



91/2019-65086(1)



TWELFTH ARBITRAL APPEAL COURT

410002, Saratov, st. Lermontov, 30, bldg. 2 tel: (8452) 74-90-90, 8-800-200-12-77; fax: (8452) 74-90-91, <http://12aas.arbitr.ru>; e-mail: info@12aas.arbitr.ru

DEFINITION arbitration court of appeal

Saratov Case No. A57-233 / 2017

20 November 2019

The operative part of the definition was announced on November 20, 2019 The full text of the definition was made on November 20, 2019

The twelfth Arbitration Court of Appeal composed of: the presiding judge O.I. Antonova, judges Borisova T.S., Zhatkina S.A., when keeping the minutes by the secretary of the court session Shebalkova K.The. with the participation:

from JSC firm "SMUR" - Litvinova Natalya Nikolaevna, acting on the basis of a power of attorney dated 05/17/2018;

from JSC "QUANT-TELECOM" - Litvinova Natalya Nikolaevna, acting on the basis of a power of attorney dated 25.08.2015;

from LLC "Company" ALS and TEK "- Vekozin Vadim Nikolaevich, acting on the basis of a power of attorney dated 03.12.2018, diploma No. 1342503,

Having considered in an open court session the application of the joint-stock company firm "SMUR" on the revision of the decision of the Twelfth Arbitration Court of Appeal of December 13, 2017 in case No.A57-233 / 2017 on the appeal of the joint-stock company firm "SMUR" against the decision of the Saratov Arbitration Court region of August 31, 2017 in case No.A57-233 / 2017 on the claim of the limited liability company "Company" ALS and TEK "(Saratov, TIN 6452045336, OGRN 1026402661108) to the closed joint stock company firm

SMUR (Voronezh, INN 3662020332, OGRN 1023601610878); third party: JSC "QUANT-TELECOM", Voronezh, on the reclamation of property,

found:

The Arbitration Court of the Saratov Region was approached by LLC "Company "ALS and TEK", Saratov, with a statement of claim, specified in accordance with Article 49 of the Arbitration Procedure Code of the Russian Federation, to CJSC firm

"SMUR", a third party: JSC "QUANT-TELECOM", on the obligation to return (on reclaiming from someone else's illegal possession of JSC "Smur") in favor of LLC "Company" ALS and TEK "4 optical fibers (gray, white, red, black in an unpainted

module) obtained for temporary use by CJSC firm

"SMUR" under the act of acceptance and transfer of property for temporary use dated 10.10.2012 in accordance with the terms of contract No. 3 / 12-12 for the purchase and 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 regions, concluded on 04.09.2012 between LLC "Company ALS and TEK" and CJSC firm

"SMUR" (the second stage - optical fibers from the city of Ershov to the city of Saratov) in the fiber-optic communication line "Saratov-Ozinki": from the optical crossbar in a container on the territory of the RTRS "Saratov ORTPPTS" at the address Saratov region, . Ershov, st. Meliorativnaya, 32A, to the main distribution coupling MRM28 near the settlement of Pushkino, Sovetsky district, Saratov region, from the distribution main coupling MRM28 near the settlement of Pushkino, Sovetsky district, Saratov region, to the optical crossover in a container on the territory of JSC

"Urbakhskiy kombinat khleboproduktov" at the address Saratov region, Sovetskiy district, p. Pushkino, st. Zavodskaya, 1a, from the main distribution coupling MRM28 near the village of Pushkino, Sovetskiy district, Saratov region, to the optical junction "VOSTOK", Saratov, st. Bolshaya Kazachya, 6, from the optical crossover

"VOSTOK", Saratov, st. Bolshaya Kazachya, 6, before the optical cross-country in the territory of JSC "Integral" at the address Saratov, Chernyshevsky, 153.

By the decision of the Arbitration Court of the Saratov Region dated 08.31.2017 in the case

No. A57-233 / 2017, the claim was refused.

By the decision of the Twelfth Arbitration Court of Appeal dated 13.12.2017, upheld by the decision of the Arbitration Court of the Volga District of 17.05.2018, the decision of the court of first instance was canceled. A new judicial act was adopted, by which the appellate court ordered the defendant to return the disputed property to the plaintiff.

The Supreme Court of the Russian Federation found no grounds for reviewing judicial acts.

01.10.2019 JSC firm "SMUR" applied to the Twelfth Arbitration Court of Appeal with an application to revise the ruling of the Twelfth Arbitration Court of Appeal of 13.12.2017 due to newly discovered circumstances.

At the court session on November 20, 2019, JSC Firm "SMUR" filed a motion to suspend the proceedings in the case on the application for revising the decision of the Twelfth Arbitration Court of Appeal dated December 13, 2017 due to newly discovered circumstances before the Nineteenth Arbitration Court of Appeal issued a decision in case No. A14-1036 / 2017 based on the results of consideration of the appeal of LLC DSPS against the decision of the Arbitration Court of the Voronezh Region of 15.10.2019 in case No.A14-1036 / 2017, which was refused due to the lack of grounds provided for by Articles 143,144 of the APC RF.

In support of the application for revising the decision of the Twelfth Arbitration Court of Appeal dated 12/13/2017 in case No.A57-233 / 2017 under new circumstances, JSC SMUR refers to the response

"INTEGRAL" (out. No. 106 dated 17.09.2019) to a lawyer's request. According to this answer, in the period from 10.10.2012 to 22.06.2018, neither ALS Company and

TEK ", neither MMTS LLC, nor DSPS LLC, nor IE Salimov I.I., nor QUANT-TELECOM ", nor the company" SMUR "JSC, on any rights, any premises and / or places in the premises of" INTEGRAL "LLC at the address: Saratov, st. Chernyshevsky, 153, for the purpose of creating access to fiber-optic lines and / or placing telecommunication equipment and / or entering and placing any fiber-optic cable in the building for the use of optical fibers, no contracts were provided with the specified persons

on the requested subject in the specified the period from 10.10.2012 to 22.06.2018 were not concluded.

This answer, as the applicant believes, contains information about a newly discovered circumstance - the absence at the time of the issuance of the Resolution by the twelfth Arbitration Court of Appeal of 13.12.2017 in the possession of JSC firm "SMUR" of optical fibers in the section from Saratov, Bolshaya Kazachya st., D. 6 to Saratov, Chernyshevsky st., 153 due to the lack of

"ALS and TEK" access node - optical distribution at the address: Saratov, Chernyshevsky st., 153, lack of fiber-optic cable LLC

"The company" ALS and TEK ", included in the specified optical distribution frame and, accordingly, the optical fibers in it, which should have been in the use of the claimant on the basis of contract No. the act of acceptance and transfer of property for temporary use dated 10.10.2012

In addition, as the applicant points out, LLC Company ALS and TEK was not interested in the actual execution of the ruling of the Twelfth Arbitration Court of Appeal dated 13.12.2017 in case No. A57-233 / 2017, i.e. real seizure of property from the debtor and its transfer to the claimant. According to the applicant, such a formal approach to the execution of the court order by the LLC

"ALS and TEK Company" directly indicates the initial location of the disputed property in the possession of the claimant, confirms the erroneousness of the conclusions contained in the above decision.

The applicant also refers to the forensic technical examination carried out in the framework of the case A14-1036 / 2017, which established the absence of property subject to transfer under contract No. 3 / 12-12 dated 04.09.2012.

At the same time, according to the applicant, he did not have a procedural opportunity during the consideration of case No.A57-233 / 2017 to file a petition for the appointment and conduct of a forensic technical examination.

In connection with the foregoing, JSC firm "SMUR", believing that the conclusion of the technical examination carried out by the experts of the Federal State Unitary Enterprise "Central Research Institute of Communications" No. 1/19 dated 07/15/2019, contains conclusions that are newly discovered circumstances for this case, to the Twelfth Arbitration Court with the application under consideration.

The above circumstances, in the applicant's opinion, are sufficient to revise the ruling of the court of appeal in the manner prescribed by Article 311 of the Arbitration Procedure Code of the Russian Federation.

In accordance with the provisions of Article 309 of the Arbitration Procedural Code of the Russian Federation, the arbitration court may revise the judicial act adopted by it and entered into legal force on new or newly discovered circumstances.

The grounds for revising judicial acts based on new or newly discovered circumstances are determined by Article 311 of the Arbitration Procedure Code of the Russian Federation, according to which newly discovered circumstances are recognized, including those that existed at the time of the adoption of the judicial act, circumstances significant for the case that were not and could not be known to the applicant .

Clause 3 of the Resolution of the Plenum of the Supreme Arbitration Court of the Russian Federation dated June 30, 2011 No. 52 "On the application of the provisions of the Arbitration Procedure Code of the Russian Federation when revising judicial acts on new or newly discovered circumstances" explains that a judicial act cannot be revised for new or newly discovered circumstances in cases where the circumstances specified in Article 311 of the Arbitration Procedure Code of the Russian Federation are absent, and there are grounds for revising the judicial act by way of cassation proceedings or by way of supervision, or if the circumstances established by Article 311 of the Arbitration Procedure

Code of the Russian Federation were known or could be known to the applicant when considering this case.

According to clause 4 of the Resolution of the Plenum of the Supreme Arbitration Court of the Russian Federation dated June 30, 2011 No. 52 "On the application of the provisions of the Arbitration Procedure Code of the Russian Federation in the revision of judicial acts that have entered into legal force on new and newly discovered circumstances" of the procedural code of the Russian Federation are grounds for revising a judicial act, must be significant, that is, capable of influencing the conclusions of the arbitration court when adopting a judicial act.

When considering an application for a revision of a judicial act on the basis of newly discovered circumstances, the court must establish whether the facts cited by the applicant indicate the existence of circumstances significant for the case that were not the subject of the court proceedings in this case. A judicial act cannot be revised due to newly discovered circumstances if circumstances significant for the case arose after the adoption of this act, since, within the meaning of paragraph 1 of part 2 of Article 311 of the Code, the basis for such a review is the discovery of circumstances that, although objectively existed, could not have been taken into account, since they were not and could not be known to the applicant. In this regard, the court should check whether the facts referred to by the applicant do not indicate the presentation of new evidence related to the circumstances already investigated by the court. The submission of new evidence cannot serve as a basis for revising a judicial act due to newly discovered circumstances in accordance with the rules of Chapter 37 of the Code. In this case, the application for revision of the judicial act due to newly discovered circumstances shall not be subject to satisfaction. Circumstances that have arisen after the adoption of the judicial act may be grounds for filing an independent claim.

In accordance with clause 5 of the said resolution of the Plenum of the Supreme Arbitration Court of the Russian Federation, in accordance with clause 1 of part 2 of article 311 of the Arbitration Procedure Code of the Russian Federation, the newly discovered circumstance specified in the application, which was not and could not be known, can be recognized as a significant circumstance for the case.

to the applicant, indicating that if it had been known, it would have led to a different decision.

The grounds provided for in the Code for the revision of newly discovered circumstances of judicial acts that have entered into legal force are aimed at establishing additional procedural guarantees for the protection of the rights and legitimate interests of subjects of public relations in the field of entrepreneurial and other economic activities. This mechanism can be used only in exceptional cases, including in order to correct an obvious miscarriage of justice that occurred due to the lack of information about the circumstances that are essential for making a correct decision on the merits of the dispute. A different understanding of the institution of revising judicial acts based on newly discovered circumstances would lead to a violation of the principle of legal certainty, which presupposes, in particular, that the judicial act rendered upon the final resolution of the case is beyond doubt. The procedure for canceling a judicial act due to newly discovered circumstances assumes that there is evidence that was not previously objectively available and which may lead to a different result of the trial. A person who wishes to set aside a judicial act must prove that he was not able to present the relevant evidence before the end of the trial and that such evidence is relevant to the case.

Thus, the legal institution of revising judicial acts on new and newly discovered circumstances is subject to application only in exceptional cases, in order to correct an obvious miscarriage of justice that occurred due to the lack of data on circumstances that are essential for making a correct decision on the merits of the dispute.

According to Part 1 of Article 311 of the Russian Federation, the materiality of the circumstances (both new and newly discovered) is a prerequisite for satisfying an application for revision of a court decision in accordance with Chapter 37 of the Russian Federation, and the courts are obliged to assess the ability of such circumstances to influence the conclusions of the court that served as the basis for the adoption of a judicial act.

This is based on the principle of *res judicata* - legal certainty, that is, the inadmissibility of re-consideration of a once decided case. The principle stipulates that neither party can demand a review of a final and enforceable order only for the purpose of a rehearing and obtaining a new order. Revision cannot be considered a hidden form of appeal, while only the possible existence of two points of view on one issue cannot be a basis for revision. Deviations from this principle are justified only when they are mandatory due to circumstances of a significant and compelling nature (ECHR judgment of 24.07.2003 "Ryabykh v. Russian Federation" (complaint No. 52854/99)).

After evaluating the arguments given by JSC "SMUR" in the application for revising the ruling of the court of appeal on the basis of newly discovered circumstances, the panel of the court of appeal does not see any legal grounds for satisfying the application. The facts referred to by the applicant testify to the applicant's submission of new evidence related to the circumstances already investigated by the court earlier, connected with the actual transfer of property by

Agreement No. 3 / 12-12 for the purchase and 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 dated 04.09.2012.

However, the applicant does not indicate the reasons why the evidence to which he refers in his application could not have been presented before the end of the trial in the present case. The applicant limited himself only to indicating that he had no procedural opportunity during the consideration of case No.A57-233 / 2017 to file a petition for the appointment and conduct of a forensic technical examination.

At the same time, the presentation of new evidence cannot serve as a basis for revising a judicial act on the basis of newly discovered circumstances in accordance with the rules of Chapter 37 of the Code.

In such circumstances, the judicial board comes to the conclusion that there is no legal basis for satisfying the application of JSC firm "SMUR" to revise the ruling of the Twelfth Arbitration Court of Appeal from

December 13, 2017 in case No.A57-233 / 2017 due to newly discovered circumstances. Guided by Articles 184, 185, 311, 317 of the Arbitration Procedure Code of the Russian Federation, the arbitration court

determined:

In satisfaction of the application of the joint-stock company firm "SMUR" (INN 3662020332, OGRN 1023601610878), Voronezh, on the revision of the decision of the Twelfth Arbitration Court of Appeal of December 13, 2017 in case No. A57-233 / 2017, due to newly discovered circumstances.

The ruling of the arbitration court of the appellate instance comes into legal force from the date of its adoption and can be appealed to the Arbitration Court of the Volga District within one month from the date of making the ruling in full through the arbitration court of first instance.

Presiding O.AND. Antonova

Judges T.S. Borisov

S.A. Zhatkina