



# ENSURING FAIRNESS: THE CRUCIAL ROLE OF GOOD FAITH IN THE TRANSFER OF IMMOVABLE PROPERTY

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## ABSTRACT

The transfer of immovable property is a complex legal transaction that involves various parties and interests. Good faith, also known as *bona fides*, refers to the honest intention to act without taking an unfair advantage over others or engaging in deceptive practices. It is a principle often used in legal, ethical, and business contexts. At the core of ensuring fairness and equity in these transactions lies the principle of good faith. This research article explores the crucial role of good faith in property transfers, examining its legal basis, practical implications, and how it influences transactions between buyers, sellers, and third parties. By analysing legal frameworks, case studies, and judicial precedents, the article demonstrates how good faith serves to protect innocent parties, prevent fraud, and ensure that property rights are transferred with transparency and integrity.

**KEYWORDS:** Good faith, *bona fides*, property transfer, fairness, legal framework, legal ethics, fraud prevention, transparency, integrity.

## 1.0. INTRODUCTION

The transfer of immovable property forms a significant part of any legal system, impacting individuals and businesses alike. The role of good faith is particularly evident in cases of property transfers, where ownership, title, and encumbrances are often in dispute. The principle of good faith ensures that these transactions are conducted fairly, honestly, and transparently. Without good faith, property dealings risk being marred by fraud, inequity, and disputes, undermining trust in the legal framework. This article delves into the concept of good faith in property transfers, examining its historical roots, legal interpretations, and practical applications. By doing so, it underscores good faith as a linchpin for just and equitable property dealings.

## 2.0. DEFINITION OF GOOD FAITH

Good faith, in general terms, refers to the honest intention to act without taking an unfair advantage over others or engaging in deceptive practices. It is a principle often used in legal, ethical, and business contexts.

Good faith, in legal terms, known as *bona fide*, refers to acting with honesty, integrity, and a lack of intent to deceive. In property transactions, it involves acting without knowledge of any defects in the title or rights of the property being transferred. Good faith can be described through two main components:

1. Subjective Good Faith: This refers to the actual intention and belief of the parties involved in the transaction. It requires that one act without knowledge of any fraudulent activities or defective title.

2. Objective Good Faith: This pertains to what a reasonable person would expect in a given situation. It assesses whether the party exercised due diligence and acted reasonably under the circumstances.

Both components ensure that property transfers are carried out ethically and without hidden agendas.

## 2.1 DEFINITIONS UNDER STATUTES

General Clauses Act defines good faith as “a thing shall be deemed to be done in ‘good faith’ where it is in fact done honestly, whether it is done negligently or not”.<sup>1</sup>

Bharatiya Nyaya Sanhita defines good faith as “Nothing is said to be done or believed in “good faith” which is done or believed without due care and attention;”<sup>2</sup>

In the case of Muhammad Ishaq v. The Emperor,<sup>3</sup> the Privy Council held that an action taken by the defendant based on a belief that the decree was passed in favour of him was illegal since he found out that he did not enjoy any such favourable decree if he had inquired with a little more care and attention.

Laws mainly focus on any act which is done in a fair and just manner with diligent care even though it amounts to any fraudulent consequences, should not be an aggrieved person in such fraudulent thing.

## 3.0. HISTORICAL ORIGIN OF GOOD FAITH

The concept of good faith emerged in Roman Law, a Roman scholar Cicero wrote “*Ut inter benos bene agier oportet et sine fraudatione* – One must act well, as among good men, without fraudulence” which essentially means, the people should always act in good faith and without deceit especially when dealing with others who are considered trustworthy. Roman law acknowledged the concept of bona fide whereas most western civilization evolved the legal rules for the concept of good faith between the privity of contract. For the Roman Lawyer, good faith or *bona fides* meant fidelity to a promise.<sup>4</sup> Cicero in his work *De Officiis*, a seller of real estate was only responsible for flaws in the property that the seller expressly denied.<sup>5</sup> Eventually, according to Cicero, through the work of “jurisconsults,” sellers became responsible for “any defect in a piece of real estate if known to the vendor but not expressly stated.”<sup>6</sup>

Good faith is the soul of the proprietor that one can legitimately obtain ownership of something free from fraud and other crimes. In transferring ownership rights, good faith is the basis for accepting goods from a person who can transfer them, and there is no fraud or other crime in the act or contract.<sup>7</sup>

## 4.0. LEGAL FRAMEWORK OF GOOD FAITH IN PROPERTY TRANSFERS

The role of good faith in property transactions is primarily governed by statutory laws, regulations, and principles of equity. Transfer of Property Act, of 1882 majorly covers the role of good faith in property transactions in India, under this Act, the concept of good faith is crucial in determining the validity of a transfer.

1 Section 3(22) of the General Clauses Act, 1897

2 Section 2(11) of Bharatiya Nyaya Sanhita, 2023

3 (1914) ILR 36 ALL 362

4 The Evolution of Good Faith in Western Contract Law by Samuel Martin

5 *De Officiis*, 3,65

6 *ibid*

7 Martijn W. Hesselink, ‘The Principles Of European Contract Law: Some Choices Made By The Lando Commission’, *Global Jurist Frontiers*, 1.1 (2001) <https://doi.org/10.2202/1535-1653.1011>

#### 4.1 Section 38

Section 38<sup>8</sup> of the Transfer of Property Act, 1882 deals with the concept of transfer by a person authorized only under certain circumstances to transfer. It protects a transferee who acts in good faith and for consideration when dealing with a transferor who has limited authority to transfer.

In *R.K. Mohammed Ubaidullah v. Hajee C. Abdul Wahab*,<sup>9</sup> the managing partner of a partnership firm sold property without the consent of the other partners. The Supreme Court held that a transferee who acts in good faith pays consideration, and has no knowledge of the transferor exceeding their authority is protected under Section 38. However, the transferee must establish they acted with due diligence and without negligence.

Illustration: If a guardian is authorized to transfer only a portion of a minor's property but transfers more than the authorized share, the transferee is protected as long as they acted in good faith and paid consideration without knowledge of the guardian's authority being exceeded.

#### 4.2 SECTION 41

Section 41<sup>10</sup> of Transfer of Property Act, 1882 deals with the concept of transfer by an ostensible owner. It protects the transferee who acquires property from someone who appears to be the owner but is not the real owner by believing him as the real owner.

The word Good Faith means, that the transferee has acted honestly and in the real belief that the ostensible owner is the real owner. Reasonable care is not enough if good faith is absent. A person may act without negligence but at the same time without honesty. A person may have made a reasonable careful inquiry, but if, after ascertaining the facts, he chooses to ignore them, he is not protected. But when a man purchased possessory title believing in good faith that his vendor was the real owner and any inquiry that he could have made would only have confirmed him in that belief, the Court held he was protected by this section. The transferee, to establish that he has acted in good faith, is to prove that he has taken reasonable care to ascertain that the ostensible owner has power to transfer the property.<sup>11</sup>

*Gandhara Singh v. Union of India*<sup>12</sup> is a case that provides a good example of good faith. In this case, the plaintiff migrated to India from Pakistan during the partition. He had left land in Pakistan and was allotted land in lieu of that in India. Later on, it was found that some part of the land left by him in Pakistan was mortgaged to Muslims. A notice was served on him to pay mortgage money back. He did not. Therefore, a part of the land allotted to him was auctioned. The defendant took part in the bid. The plaintiff also bid. In auction, the defendants got the land. The plaintiff did not challenge the order of auction in appeal. This conduct of the plaintiff was enough to create a belief in the defendants that he consented to the auction sale and the purchasers acted in good faith in purchasing it at the time of auction.

Illustration: If 'A', the real owner of a property, allows 'B' to act as the owner, and 'B' sells the property to 'C' for valuable consideration, 'C' will get a valid title to the property if 'C' acted in good faith and had no notice that 'B' was not the real owner.

<sup>8</sup> Transfer by person authorised only under certain circumstances to transfer - Where any person, authorised only under circumstances in their nature variable to dispose of immoveable property, transfers such property for consideration, alleging the existence of such circumstances, they shall, as between the transferee on the one part and the transferor and other persons (if any) affected by the transfer on the other part, be deemed to have existed, if the transferee, after using reasonable care to ascertain the existence of such circumstances, has acted in good faith.  
9 (2000) 6 SCC 402

<sup>10</sup> Transfer by ostensible owner.—Where, with the consent, express or implied, of the persons interested in immovable property, a person is the ostensible owner of such property and transfers the same for consideration, the transfer shall not be voidable on the ground that the transferor was not authorised to make it: provided that the transferee, after taking reasonable care to ascertain that the transferor had the power to make the transfer, has acted in good faith.

<sup>11</sup> Dr. G.P.Tirupathi - The Transfer of Property Act, Central Law Publication, 2022, 12<sup>th</sup> Edition, Pg 260

<sup>12</sup> AIR 1984 P&H 51

### 4.3 SECTION 43

Section 43<sup>13</sup> of Transfer of Property Act, 1882 provides a mechanism to protect the rights of a transferee when the transferor does not own the property at the time of transfer but later acquires ownership of it. It protects the transferee who acted in good faith and for consideration.

If demand is late and meanwhile the transferor gives that property to third person who is bona fide purchaser for value without notice, the right of first transferee ends and that of bona fide purchaser for value without notice prevails.<sup>14</sup>

The basis of the principle embodied in Section 43 calling upon the transferor to deliver the subsequently acquired property to the transferee, who must have acted upon his false representation and did harm to himself by paying money for, what he could not get, and thereby "feed the estoppel" created against him. If a person, who alienated property to which he has no present title, may subsequently become entitled to, he must honour his commitment. Since he cannot derogate from his own grant, his subsequently acquired interest, feeds the estoppel, raised by the prior grant and perfects the title of the alienee. The common law rule of estoppel is:

*"Where a grantor has purported to grant an interest in land which he didn't, at the time, possess, but subsequently acquires, the benefit of his subsequent acquisition goes automatically to the earlier grantee, or as it is usually expressed, feeds the estoppel."*<sup>15</sup>

In *Jumma Masjid v. Kodimaniandra Deviah*,<sup>16</sup> A mortgagor (transferor) created a mortgage on a certain property without having a valid title at the time. Later, the mortgagor acquired the title to the property. The question arose whether the subsequent acquisition of the title would validate the earlier transfer under Section 43. The Supreme Court held that Section 43 would apply only if the transferee acted in good faith and for consideration. The court clarified that good faith means the transferee must have acted honestly, without knowledge of the defect in the transferor's title at the time of the transaction.

Illustration: A, who does not own a piece of land but fraudulently represents that he does, sells it to B. Later, A acquires ownership of the land. Under Section 43, the ownership of the land will automatically pass to B when A acquires it, provided B acted in good faith and paid consideration.

### 4.4 SECTION 51

Section 51<sup>17</sup> of Transfer of Property Act, 1882 aims to protect those who enhance the value of a property (i.e., improvement made by a bona fide holder) under the mistaken belief of ownership, ensuring fairness and equity.

The section is based on the maxim, "He who seeks equity must do equity". If you purchase any house from any benamidar in good faith, you are certainly entitled to make any improvements, you like in that house. If after you have made any such improvements, I seek to recover the house from you on the strength of my title. I can do so only if I do equity to you in return by paying for the improvements.

There is a conflict of decisions as regards the meaning of 'good faith'. In Lachmi Prasad's case,<sup>18</sup> it is said that the words 'reasonable care' would be inappropriate in Section 51, for, if the defect in title were due to want of authority

13 Transfer by an unauthorized person who subsequently acquires interest in property transferred.—Where a person fraudulently or erroneously represents that he is authorized to transfer certain immoveable property and professes to transfer such property for consideration, such transfer shall, at the option of the transferee, operate on any interest which the transferor may acquire in such property at any time during which the contract of transfer subsists.

Nothing in this section shall impair the right of transferees in good faith for consideration without notice of the existence of the said option.

14 Dr. G.P.Tirupathi - The Transfer of Property Act, Central Law Publication, 2022, 12<sup>th</sup> Edition, Pg 275

15 Rajapakse v. Fernando, A.I.R. 1920 P.C. 216.

16 (1962 AIR 847)

17 Improvements made by bona fide holders under defective titles - When the transferee of immoveable property makes any improvement on the property, believing in good faith that he is absolutely entitled thereto, and he subsequently evicted therefrom by any person having a better title, the transferee has a right to require the person causing the eviction either to have the value of the improvement estimated and paid or secured to the transferee, or to sell interest in the property to the transferee at the then market value thereof, irrespective of the value of such improvement. The amount to be paid or secured in respect of such improvement shall be the estimated value thereof at the time of the eviction. When, under the circumstances aforesaid, the transferee has planted or sown on the property crops which are growing when he is evicted therefrom, he is entitled to such crops and to free ingress and egress to gather and carry them.

18 Lachmi Prasad v. Lachmi Narayan, 25 A.L.J. 926.

or ostensible ownership and reasonable care had been exercised, the defective title would be cured by estoppel and the question of compensation would not arise. The true rule, however, appears to be that the purchaser must inquire as to the authority of his transferor, whether such inquiry is required by law, and if he omits to do altogether, no reason can be pleaded on his behalf to say that he believed himself in good faith to be entitled to the property absolutely. Good faith, in this section, means not only acting honestly and fairly but includes due inquiry.<sup>19</sup> If a person makes the improvement with the knowledge that he has no title to the property, he is not entitled to the payment for the improvement.<sup>20</sup> Good faith is to be proved by the transferee.<sup>21</sup>

In *Narayan Das v. Jatindranath*,<sup>22</sup> A person made substantial improvements to a property under the mistaken belief of ownership. When the rightful owner claimed possession, the issue of good faith arose. The court ruled that good faith depends on whether the person truly believed, without malice or negligence, that they owned the property. In this case, the court awarded compensation as the improvements were made without knowledge of the defective title.

Illustration: 'A', under the mistaken belief that he is the owner of a piece of land, constructs a house on it, investing ₹10 lakhs. Later, 'B', the true owner of the land, successfully sues 'A' for possession of the land. Under Section 51, 'A', acting in good faith, can claim compensation from 'B' for the value of the improvements (i.e., the house). Alternatively, 'B' may offer to sell the land to 'A' at a mutually agreed price instead of paying compensation. However, if 'A' had knowledge that the land did not belong to him, he would not be entitled to compensation under this section.

#### 4.4.1. DOCTRINE OF ACQUIESCENCE

The Doctrine of Acquiescence is a legal principle that applies when a party, despite having the right to object, remains silent or inactive for a significant period, leading to an assumption that they have accepted or consented to a situation. If the true owner remains silent and allows the mistaken possessor to make substantial improvements, he is said to have acquiesced (i.e., silently consented). Acquiescence means that the true owner, by his inaction, leads the possessor to believe he has the right to make improvements. Later, the true owner cannot unjustly claim the property without compensating the possessor for improvements.

*Good Faith & Acquiescence*- Good faith is essential—the possessor must genuinely believe he owns the land. If there is fraud, dishonesty, or wilful negligence, Section 51 won't apply. If the true owner knew about the improvements and did not object, he is estopped from denying compensation.

#### 4.5 SECTION 53

Section 53<sup>23</sup> of Transfer of Property Act, 1882 states that if a person transfers property to another with the intent of defeating or delaying the claims of any creditor, the transfer can be voidable at the option of the creditor. The creditor can seek to have the transfer set aside if it was made with the intent to defeat or delay their claims. It clarifies that the transfer is not voidable if the transferee proves that they were unaware of the intention of the transferor to defraud creditors. In other words, if the transferee has acted in good faith, they may not be held responsible.

19 *Abhoy Charan v. Attarmoni*, 13 C.W.N. 931.

20 *Maddarappa v. Chandramona*, A.I.R. 1965 S.C. 1812.

21 *Kashipathi v. Subba Rao*, A.I.R. 1961 Mys. 62

22 (1927) 29 BomLR 1143

23 Fraudulent transfer.— (1) Every transfer of immovable property made with intent to defeat or delay the creditors of the transferor shall be voidable at the option of any creditor so defeated or delayed. Nothing in this sub-section shall impair the rights of a transferee in good faith and for consideration. Nothing in this sub-section shall affect any law for the time being in force relating to insolvency. A suit instituted by a creditor (which term includes a decree-holder whether he has or has not applied for execution of his decree) to avoid a transfer on the ground that it has been made with intent to defeat or delay the creditors of the transferor shall be instituted on behalf of, or for the benefit of, all the creditors.

(2) Every transfer of immovable property made without consideration with intent to defraud a subsequent transferee shall be voidable at the option of such transferee. For the purposes of this sub-section, no transfer made without consideration shall be deemed to have been made with intent to defraud by reason only that a subsequent transfer for consideration was made.

In *K.K. Verma v. Union of India*,<sup>24</sup> The court held that a transfer of property made to defeat creditors was voidable under Section 53. The transfer was fraudulent and, even if made in good faith by the transferee, could be questioned by the creditor.

Intention is an essential ingredient for the application of the rule of this section, but intention must be to defeat or delay creditors generally and not in preference of one creditor to another.<sup>25</sup> Intention is to be gathered from all the circumstances of the case.<sup>26</sup>

Where the transferee shares the fraudulent intent and actively aids and assists the transferor in fulfilling his intention of defrauding the creditor, there is no doubt that the transfer was made to defeat the interest of the creditor.<sup>27</sup>

Illustration: 'A' owes a debt of ₹50,000 to 'B'. To avoid paying the debt, 'A' transfers his valuable property (a house) to his brother 'C', without receiving any consideration (money or equivalent value) in return. The transfer is made with the intent to defraud 'B', so that 'B' cannot claim the property in case of non-payment. Now, 'B' learns about the transfer and files a suit to set aside the transfer, claiming that it was made with the intent to defeat or delay his claim. Under Section 53 of the Transfer of Property Act, 'B' can have the transfer set aside by the court because it was made with fraudulent intent, i.e., to defeat or delay his legitimate claim as a creditor. However, if 'C' (the transferee) can prove that he was unaware of A's intent to defraud 'B' and had no reason to suspect fraud (i.e., he acted in good faith), 'C' may not be affected by the fraudulent transfer.

These legal frameworks ensure that individuals engaging in property transactions are protected against unfair practices, as long as they adhere to the principles of good faith.

## 5.0. LAW COMMISSION REPORT NUMBER 70

Law Commission Report Number 70 primarily concern with the reviewing and proposal of amendments related to Transfer of Property Act, 1882, and examine its provisions and suggest necessary changes to improve its application in property related legal matters: essentially aiming to reform the law governing property transfers in India. In this Report, it essentially concentrates on the concept of Good Faith in several provisions.

While discussing *Section 41 of Transfer of Property Act*, it mentioned if the transferee for value without notice further proves good faith and reasonable enquiry about the property, the conflict becomes more acute. Strict law would support the real owner, while equity of law would operate and support in favour of the transferee. In the above circumstances, there are ethical contemplation in his favour which override the purely legal contemplations that could be urged in favour of the real owner. It is evident that the conflicts between the parties has been resolved by the action of the law.<sup>28</sup>

Section 41 supports the decision of the law to adopt one particular approach for resolving the conflict. Where, of two persons, one must suffer, he who is less innocent must suffer, because the equities are against him though strict law is in his favour. On this principle, section 41 protects the bona fide transferee who acted for value without notice-not in every case but where the transferor is the ostensible owner with the consent of the true owner.<sup>29</sup>

In Section 50 of the Act, The Report discussed that the section raises the question of good faith on the part of the payer twice; good faith has to be proved not only with regard to the payment, but also with regard to the title of the person from whom the property is held. Here again, good faith so defined as to exclude need for due care and caution. We recommend that the section should be suitably amended.<sup>30</sup>

24 AIR 1954 BOM 358

25 Errachi Reddiar and another v. Vellayya Reddiar, A.I.R. 1968 Mad. 257.

26 ibid

27 Saroj Ammal v. Sri Venkateswara Finance Corpn., A.I.R. 1989 N.O.C. 4 (Mad.)

28 Law Commission Report No.70, discussed in Section 41 of Transfer of Property Act

29 ibid

30 Law Commission Report No.70, discussed in Section 50 of Transfer of Property Act, heading of Good faith-proper construction of the expression

In these sections, Report 70 emphasize the importance of good faith by incorporating its essence in Report 70.

## 6.0 GOOD FAITH IN PRACTICE: Protecting the Parties Involved

The principle of good faith functions to protect the interests of various parties involved in the transfer of immovable property:

### 6.1. Protecting Innocent Purchasers

In the context of property sales, good faith shields a bona fide purchaser who acquires property without knowledge of any defects in the seller's title. Such protection is essential in promoting market stability and encouraging investment.

### 6.2. Preventing Fraudulent Practices

Good faith mandates transparency in property deals, ensuring that sellers do not mislead buyers about the status of the property, such as existing encumbrances, liens, or disputes. This reduces the likelihood of fraud in property transactions.

### 6.3. Equitable Relief for Third Parties

In cases where third parties have interests in the property, such as creditors or prior owners, good faith ensures that the rights of those unaware of the transaction are not unduly harmed. Courts often give precedence to the party acting in good faith, particularly when the other party's actions were questionable.

## 7.0. CHALLENGES AND COMPLEXITIES IN APPLYING GOOD FAITH

While good faith is an important legal principle, its application can be complex. Courts often need to assess subjective intent, knowledge, and the circumstances surrounding each transaction. Some of the challenges include:

### 7.1 Determining Knowledge of Defects

Courts must establish whether the buyer or transferee knew or should have known about defects in the title, requiring careful analysis of the facts.

### 7.2 Fraudulent Claims

There are instances where a party may falsely claim good faith. Legal systems must develop mechanisms to distinguish between true good faith and fraudulent conduct.

### 7.3 Balancing Interests of Third Parties

Conflicts between a bona fide purchaser and third-party creditors or original owners can create legal complexities, requiring courts to balance competing interests.

## 8.0. IMPACT OF GOOD FAITH ON PROPERTY TRANSACTION

Good faith serves as a mechanism to maintain the integrity and transparency of property transfers. By ensuring that parties are acting with honesty and fairness, good faith promotes:

- *Market Stability* - Property markets are more reliable when participants trust that transactions will be conducted in good faith, reducing the risk of fraud or disputes.
- *Legal Certainty* - Clear rules around good faith ensure that property owners and buyers can have confidence in the validity of their transactions.
- *Protection of Rights* - Good faith safeguards the rights of parties who act in good conscience and follow due process, promoting fairness and reducing disputes.

## 9.0. CONCLUSION

In property transactions, good faith plays a crucial role in ensuring transparency, fairness, and trust between parties. It requires buyers, sellers, and intermediaries to act honestly, disclose relevant information, and refrain from deceptive practices. As property transactions become more complex, the role of good faith in ensuring just and ethical

dealings remains indispensable. Good faith helps prevent disputes, enhances market stability, and ensures the enforceability of contracts. Ultimately, fostering good faith in property transactions not only protects individual interests but also upholds the integrity of the real estate market as a whole. Future reforms and clearer guidelines on good faith will further enhance the reliability and fairness of property law.

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