ACQUISITION OF MOVABLES IN GOOD FAITH*

Doç. Dr. Lâle Sirmen**

1. What is "Good Faith" (Bona Fides)?

The Turkish legislator has not defined "good faith" (bona fides). Obviously the legislation leaves its definition to the doctrine and the precedents. The notion of "good faith" is closely related with the existence of a legal defect which prevents the outcome of the desired legal effects. It is, therefore, the ignorance of a legal defect due to an unconscious lack of knowledge or a wrong opinion. Good faith demands a reasonable ignorance as well. Thus, mere ignorance can not be taken for good faith when either law or the circumstances of the case require a knowledge of the actual legal situation (1). It is pointed out in the several articles of the Civil Code that one cannot allege that he has no knowledge of the entries in the public registers. Likewise, every person is obliged to know the contents of the public announcements. No person can plead good faith in any case where he has failed to exercise the degree of care required by the circumstances (CC. Art. 3/I).

While it is not easy for a person to prove his ignorance, the Civil Code lays down a presumption of good faith according to which good faith is presumed whenever the existence of a right has been expressly made to depend on the observance of good faith (CC. Art. 3). Consequently, the other party on whom the burden of proof rests, should prove that the person pleading good faith knows or should know the legal defect, for example, he would have discovered it, if he had shown the care required by the circumstances of the case. Moreover the precedents approve the competence of the judge to decide on his own

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* This article is part of the report on "Acquisition of Movables" submitted to the International Institute for the Unification of Private Law, in March 1985.

** Faculty of Law, University of Ankara.

(1) **Edis, Seyfullah,** Medeni Hukuka Giriş ve Başlangıç Hükümleri, İkinci Bası, Ankara 1983, pp. 256–258.

initiative, when he is convinced of the absence of good faith through the evidences submitted to him (2).

2. **Function of Good Faith in the Acquisition of Movables**

In the Turkish law, acquisition in good faith of corporeal movables (3) is recognized in the Civil Code. "Where a person acquires the ownership or some other real right over a movable in good faith from a person in possession of the movable with the consent of its owner, this acquisition will be assumed valid although he is not authorized to dispose of it" (CC. Art, 901). This article should be interpreted in accordance with the original text (Article 933 of the Swiss Civil Code) as follows: Where a movable is transferred with an intention to pass ownership or some other real right to the transferee, and he takes possession in good faith, his right in the movable will be protected even where the transferor to whom the movable has been delivered by the owner or by the consent of the owner, has no authority to dispose of it or alienate it.

Furthermore, limited real rights of third parties cannot be invoked against the transferee, if the acquisition has taken place in the conditions laid down in Article 901 of CC. Those rights of any third parties to the movable will be extinguished where a person acquires the ownership or some other real right in the movable from a person in possession of the movable with the consent of said third parties (4).

3. **The Requirements for Acquisition in Good Faith**

Article 901 of the Turkish Civil Code stipulates three conditions on which the acquirer of rights *in rem* over a corporeal movable is protected;

a. The transferor must be in possession of the movable delivered to him by the owner or by the consent of the owner. The acquisition of a movable lost to its possessor or stolen or otherwise taken from its possessor against his will, though in good faith, is not protected while

(2) **Edis,** pp. 281–284; **Oğuzman, Kemal;** Medenî Hukuk Dersleri (Giriş, Kaynaklar, Temel Kavramlar) 3 bası 1978, p. 162 et seq.

(3) CC. Art 901 cannot apply to the acquisition of forces of nature which are also considered as movables in CC. Art. 686: **Gürsoy, Kemal/Eren, Fikret/Cansel, Erol,** Türk Eşya Hukuku, İkinci Bası, Ankara 1984, p. 131.

(4) **Homberger, A.,** Kommentar zum Schweizerischen Zivilgesetzbuch, Das Sachenrecht, Dritte Abteilung, Besitz und Grundbuch, Zürich 1938, Art. 933, N. 39.

the movable has not been delivered to the transferor with the consent of the owner, Nevertheless there is an exception to this rule. According to Article 903, cash and negotiable instruments to bearer cannot be recovered from the bona fide holder, even though the owner was deprived of his possession in them against his will.

Where a person in possession of a movable loses it or has it stolen from him or otherwise taken from him against his will, he can demand it back within a period of five years from any person who is detaining it in good faith (CO. Art. 902). The person in possession of such a movable, provided that he is in good faith, is not liable to the person entitled to it for any damage caused by its user. Furthermore he is not bound to make good any losses or deterioration consequent on such user (CC. Art. 906). On the contrary he can demand compensation for any necessary and useful outlay on it and refuse to return it until this has been paid. He can also remove any improvements or additions made to the movable provided this can be done without injury to the property (CC. Art. 907).

According to Article 902 of the Civil Code, where a movable lost to its possessor or stolen or otherwise taken from him without his will, has been bought in good faith at a public auction or in market overt or from a dealer in property of the same kind, it cannot be recovered from the purchaser unless he is compensated for the purchase-money paid. There is no doubt that the Articles 906 and 907 of CC are also applicable in this particular case.

However, the bona fide transferee can acquire the ownership in a movable which is lost or stolen or otherwise taken from its owner against his will by prescription. Where a person has been continuously in good faith and peaceable possession of another's movable property for five years as owner, he is held to have acquired the ownership of it by prescription (CC. Art. 701). This provision applies in respect of acquistion of non-delivered movables as well. But under Turkish Law, there is absolutely no possibility for the transferee in bad faith to acquire the movable property by prescription.

b. The second requirement for acquisition is that the transferee must be in good faith. The protection of the acquirer in good faith of real rights in the movables is based on the fact that, under the Civil

(5) **Homberger,** Art. 933, N. 25 et seq; **Oğuzman, Kemal/Seliçi, Özer;** Eşya Hukuku, Genişletilmiş 3.Bası, İstanbul 1982, pp. 119, 123; **Tekinay, S. Sulhi,** Eşya Hukuku, İstanbul 1978, s. 133.

Code, possession is the evidence of ownership. The person in possession of a movable is presumed to be its owner (CC. Art. 898). This presumption corresponds also to the principle that ownership may be transferred by transfer of possession (CC. Art. 687). The transferee has therefore sound reasons to mistake the transferor in possession of a movable for a person who has the right to dispose of it, provided that the transferee has no knowledge of the defect, or neither law nor the particular case obliges him to know. In this sense good faith consists in the reasonable belief that the transferor has the right to dispose of the movable in his possession, in conformity with the contract. Good faith is presumed to exist in favour of the transferee. But where it is proved that the transferee has already had a knowledge of the defect in the transferor's right of disposal or would have known it, if he had taken the precautions according to the circumstances of the particular case, the transferee can no longer base his claim on the existence of good faith. However when the transferee proves that even if he had taken them, he would have not discovered the defect in the transferor's right fo disposal, his acquisition will be protected.

In our law system, besides such public registers of ships and aircrafts, there are two official registers kept for the movables. One of them is the register kept for the pacts by which a transferor reserves the ownership over the movable transferred (CC. Art. 688). The other official register is kept for the pledge of the cattle (CC. Art. 854). But since neither of those registers benefits the presumption of correctness, third parties pleading good faith are not obliged to know their contents (6).

Execution proceeding in form of seizure of a movable does not prevent the acquisition in good faith of that movable (Code of Execution and Bankruptcy, Art. 86). The announcement of the bankruptcy on the other hand prevents the acquisition in good faith (CEB. Art 191). Only within the period between the court's decision on bankruptcy and its announcement, good faith is protected in the acquisition of the movables through the delivery of bills repsesenting them (CEB. Art. 191).

According to our law, good faith must exist at the time the possession in the movable is transferred with the intention to pass the ownership in the movable to the transferee (7). If the transferee has been

(6) **Homberger,** Art. 933 N. 31; Edis, p. 260.

(7) **Homberger,** Art. 933, N. 34; **Gürsoy/Eren/Cansel,** p. 143; **Oğuzman/Seliçi,** p. 120.

already in possession of the movable accompanied by a right other than ownership, for example as a hirer, he must be in good faith at the time the contract that transfers him the posession without delivery is concluded.

Although it has not been expressed in the written laws, good faith is also required in the negotiation or conclusion of the contract, on the part of any person who is acting in the name of or on the account of the transferee, provided that he is authorized to act or the contract is ratified by the transferee (8).

c. The third requirement for the acquisition in good faith of a movable is that the transferree must acquire a real right (right *in rem*) in the movable through a valid act of disposal (act of acquisition) which requires both an agreement of the parties on the right to be acquired and the transfer of possession with the intention to pass that right in conformity with the agreement of the parties (9). Thus the transfer of ownership in a movable consists in a contract which contains an agreement on the transfer of ownership completed with the transfer of the possession. In Article 868 of the Civil Code, it is not expressly required that the act of disposal on the movables, that is the transfer of possession with the intention to pass a real right should depend on a valid executory contract such as sale, exchange, donation ect. But in the juristic works and in the precedents the dominating view emphasize that the existence of such an executory contract is required even though it is not expressly required in the Civil Code (10). Therefore the validity of the act of disposal over the movables depends also upon the existence of such a valid contract. As the transferor has the right to conclude an executory contract concerning a movable which is not in his ownership at the time of its conclusion, the absence of ownership will not invalidate the executory contract, provided that it exists at the time of its transfer.

Since our Law protects the transferee who takes the possession of a movable with the intention to acquire a right *in rem* in it, transfer of possession is required for the protection of the acquisition in good faith. Although the term "hand over" is, in the various articles of the Civil Code, used to mean "transfer of possession", transfer of possession is technically possible even without an actual handing over. Thus pos-

(8) **Homberger,** Art. 933, N. 37; **Gürsoy/Eren/Cansel,** p. 142; **Edis,** p. 270.
(9) **Gürsoy/Eren/Cansel,** p. 674; **Oğuzman/Seliçi,** p. 694–695.
(10) **Gürsoy/Eren/Cansel,** p. 674, et seq

session in a movable can be transferred by or without delivery of the movable. *Inter praesentes*, possession is transferred by the delivery of the thing itself to the other person or by putting at his disposal the means by which he can acquire control over it. The delivery is complete when the transferee has, by the consent of the former possessor, been placed in the position of exercising effective control over the thing (CC. Art. 890). Delivery *inter absentes* is complete when the thing is actually handed over to the transferee or to his authorized agent (CC. Art. 891). Possession of a movable can also be acquired without delivery, where a third party or the person himself who is alienating continues in possession of it under a distinct title by virtue of some legal transaction. Such transfer is not binding on the third party who continues in possession until the transferor has informed him of the transfer (CC. Art. 892). Where bills or documents have been drawn to represent movables which have been delivered to a carrier or placed in a repository, the delivery of these bills has the same effect as the delivery of the movables themselves. However, if the bills have come into possession of one party in good faith and the movables in that of another, the latter has the prior right to them (CC. Art. 893).