



# SUPREME COURT OF THE RUSSIAN FEDERATION

№ 310-ЭС19-5391

## **ruling**

Moscow

20

.05.2019

Judge of the Supreme Court of the Russian Federation N.S. Chuchunova, having considered the complaint (application) of the joint-stock company firm "SMUR" against the ruling of the Nineteenth Arbitration Court of Appeal dated September 14, 2018 (judges Pismenny S.I., Korovushkina E.V., Mokrousova L.M. .) and the ruling of the Arbitration Court of the Central District on 31.01.2019 (judges L.V. Solodova, L.A. Kryzhskaya, L.V. Leonova) in case No. A14-8464 / 2015 of the Arbitration Court of the Voronezh Region,

### **found:**

Joint-stock company firm "SMUR" (hereinafter - the Firm) applied to the Arbitration Court of the Voronezh Region with a claim against the limited liability company "Company" ALS and TEK "(hereinafter - the Company) to terminate the purchase agreement dated 10.09.2012 No. 3 / 12-12 - sale of optical fibers and a share in the right of common share ownership in a fiber-optic communication line in the Voronezh and Saratov regions in terms of alienation of 4 OV of the G.652 standard and 4/64 shares in the right of common share ownership of the shell, protective and power elements of the optical cables, couplings, crosses in fiber-optic communication lines

"Ershov-Ozinki" and alienation of 4 OV standard G.652 and 4/72 shares in the right of common share ownership of the sheath, protective and power elements of the optical cable, couplings, crosses in the fiber-optic communication line "Borisoglebsk-Rogachevka" in the section from the coupling M2A ORTPTS Settlement Tellermanovskiy, Gribanovsky District, Voronezh Region, to the M1 coupling at the automatic telephone exchange of OJSC Rostelecom Borisoglebsk, K. Marx, 76.

The Firm also asks to collect from the Company an advance payment for product.

RetnNet Joint Stock Company (hereinafter referred to as the Company) is involved in the case as a third party that does not declare independent claims regarding the subject of the dispute.

By the decision of the Arbitration Court of the Voronezh Region dated 01/09/2018, the stated requirements were satisfied in full, court costs were distributed.

By the resolution of the Nineteenth Arbitration Court of Appeal dated 09.14.2018, upheld by the decision of the Arbitration Court of the Central District on 31.01.2019, the decision of the court of first instance dated 09.01.2018 was canceled and the stated claims were refused; distributed court costs.

In a cassation appeal filed with the Supreme Court of the Russian Federation, the applicant asks to quash the decisions of the appellate, district courts, upholding the decision of the first instance, citing a significant violation of substantive and procedural law.

In support of the arguments of the complaint, the applicant, referring to the incorrect application of Articles 450,455 of the Civil Code of the Russian Federation (hereinafter - the Civil Code), indicates that since the identifying signs of the property actually transferred for temporary use do not correspond to the identifying features of the property, which are indicated in the statement and the act of acceptance and transfer, then the Firm had sufficient grounds to terminate the contract and collect prepayment.

In accordance with part 1 of article 291.1, part 7 of article 291.6 and article 291.11 of the Arbitration Procedural Code of the Russian Federation (hereinafter referred to as the Arbitration Procedure Code of the Russian Federation), a cassation appeal shall be submitted for consideration in a court session by the Judicial Collegium of the Supreme Court of the Russian Federation, if the arguments set out in it confirm the existence of significant violations of substantive law and (or) rules of procedural law that affected on the outcome of the case, without the elimination of which it is impossible to restore and protect the violated rights and legitimate interests of the applicant in the field of entrepreneurial and other economic activities.

Having studied the judicial acts held in the case, evaluating the arguments of the applicant's cassation appeal, the court finds no grounds for its transfer to the Judicial Collegium for Economic Disputes of the Supreme Court of the Russian Federation, proceeding from the following.

As follows from the appealed acts, on June 14, 2012 between the Company (seller) and the Company (buyer), an agreement No. RN-414/2012 was concluded for the purchase and sale of 8 optical fibers (OF) of the G.655 standard and 8 optical fibers of the G.652 standard in fiber optical communication line (FOCL) in accordance with the list, in accordance with Appendix No. 1 to this Agreement.

At the same time, the parties determined that the FOCL is a fiber-optic communication line consisting of a fiber-optic cable (FOC) containing at least 8 optical fiber of the G.655 standard and 8 optical fiber of the G.652 standard, connecting the optical distribution frame installed on the territory of the ORTPC Ershov, Saratov region, and optical distribution frame installed in OUP Ozinki, Saratov region, optical couplings and optical crossbars of various

destination and line-cable structures (LKS), designed to accommodate fiber optic cable, optical crosses and couplings. FOCL route - the path of the fiber optic cable in the ground or in the LCS in accordance with the design documentation from the optical crossbar on the territory of the ORTPS in Ershov, Saratov region to the optical crossbar in the OUP Ozinki (51 ° 14'34 "C 49 ° 45'12" V)

From the act of transfer and acceptance of June 14, 2012, it follows that the Company received optical fibers from the Company in accordance with the Statement of Transferred Property (Appendix No. 1 to the Act of Transfer and Acceptance), including 8 OV's in a natural color module: No. 57 blue, No. 58 orange, No. 59 green, No. 60 brown, No. 61 gray, No. 62 white, No. 63 red, No. 64 black. The length of each section

(optical) is 118.479 km. The type of FOK is indicated - DKP-7-6-6 / 64, the terms of the contract are fulfilled in full.

Also, on June 14, 2012 between the Company (seller) and the Firm (buyer), a purchase and sale agreement No. RN-437/2012 was concluded, the subject of which is optical fibers (OF) intended for transmission of communication signals. A detailed route for the passage of the OV, technical characteristics, and other data that make it possible to definitely establish the OV to be transferred to the ownership of the buyer are indicated in Appendix No. 1 to the contract (clause 2.1 of the contract).

According to the act of acceptance and transfer of OV dated June 14, 2012 under the sales and purchase agreement No. RN-437/2012, the Company transferred the RetnNet container - Ozinki RetnNet container in the natural color module two OVs to the Firm on the site Ershov ORTPTS: No. 55 pink and No. 56 aqua, optical length of each 118.479 km. The buyer checked, in accordance with the procedure established by the contract, the quality, quantity and identifying signs of the OM transferred to him. The type of optical cable in the contract is not defined by the parties.

By the agreement of 03.03.2014, the parties supplemented this agreement, including clause 1.13, according to which the property is 2/64 shares in the right of common share ownership of a fiber-optic communication line (FOCL)

"Ershov-Ozinki", alienated by the seller to the buyer under the contract, actually consisting of 2 (two) optical fibers of the G.655 standard in a fiber-optic cable (FOC), the identifying features of which are specified in Appendix No. 1 to the contract, as well as 2/64 share in the right of common share ownership of the sheath, protective and power elements of the fiber-optic cable, couplings, optical distribution frames and other structural elements of the fiber-optic cable.

On September 10, 2012, the firm (buyer) signed an agreement with the Company (seller) dated September 4, 2012 No. 3 / 12-12 for the purchase and sale of optical fibers and a share in the right of common ownership in a fiber-optic communication line in the Voronezh and Saratov regions.

According to clause 1.1 of contract No. 3 / 12-12, the seller undertakes to transfer the following property to the ownership of the buyer after payment:

- four OVs of the G.652 standard and 4/72 shares in the right of common share ownership of the sheath, protective and power elements of an optical cable (OC), couplings, crosses in the Borisoglebsk-Rogachevka FOCL in the section from the M2A coupling of the ORTPTS in the settlement of Tellermanovskiy, Gribanovsky district Voronezh region to

M1 couplings at the automatic telephone exchange of OJSC "Rostelecom" Borisoglebsk, st. K.Marks, 76 with a total length of 6.8 km (p. 1.1.1);

- four OV of the G.652 standard and 4/64 shares in the right of common share ownership of the sheath, protective and power elements of an optical cable (OC), couplings, crosses in the Saratov-Ozinki FOCL with a total length of 345.078 km (paragraphs 1.1.2);

Simultaneously with the transfer of ownership of the property, the seller transfers to the buyer the ownership and the corresponding shares in the right of common share ownership of the sheath, protective and power elements of the optical cable, couplings, crosses in the fiber-optic communication line Borisoglebsk-Rogachevka, Ershov-Ozinki, Saratov-Ershov.

In Appendix No. 8 to contract No. 3 / 12-12, the parties agreed on technical requirements for property, its inspection upon acceptance, as well as documents confirming the legitimacy of the placement of fiber-optic communication lines (FOCL)

and submission of technical documentation for fiber-optic communication lines to the authorized bodies.

According to the payment orders presented in the case file, the Firm transferred the amount of 10,926,924 rubles 96 kopecks to the Company's settlement account against payment under contract No. 3 / 12-12.

From the certificate of acceptance and transfer of property for temporary use of 10.10.2012, it follows that the buyer has the right to use 4 (four) optical fibers in the Borisoglebsk-Rogachevka fiber-optic link and 4 (four) optical fibers in the Saratov-Ozinki fiber-optic link. At the time of signing the acceptance certificate, the property is in working condition. The characteristics of the property comply with the conditions of the current legislation of the Russian Federation, the terms of this agreement, technical requirements for property and are reflected in the executive documentation. The buyer has no claims to the property and undertakes to return the said property from temporary use on the terms stipulated by the contract.

By the act of acceptance and transfer of November 21, 2012, the buyer was transferred to the ownership of the first stage of the property, consisting of optical fibers and a share in the right of common shared ownership in the fiber-optic communication line Saratov-Ozinki of the Saratov region on the Ozinki-Ershov section, indicated in the table, as well as 4 OV FOCL Borisoglebsk-Rogachevka.

From this act it follows that after signing it, the buyer has the right to own, dispose and use 4 optical fibers in the Borisoglebsk-Rogachevka FOCL in the section from the M2A clutch ORTPTS settlement Tellermanovskiy, Voronezh region to the M1 clutch ATS OJSC

Rostelecom Borisoglebsk, st. K. Marx, 76 and 4 optical fibers in the fiber-optic communication line Saratov-Ozinki in the Ozinki-Ershov section. The transferred property complies with the terms of the contract and is in working condition, the buyer has no claims. The cost of the property and the share transferred from the seller to the buyer in stage I is 7,443,022.15 rubles, plus 18% VAT - 1,339,743.99 rubles. (total 8 782 766.14 rubles).

Between the Firm (lessor) and closed joint stock company

KVANT-TELECOM (lessee) On November 23, 2012, an agreement No. 23-A4732 / 12 was concluded for the lease of a share in the right of common shared ownership of a fiber-optic link, under which the lessor undertakes to transfer to the lessee within 10 days from

the moment of signing the lease agreement, the property (lease object) defined in Appendix No. 1 to the agreement: four OV of G.652 standard and 4/72 shares in the right of common share ownership of the sheath, protective and power elements of the optical cable, couplings, crosses in the Borisoglebsk FOCL -Rogachevka on the section from the M2A clutch of the ORTPTs in Tellermanovskiy settlement of the Gribanovsky district of the Voronezh region to the M1 clutch at the automatic telephone exchange of OJSC Rostelecom Borisoglebsk, st. K. Marx, 76 with a total length of 6.8 km; four OV of G.652 standard and 4/64 shares in the right of common share ownership of the sheath, protective and power elements of the optical cable, couplings, crosses in the Saratov-Ozinki FOCL with a total length of 345.078 km.

The property was transferred to the lessee under an act dated 26.11.2012 without any comments.

On January 27, 2014, the defendant sent a notice of termination of the contract dated September 10, 2012 No. 3 / 12-12 for the purchase and sale of optical fibers and a share in the right of common share ownership of a fiber-optic communication line in the

Voronezh and Saratov regions with reference to the fact that during the use of the property, in the course of the emergency restoration work, it was found that the identifying signs of the actually transferred property do not correspond to the identifying signs of the property, which are indicated in the Statement of the transferred property and in the acceptance certificate signed by the parties dated 10.10.2012, including the numbers of actually transmitted and currently used ports on the optical backbone do not correspond to the numbers of optical fibers specified in the act.

In addition, the couplings on the fiber-optic cable are made of poor quality: in the couplings, the module numbers are mixed up and do not fit together; the couplings are made in violation of the technical requirements established by the legislation of the Russian Federation, as a result of which water is present in them. It is also indicated that the seller does not transfer the documentation provided for by the contract.

Notifying the Company about its unilateral refusal to fulfill the contract, the Firm, referring to clause 4.2 of the contract, requested to return the transferred funds in the amount of 10,926,924.96 rubles, paid for the non-transferred property, within 30 days.

Failure to voluntarily fulfill these requirements was the basis for the plaintiff's appeal to the court with this claim.

Satisfying the stated requirements, the court of first instance came to the conclusion that the defendant did not transfer the property stipulated by the contract to the plaintiff either for temporary use or in the ownership of the first stage, and also did not provide the Firm with technical documentation, thereby committing a significant violation of the terms of the contract. At the same time, the court indicated that the act of acceptance and transfer of property for temporary use of 10.10.2012 and the act of acceptance and transfer of property into ownership of stage I of 21.11.2012 was signed by the parties formally. After re-examining and evaluating the presented evidence according to the rules of Article 71 of the Arbitration Procedure Code of the Russian Federation, guided by Articles 432, 450, 455 of the Civil Code, the court of appeal, with the conclusions of which

the district court agreed, canceled the decision of the court of first instance, refused to satisfy the requirements, having come to a reasonable conclusion that the discrepancies between the numbering of optical fibers and the brand of optical cable specified in the disputed agreement and actually available by the experts did not constitute a significant violation of the terms of the agreement, since they did not deprive the buyer's ability to use the received property for its intended purpose and did not entail any negative consequences for him.

The Court of Appeal took into account that after the transfer of the property under the act of 10.10.2012, the contract continued to be executed by the defendant in terms of payment until 28.12.2012, and on 21.11.2012 the defendant signed an act of acceptance of the transfer of property into ownership at stage 1.

The signing on 10.10.2012 by the defendant of the act without objection indicates that at the time of the transfer, no defects were found in the transferred property. Otherwise, as follows from clause 6 of Appendix No. 7 to the agreement, if the optical fibers do not meet the technical requirements of this agreement or the requirements of the current legislation, and if other shortcomings are found (including in the attached executive documentation), the parties reflect them in the protocol working commission in the form of a list of imperfections, comments.

As the court of appeal rightly pointed out, the arguments about the increase in the costs of maintaining the optical fiber located in the optical cable of a different brand

are speculative and have not been documented by the plaintiff.

In these circumstances, the court of appeal had legal grounds for refusing to satisfy the claims.

The arguments of the cassation appeal do not indicate violations of the norms of substantive and procedural law admitted by the courts, which would serve as a sufficient basis by virtue of part 1 of Article 291.11 of the APC RF to cancel the contested judicial acts.

Taking into account the foregoing and guided by Article 291.6 of the APC RF, the court

**Determined to:**

refuse to transfer the cassation appeal of the company

"SMUR" for consideration in a court session of the Judicial Collegium for Economic Disputes of the Supreme Court of the Russian Federation.

Supreme Court Justice  
Russian Federation N.S. Chuchunova