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***IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION***

WRIT PETITION (Lodg.) NO. 613 OF 2019

Tokheim India Pvt. Ltd. & Anr. ... Petitioners.

V/s.

Indian Oil Corporation Ltd. and Anr. ... Respondents.

Dr. Virendra Tulzapurkar, Senior Advocate a/w. Dr. Birendra Saraf a/w. Anoj Menon, Pooja Kshirsagar, Asadulla Thangal and Anushka Shah i/b. AZB and Partners for the Petitioners.

Mr. Chirag Mody a/w. Ashok Purohit and Raveena Yadav with Aditi Yadav I/b. Ashok Purohit and Co. for Respondent No.1.

Mr. Ashish Mehta a/w. Tvicha Desai I/b. Ashish Mehta for Respondent No.2 - UOI.

***CORAM : NARESH H. PATIL, C.J. &
N.M. JAMDAR, J.***

DATE : 26 FEBRUARY 2019.

P.C. :-

Heard the learned Counsel for the parties.

2. The learned Counsel appearing for the Petitioners submitted that clause 9C (Penalty against deduction of tampering) of the tender issued by the Respondent No.1 is unreasonable and the same deserves to be quashed and set aside. The learned Counsel

submitted that in identical Petitions, the Division of this Court had passed orders in Writ Petition(Lodg.) Nos. 2445 of 2017 with 2437 of 2017 and Writ Petition (Lodg.) No. 2447 of 2017 and in several other Petitions. It is submitted that those Petitioners had participated in the tender process and tender was also awarded to some of them.

3. The learned Counsel for the Respondent No.1 submitted that, considering large number of complaints regarding adulteration of fuel, a clause such as 9C, is purposefully inserted. This clause is inserted to place the responsibility on the successful tenderer to supply a tamper proof dispenser. The learned Counsel for the Respondents submitted that thus there is nothing arbitrary in the clause, which is couched in the larger public interest.

4. We have perused the orders passed by this Court. We have also perused clause 9C which reads as under :-

“9C. Penalty against detection of tampering :

Within Warranty Period :

In the event of any kind of tampering (Hardware/Software/External Chips/Change in circuitry system) happening in the intelligent electronic cards within warranty period, which can be attributed to the negligence of DU/MPD vendor by not providing

tamper proof intelligent cards or should have been prevented by DY/MPD vendor, a penalty of 10% on the total value of Dispensing units Tender Contract (excluding CAMC) value) will be levied. Vendor has to develop counter mechanism and upgrade it in all the DU/MPDs that were supplied with similar configuration/similar platform against this tender within six months of notice from IOCL/BPCL/HPCL.

Total value of dispensing Units shall mean the landed cost of supply point including all taxes and duties but excluding CAMC value for all the DUs for which PO is placed.

Beyond Warranty Period and within CAMC period:

In case the tampering (Hardware/Software/External Chips/Change in circuitry system) happens beyond warranty period, a penalty of 10% on the CAMC PO value (including all taxes) applicable during that financial year of incidence and for that model of dispensing units supplied against the concerned tender will be debited to the vendor. Vendor should ensure that all the tamper prone cards are replaced with cards having counter mechanism at all the MPDs in a systematic manner within 6 months of notice from IOCL at no extra cost. The clause is also applicable in an instance where tampering re-occurs even after upgradation. This condition applies throughout the CAMC period. Bidder will not be responsible for fraud arising out of mechanical damage or physical changes made to the DU other than in electronic cards or by passing of the ERA for tampering. The term tampering of intelligent cards will be applicable where in there are (1) Unauthorized software

modifications in DUs (2) Inserting foreign devices which are not part of standard equipment with an ill intended purpose to alter the accuracy of deliveries/camouflaging event logs (3) Dispenser not meeting the functionalities mentioned in the tender etc. The term also applies in case DUs/MPDs does not detect or throw evidence of tampering in intelligent electronic cards and continues to function without providing an event log or an error.

Vendors have the option to upgrade dispensers once in three years (or even earlier) for strengthening it against tampering with no additional outgo to IOCL. However, such upgradation should be done with prior written communication to IOCL giving reason and justification for such upgrade.

Definition of Intelligent Cards : *Pulsar Card, Control Card/ CPU/ERA, Display Cards, E Cal card and any other cards within the dispensing unit which sends and receives data. Terms and conditions of Comprehensive Annual Maintenance Contract (CAMC) during warranty period are attached separately.*

Applicable taxes on all penalty amounts shall be to vendors' account.

Indemnity : *Vendor to undertake that due to usage/malfunctioning of such Dispensing Unit, if any litigation/prosecution is initiated against Purchaser or its Dealer, or Indian Oil including its Chairman, Directors, Employees, Officers, etc. or its Dealers incurs any loss, damages, expenses, cost, charges, etc., Supplier at all times shall indemnify and keep oil company indemnified therefore at all times whatsoever during the total contractual period, including CAMC.”*

5. We are conscious of the fact that the Petitioner has to participate in the tender process. Today is the last date of submitting the tender. The challenge is raised to one of the clauses.

6. We observe that irrespective of the Petitioners' participation in the tender process, its acceptance otherwise by the Respondents, the Court may consider the challenge raised to clause 9C of the tender document.

7. The Registry is directed to club Writ Petition No. 2632 of 2018, Writ Petition No. 2639 of 2018, Writ Petition No. 2852 of 2018 and Writ Petition (Lodg.) No. 2437 of 2017, which raise identical challenges in respect of the tender clause. These Petitions be listed together on 25 March 2019.

8. The Respondents to file reply within three weeks.

9. In view of the urgency, the learned Counsel for the Respondents would intimate the order passed by this Court to the Respondents, without waiting for the copy of the order.

N.M. JAMDAR, J.

CHIEF JUSTICE