Anghelescu, C.Al. & Nazat, B. (2013). *Curs de drept civil. Drepturile reale principale/Civil law course. Main real rights*. Bucharest: Hamangiu.

Botea, Gh. (1996). *Patrimoniul şi drepturile reale. Prezentare generală*/*The patrimony and real rights. General presentation*. Bucharest: Petrom.

Filipescu, I.P. & Filipescu, A.I. (2000). *Drept civil. Dreptul de proprietate şi alte drepturi reale/Civil law. Ownership and other real rights.* Bucharest: Actami.

[1] Art. 885, paragraph (1) of the Civil Code "The acquisition and extinguishment of real rights on real estate": "Subject to contrary provisions, the real rights on real estates contained in the real estate register are acquired between parties and by the third parties only by their registration in the real estate register, based on the act or fact which justified the registration".

Lulă, I. (2000). Observaţii asupra prezumţiilor prevăzute de art.1909 alin.1 C.civ./Observations on presumptions provided by article 1909, par.1 of the Civil Code. *Dreptul/The Law* no. 1.

Luţescu, G.N. (1947). *Teoria generală a drepturilor reale*/*The general theory of real rights*. Editura de Stat.

Oprişan, C. (1990). Acţiunile petitorii/The actions of the petitioners. *Dreptul/The Law* no. 9-12.

Stătescu, C. (1970). *Drept civil. Persoana fizică. Persoana juridică. Drepturile reale*/*Civil law. The physical entity. The legal entity. Real rights.* Bucharest: Editura Didactică şi Pedagogică.

Stoica, V. (1998). Corelaţia dispoziţiilor art.14 din Codul de procedură penală cu prevederile art.1909-1910 din Codul civil/The correlation of the provisions of article 14 of the Criminal Procedure Code with the provisions of the Civil Code art. 1909-1910. *Revista română de drept*/*The Romanian Journal of law no. 10.*

Stoica, V. (2013). *Drept civil. Drepturile reale principale*/*Civil law. Main real rights*. Bucharest: C.H. Beck.

Toma, M. (2000). *Drept civil. Drepturi reale*/*Civil law. Real rights.* Bucharest: Argument.