

REMARKS CONCERNING THE “FRAUDULENT” \*  
SALE IN THE ROMANIAN LAW

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RESUMEN

En el contrato de compraventa, la propiedad de la cosa vendida debiera pertenecer al vendedor, esto es, ser de su propiedad. La práctica legal actual demuestra que, en ocasiones, la propiedad vendida de hecho no pertenece al vendedor, sino al verdadero dueño, lo que es conocido como una venta “fraudulenta”. La venta “fraudulenta” no conlleva problemas serios en los sistemas jurídicos en que este tópico está regulado claramente por la ley. En el Derecho rumano, la venta “fraudulenta” ha sido un tópico controvertido por la ausencia de regulación en este campo. Tomando en cuenta las opiniones presentadas en este artículo, pensamos que la venta “fraudulenta” debiera ser resuelta sobre la base de criterios obtenidos caso a caso.

PALABRAS CLAVE: Venta – Venta fraudulenta – Derecho rumano.

ABSTRACT

In the matter of sales contract the property on sale should belong to the seller, i. e., to be his private property. The current legal practice demonstrates that sometimes, the property sold does not actually belong to the seller, but to the true owner, this is known as a “fraudulent” sale. The “fraudulent” sale does not imply serious problems within the legal systems in which this issue is clearly regulated by law. In the Romanian law, the “fraudulent” *sale* has been a controversial issue because of the lack of regulations in this field. Taking into consideration the opinions exposed into the present paper, we think that “fraudulent” *sales* should be solved on a case-by-case basis.

KEY WORDS: Sale – Fraudulent Sale – Romanian Law.

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\* We used fraudulent between inverted commas all over the paper because we couldn't find a suitable English term to cover the situation of the seller who sells in good faith a property which actually does not belong to him and he is not aware of that.

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In the matter of sales contract the property on sale should belong to the seller, i.e., to be his private property. The conveyance of the property from the seller to the buyer may be performed only if the seller is the true owner of the property sold<sup>1</sup>.

The current legal practice demonstrates that sometimes, the property sold does not actually belong to the seller, but to the true owner, this is known as a “fraudulent sale”.

The “fraudulent” sale does not imply serious problems within the legal systems in which this issue is clearly regulated by law. For instance, the French law, in the article 1599 of the Civil Code provides clearly that “*the fraudulent sale is rendered null and void; and further on that liability for damages may be established if the buyer did not know that the property belonged to the true owner*”<sup>2</sup>.

In the Romanian law, the “fraudulent” sale has been a controversial issue because of the lack of regulations in this field. Despite the fact that the main source of inspiration for the Romanian Civil Code was the French Civil Code issued in 1804 (the Napoleonic Code), art. 1599 from this code was not adopted by the Romanian legislation. This is the reason for the prolonged controversies in the Romanian legal writings and case law, concerning the solution to be adopted in the matter of This controversial subject has not been closed yet, because the authors do not agree on the nature and effects of the legal sanctions that should be applied in cases of “fraudulent sale”<sup>3</sup>.

The main opinions stated in the Romanian law are the following:

1. The “fraudulent” sale is absolutely null and void, either a) for lack of the purpose of the contract (i.e. title), or (b) for lack of the property<sup>4</sup>.

a) The “fraudulent sales” contract is rendered absolutely null for lack of purpose, because the buyer’s purpose of objective is to acquire true title to the purchased property but this title cannot be conveyed to the buyer because the seller (i.e. the “fraudulent seller”) is not the true owner of the property sold (*nemo dat quod non habet*). In other words, the seller’s lack of ownership of the property defeats the purpose of the buyer, and his obligation to pay the price, since the buyer assumes this obligation by virtue of his gaining title to the purchased property, which is unlikely to happen.

b) The “fraudulent” sale is rendered absolutely null for lack of actual property, because the seller undertakes to sell a property that does not actually exist so he will not be able to convey the property to the buyer; under this circumstance, the sales contract lacks property and is absolutely null since, according to art.

<sup>1</sup> The ancient Roman law says that “No one gives who does not possess”, or “nobody can convey to some other party more rights than he himself has”.

<sup>2</sup> The French legal writings and case law consider that the nullity is relative, protective and may be set forth by the buyer only. (M. Planiol, G.Ripert, J. Hamel, *Traite pratique de droit civil français* (2<sup>nd</sup> edition, Paris 1956), X, pp. 50-51.

<sup>3</sup> See M. MUREȘAN, *Civil Law. Special Contracts. Academic course* (Cordial Lex Printing House, Cluj-Napoca, 1999), p. 31.

<sup>4</sup> See D. ALEXANDRESCO, *Theoretical and practical explanations concerning the Romanian Civil Law* (Bucharest 1916), VIII, part II, pp. 86-103.

948 of the Romanian Civil Code, the presence of a well determined property is an essential condition for the validity of an agreement.

The majority of the Romanian legal writers adopted this opinion in the period between the two World Wars.

At present, the Romanian legal literature considers that the absolute nullity solution might be sustained if both the seller and the buyer are bad faith parties, i.e., they enter the sales contract being aware of the fact that the property sold actually belongs to a true owner<sup>5</sup>. If the sales contract was entered by the seller contrary to the owner's right and with the complicity of the buyer, the said contract is rendered absolutely null by virtue of the well-known adage "fraud corrupts everything" (*fraus omnia corrumpit*)<sup>6</sup>.

Additionally, the Romanian legal literature and practice unanimously admits that in case a non-owner third party should sell property belonging to the public or to the administrative and territorial authorities, the contract would become absolutely null because, according to art. 136, line 4 of the Romanian Constitution, the public property is inalienable.

In case, at least the buyer is of good faith, i.e. the said buyer did not know at the moment the contract was entered that the seller was not the true owner, the Romanian legal literature considers that the sanction of absolute nullity is not justified because the effect of this sanction would contradict the principle of protecting the buyer's good faith and this requires a different solution<sup>7</sup>.

Other legal authors recognize that the theory of absolute nullity has the inconvenience of obstructing the ratification of the sale by the true owner, or its validation by the "fraudulent seller" acquiring title from the true owner<sup>8</sup>.

In the Romanian legal practice it was decided, that in particular cases the sales contract is absolutely null for lack of purpose of the contract, because the real estate sold belonged to some other party, i.e. the true owner<sup>9</sup>. However, the majority of case law states that in the Romanian civil legislation, the "fraudulent" sale of property is not forbidden, being neither ethically incorrect nor in contravention of law and order. This does not mean that the true owner is at the mercy of some parties who would like to acquire his property. By having his property "sold" in a fraudulent way, the real owner does not lose his title. In case the property is in the possession of some other party, the owner may claim it before the usucapion intervenes.

In case he has full possession of the property, he may oppose the buyer claiming title under the contract concluded with the fraudulent seller of the property<sup>10</sup>.

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<sup>5</sup> See Ruxandra CODREA, *The consequences of "fraudulent" sale in case the buyer ignores that the seller is not the owner of the sold property*, in *The Law Journal* (1998), pp. 28-30.

<sup>6</sup> See F. DEAK, *Civil Law Treaty. Special contracts* (Bucharest, The Legal World Publishing House, 2001), pp. 56-57.

<sup>7</sup> See R.CODREA, quoted work (n. 5), p. 29.

<sup>8</sup> See F. DEAK, quoted work (n. 6), p. 55.

<sup>9</sup> See Suceava District Law Court, Decision N° 346/1993 published in *The Law Journal*, 10-11 (1993), p. 111.

<sup>10</sup> See the Supreme High of Cassation and Justice, Civil and Intellectual Property Department, Decision N° 5801 of 21 October 2004, published in "The Law" Journal, 10 (2005), pp.224-225

As a result, according to the Romanian case law, the fraudulent sales contract is not necessarily rendered absolutely null. Only exceptionally, the Romanian legal practice, in conformity with the legal writings, acknowledges that the absolute nullity of a fraudulent sale does obtain when the parties have concluded the contract with full knowledge that the property belongs to the true owner. Semantically “with full knowledge” reveals that the contracting parties have been aware of the fact that the property (well determined) is not the seller’s property, but the true owner’s. In this case, the contract intends to defraud and is an intentional act, an illicit cause<sup>11</sup> or fraud, both having a common characteristic—the bad faith of the parties—and consequently, the contract is null and void<sup>12</sup>.

2. Another opinion considers the sales contract rendered relatively null for the lack of “capacity” on the seller<sup>13</sup>.

The Romanian legal writers and case law raising the objection that the “impossibility” of the seller to convey the title of the sold property—which is not his—does not constitute legal “incapacity” of the seller as a natural person, but it is a simple matter of circumstance<sup>14</sup>.

3. If the buyer was misled into believing that the property belonged to the seller, the majority of the Romanian legal writings and case law acknowledge that the sale is rendered relatively null for mistake regarding the seller’s capacity as owner<sup>15</sup>. To sustain this view art. 954, line 2 of the Romanian Civil Code is invoked: “*The mistake does not yield to nullity when it falls upon the contracting party, except for the case when the person is the main cause of concluding the agreement*”.

Regarding the matter of the sales contract, it is considered that the seller’s capacity as owner is a decisive factor for the buyer to conclude the contract, and a requisite well known to the seller, too<sup>16</sup>. If the buyer had been aware of the

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<sup>11</sup> According to art. 968 of the Romanian Civil Code: “*the cause is illicit when it is legally prohibited, when it infringes the ethics and the public order*”.

<sup>12</sup> See the High Court of Cassation and Justice, Civil Department, Decision N° 653 of 29 January 2004, published in “The Law” Journal (2005), p.181; In the same context, the High Court of Cassation and Justice, Civil Department, Decision N° 632 of 29 January 2004, published in “The Law” Journal N° 3/2005, p. 261; The High Court of Cassation and Justice, Civil Department, Decision N° 3349 of 5 May 2004 and Decision N° 2284 of 19 March 2004 published in “The Law” Journal N° 2/2005, p.182; The Supreme Court of Appeal and Justice, Civil and Intellectual Property Department, Decision N° 1920 of 10 March 2005, published in “The Law” Journal N° 12/2005, pp. 264–265; The Supreme Court of Justice, Civil Department, Decision N° 3428 of 11 October 2002, published in “The Law” Journal N° 5/2003, pp.179-180.

<sup>13</sup> See R. SANILEVICI - I. MACOVEI, *The Consequences of “fraudulent” sale in the light of the solutions given by the legal practice in The Romanian Law Journal* (1975), p.33.

<sup>14</sup> See M. MUREȘAN, quoted work (n. 3), p. 32.

<sup>15</sup> See D. COSMA, *The General Theory of the Civil Legal Act* (Bucharest, The Science Publishing House 1969), p. 217; M. MUREȘAN, quoted work (n. 3), p. 33; F. DEAK, quoted work (n. 6), pp. 55-56 ; I. ZINVELIU, *The Civil Contracts. Instruments for accomplishing the citizens’ welfare* (Dacia Publishing House, 1978), p. 62.

<sup>16</sup> See F. DEAK, quoted work (n. 6), p. 56

mistake, one may presume that he wouldn't have concluded the sales contract with a non-owner (i.e. fraudulent seller).

Only the buyer or his successors may exercise the action of establishing the relative nullity of the *fraudulent* sales contract. The seller cannot request the contract cancellation even if his mistake was in good faith (believing he was the true owner) because the Romanian law, art. 954, line 2 of the Civil Code sets forth that in order to make the consent invalid, the mistake should fall upon the other contracting party, not upon the party itself.

The buyer or his successors cannot request the contract cancellation if the seller has become the owner of the property after its sale, or in case the true owner ratified the sale (by applying the rules for mandates or business management).

The true owner cannot request the cancellation of the contract because he is a third party to the contract. In case the property is in the possession of some other person the true owner may claim it, and if he is in the possession of the property, he will be able defend his title to the property against the buyer who concluded the contract with a “fraudulent seller”<sup>17</sup>.

The majority of the Romanian cases have adopted the theory of relative nullity of the “fraudulent sales” contract for mistake concerning the seller's capacity as owner<sup>18</sup>.

Other authors have some objections to this opinion stating that the sale is not an *intuitu personae* contract in which the sellers' identity or quality would matter (being or not being the owner is not a personal distinctive feature). In fact, the property conveyance at the moment the contract was concluded is not the core of the sale, this conveyance of property to the buyer is a mere obligation of the seller deriving from legally concluding the contract, and is part of its execution stage<sup>19</sup>.<sup>19</sup> Consequently, in “fraudulent sales” (individually determined), the seller is in the position of not being able to fulfill his obligation to transfer the title of the sold property, circumstance in which the issue rising is the cancellation of the contract by resolution and not that of its annulment which, by definition, cannot have as cause but the previous circumstances or, at the most, circumstances simultaneous to the conclusion of the document<sup>20</sup>.

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<sup>17</sup> See the Supreme Court of Justice, Civil Department, Decision N° 2467 of 22 December 1992 published in “The Law” Journal N° 10/1993, p.113. (Until 2003 the High Court of Justice was the supreme authority in Romania. Since 2003, according to art. 126, line 1 of the Romanian Constitution revised version, the justice is done through the High Court of Cassation and Justice, as well as by other legal authorities established by law. With the same meaning the Supreme Court of Justice, the Civil Department, Decision No. 132 of 20 January 1994, in “The Law” Journal N° 5/1995, p. 77.

<sup>18</sup> See the Supreme Court of Justice, the Civil Department, Decision N° 2369 of 11 December 1992, in “The Law” Journal N° 10-11/1993, pp. 112-113.

<sup>19</sup> According to art. 1259, line 1 of the Romanian Civil Code: “*The sale is complete/perfect between the parties and the property is lawfully conveyed to the buyer, and for the seller, as soon as the parties have agreed upon the property and its price, although the property has not been conveyed and the price has not been paid yet. Therefore, according to the Romanian and French law the conveyance of the property sold has legal consequences at the conclusion of the contract unless there is any opposite stipulation in the contract.*”

<sup>20</sup> See D. CHIRICĂ, *Civil law. Special contracts* (Bucharest, Lumina Lex Publishing House,

4. Finally, another opinion considers that the *fraudulent sales* contract is valid, not null, but it is subject to the buyer's request of resolution for non-fulfillment of the seller's obligation to convey the property<sup>21</sup>. In support of this view art. 1294 of the Romanian Civil Code was invoked which provides that "*the sale is an agreement by which two parties mutually consent as follows: one party to convey the right of property to the other party, that will pay to the first one the price agreed.*" It is considered that the property conveyance is not required for agreement, but a mere obligation on the seller created by the agreement<sup>22</sup>.

Opponents of this opinion assert that such a solution is appropriate to the legal systems in which the property is not conveyed *solo consensus* (by deliberate will only), but subsequently, as a rule, by handing it over, similar to the ancient Roman law and to a majority of the contemporary legal systems abroad<sup>23</sup>.

According to art. 1295, line 1 of the Romanian Civil Code, the conveyance of the sold property obtains as soon as the parties consent to the sale (*solo consensus*), without any other formalities. Consequently, in the Romanian law, the mutual consent of the parties' means that ownership of the property is conveyed from the seller to the buyer, and the seller has an obligation to transfer formal title of property<sup>24</sup>.

Conclusion: Taking into consideration the above-mentioned opinions, we think that fraudulent sales should be solved on a case-by-case basis. If the parties have concluded the contract with full knowledge that the property belongs to the true owner, the validity of such a contract cannot be legally recognized; it is rendered absolutely null for illicit cause, or on the basis of the adage "*fraus omnia corrumpit*".

In case both contracting parties, or at least the buyer, have been in error, believing that the seller is the true owner of the property sold, we consider the relative nullity theory of *fraudulent sales* as the best solution under the Romanian legal system.

[Recibido el 29 de mayo y aprobado el 15 de junio de 2006].

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1997), p. 63; C. TOADER, *Civil law. Special contracts* (Bucharest, All Beck Publishing House, 2003), p. 50; R. CODREA, quoted work (n. 5), p. 31.

<sup>21</sup> See D. CHIRIÇĂ, quoted work (n. 20), pp. 62-63; C. TOADER, *Eviction in the civil contracts* (All Beck Publishing House, Bucharest, 1997), pp. 55-58; R. CODREA, quoted work (n. 5), pp. 31-32.

<sup>22</sup> See M. D. BOCŞAN - S. BOGDAN, *Civil and criminal considerations on "fraudulent" sale*, in "The Law" Journal No.6/1999, pp.46-56.

<sup>23</sup> See F. DEAK, quoted work (n. 6), p. 55.

<sup>24</sup> See M. MUREŞAN, quoted work (n. 3), p. 58; I. LULĂ, *Debates regarding the controversial issue of the legal consequences of the "fraudulent" sale*, in "The Law" Journal, (1999), pp.60-69.