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STATE OF KERALA

v.

M/S ZOOM DEVELOPERS PVT. LTD. & ORS.  
(Civil Appeal Nos. 841-842 of 2009)

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FEBRUARY 10, 2009

[DR. ARIJIT PASAYAT AND S.H. KAPADIA, JJ.]

COMPANIES ACT, 1956:

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*S.212 – Consortium Agreement – Modification of – Whether results in change in the constituents membership – Bid Evaluation Committee rejecting the Bid proposal made by the consortium and excluding the consortium from zone of consideration – High Court holding the decision unjustified, arbitrary and bad in law – On appeal, Held: The modified consortium agreement is in line with the proposal submitted – There was no change in the membership of the consortium – High Court rightly held that the licence agreement has still to be executed and at that stage the change of joint and several liability shall be incorporated in the licence agreement – No infirmity in the judgment of High Court – The Technical and Financial proposals submitted by the consortium (Respondent No.1) to be considered within 15 days.*

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WORDS & PHRASES:

*'Liability', 'responsibility' – Meaning of.*

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**The High Court held that the decision of the Bid Evaluation Committee dated 6.5.2008 rejecting the Bid Proposal made by the Consortium led by the M/s Zoom Developers Pvt. Ltd. (ZDL) as non-admissible in terms of Request for Proposal (RFP) and thus excluding the said consortium from the zone of consideration was unjustified, arbitrary and bad in law. Hence the appeals.**

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On the basis of the contentions advanced, the following points emerged for consideration by the Court:

1. Whether the modified Consortium Agreement dated 11.3.2008 resulted in a change in the constituents membership of the Consortium led by M/s ZDL.

2. Whether use of the expression "joint and several responsibility" in place of "joint and several liability" would justify rejection of the Bid proposal made by the Consortium led by M/s ZDL as non-responsive/non-admissible in terms of the RFP.

Dismissing the appeals, the Court

HELD:1.1. On reading the Proposal, it becomes clear that on the date, namely, 31.1.2008, being the cut-off date (when the bids were opened), M/s PMS was the member-constituent of the consortium led by M/s ZDL. At this stage, one must keep in mind that Section 212 of the Companies Act, 1956 which makes it obligatory on behalf of the holding company to annex to its Balance Sheet the Balance Sheet and P&L account and other financial particulars of its subsidiary. Section 212 requires the legal relationship of holding company and subsidiary company to be disclosed to all its members. In the world of globalization, we have consortium agreements/ joint venture agreements. It appears from the particulars given by the consortium led by M/s ZDL that M/s PMS is a part of an international group of companies headed by M/s PPL, UK. The prescribed Form warranted Disclosure giving particulars of the consortium members. The particulars furnished indicate that the Lead Member was M/s ZDL. It is an Indian company. One of the consortium member was M/s PMS, which is incorporated in UK. It is the 100% subsidiary of M/s PPL, UK. This information also became necessary because the format required the Bidder to disclose "Ownership" of the member-company.

A Therefore, if one reads the Proposal of the Lead Member, M/s ZDL, in the form prescribed, which Proposal was of 31.1.2008, one finds that M/s PMS alone on its own was indicated as a member of the consortium and M/s PPL was not shown as the member of the consortium.

B However, the original consortium/joint venture agreement dated 4.10.2007 signed by the member-constituent of the consortium led by M/s ZDL stood signed by M/s PMS on behalf of M/s PPL, UK. Therefore, on 3.3.2008, IDC (Project Advisor) wrote to M/s ZDL pointing out the defect in the consortium agreement dated 4.10.2007. Thus, the Project

C Advisor treated the above irregularity in the execution of the consortium agreement dated 4.10.2007 as a curable defect for which time was given to M/s ZDL up to 4.4.2008. Further, the Project Advisor clearly understood the Proposal to have had been given by M/s ZDL as the Lead

D Member of the Consortium, whose constituent inter alia included M/s PMS and not M/s PPL. By the said letter, the Project Advisor also called for Annual Reports of three financial year of M/s ZDL and Annual Reports of last 3 years of M/s PMS (its own). This query indicates that the

E Project Advisor not only treated the above irregularity in the execution of the consortium agreement dated 4.10.2007 as the curable defect but it further shows that even, according to the Project Advisor, M/s PMS alone was the constituent member of the consortium led by M/

F s ZDL and it is for this reason that the Project Advisor called for the annual reports of M/s PMS (its own). This defect was cured by M/s PMS within the extended period. [Para 14] [1066-F-H; 1067-A-H; 1068-A-B]

G 1.2. The question of "authorization" by M/s PPL,UK, was not raised by the Project Advisor in its letter dated 3.3.2008. That aspect was raised only by the Law Secretary who came to be Invited as a special invitee by the Chief Secretary in the meetings of the EC held on 8.4.2008 and 6.5.2008 (which is after the extended date

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4.4.2008). It is not in dispute that M/s PPL, UK is the holding company of M/s PMS. M/s PMS is a subsidiary company. It is the separate legal entity. This Court is satisfied that at the stage of Submission of Proposal itself and right from the inception, it was M/s PMS, who alone was the constituent member of the consortium. The question of authorization raised by the Law Secretary is clearly an afterthought. In fact, there is a contradiction in his opinion. If M/s PPL was the member of the consortium, as construed by the Law Secretary, there was no need for M/s PPL to authorize M/s PMS to execute the consortium agreement. On the other hand, if M/s PMS being the separate legal entity was a member of the consortium it had to sign the consortium agreement in its own capacity. The modified consortium agreement dated 11.3.2008 is supported by a Resolution. The said consortium agreement is in line with the Proposal submitted on 31.1.2008. [Para 14] [1168-B-F]

2. M/s Universal Legal (legal advisor to the Sponsor) cleared the proposal on 4.4.2008 stating that all requisite defects stood cured. It is only after 4.4.2008 that the Law Secretary came into picture and gave an opinion to the contrary. Moreover, as found by the High Court in the impugned judgment, when the Law Secretary was asked to file his affidavit he came out with the statement that his advice was "off the record" advice. It was not given through Official Channel. No material has been placed before the High Court as to the reference made by the Chief Secretary to the Law Secretary. The very purpose of routing the query through Official Channel is that the querist formulates the query on which opinion is given. In this case, there is no formulation of such a query. In the circumstances, the High Court was right in not giving weightage to the "off the record" advice of the Law Secretary. This is one of the circumstances which vitiates the process of decision making by the EC. The bid was

A declared as non-admissible in the IVth meeting of the EC  
held on 6.5.2008. The Minutes indicate that, before the EC,  
there were two Opinions. First opinion was that of M/s  
Universal Legal and the second opinion was that of the  
B as to why the opinion of the legal advisor, M/s Universal  
Legal, stood rejected. There is no reason given as to why  
the opinion of the Law Secretary came to be accepted.  
The modified consortium agreement was between  
members of the consortium led by M/s ZDL in which the  
C member was M/s PMS and not M/s PPL, UK, right from  
the inception. Therefore, the entire exercise was to cure  
the defect. Time was given to M/s ZDL to cure the defect  
which in fact was cured before 4.4.2008. For the  
D aforesaid reasons, it is held that there was no change  
in the membership of the consortium led by M/s ZDL after  
31.1.2008. In fact, even prior to the IVth meeting the EC  
did not call upon M/s ZDL/PMS to obtain Letter of  
Authority from M/s PPL, UK. [Para 15] [1168-G-H; 1169-  
A-H]

E 3.1. Under the agreement, duties and responsibilities  
of each of the members stood carved out. Vide clause 7,  
members of the consortium were made "jointly and  
severally responsible" for every stage of implementation  
of the Project. The only objection raised by the GoK is  
F that the word "liable" ought to have been used instead  
of the word "responsible" in clause 7 and since that  
word has not been used, the Bid Proposal of M/s ZDL  
needs to be dismissed. As stated above, in the meetings  
held prior to 8.4.2008, no such objection was ever raised.  
G In fact, no opportunity was given to M/s ZDL to cure this  
defect though it was given to the consortium led by M/s  
Apollo. The important point is that the EC treated the  
above objection as a curable defect. It is only after the  
Law Secretary came on the scene that the above  
objection was raised even after the clearance by M/s  
H Universal Legal. Therefore, it is clearly an afterthought.

Further under the consortium agreement dated 11.3.2008, it was stated that M/s ZDL, PMS and Peter Fraenkel & Partners shall be fully responsible for their individual portions of work. Under the said Agreement, it was further stated that, in case the Project stood awarded to the Consortium, the Consortium commits to hold a minimum stake of 51% in the SPC. This shows that in the matter of liability, the Consortium Agreement was only a step-in-aid to the formation of SPC. Further, as rightly held by the High Court in the impugned judgment, the apprehension of GoK that in the event of disputes between members of the consortium or in the event of non-implementation of the Project, GoK would not be in a position to enforce its claim was ill-founded because the licence agreement between the successful bidder and the licensor (GoK) was yet to be entered into in which a provision as to "joint and several liability" had to be made, as mentioned in the RFP. The consortium agreement was only an assurance or a commitment to abide by the licence agreement. Lastly, it may be stated that the word "responsibility" is no doubt different from the word "liability". [Para 19] [1171-B-H; 1172-A-B]

3.2. In the absence of a prescribed format and in the absence of the definition of the word "responsibility" vis-à-vis the word "liability" in the RFP, it cannot be said that the said expression "joint and several liability" was an objective criteria. It is true that in terms of RFP, the bidder was required to stipulate the words "joint and several liability" in the consortium agreement. But it is equally true that in certain cases objective words can be interpreted subjectively. In the instant case, various bids were considered by the Project Advisor/Sponsor. They have themselves used the words "liability" and "responsibility" interchangeably. They have treated this defect as a curable defect. They have not rejected the Bid Proposal on 25.2.2008 in the first meeting on the above

A ground because the EC thought that the said defect was a curable defect. [Para 19] [1172-D-H; 1173-A]

B 3.3. The consortium agreement dated 11.3.2008 spelt out the work allocation and the responsibility of each member of the consortium. It made the consortium responsible jointly and severally for implementation of the Project. The clause dealing with "relationship of the parties" merely stated that till the formation of the SPC, each member shall be related to each other on principal-to-principal basis. This is because the consortium is formed to make a bid for this Project only. But once that consortium becomes a successful bidder and commits to hold the minimum equity stake of 51% in the SPC, then the question of joint and several liability would certainly arise. Therefore, the High Court rightly held that the licence agreement between GoK and the successful bidder (consortium) has still to be executed and it is at that stage that, in any event, the clause of joint and several liability shall stand incorporated in the licence agreement. [Para 20] [1173-D-G]

E *H.W. Wade and Forsyth: 'Administrative Law', 9th edn. pp. 432-435, referred to.*

F 4. The Chart submitted on behalf of M/s Lanco Kondapalli Power Pvt. Ltd. refers to the Financial Years October, 2003 to September, 2004, October 2004 to September, 2005, October, 2005 to September, 2006 as far as M/s-ZDL is concerned. However, it may be noted that initially the last date for submitting the bid was 31.10.2007, which was extended to 31.1.2008. The Balance Sheet and P&L account of M/s ZDL for the year ending 30.9.2007 stood adopted after audit only on 20.3.2008. If the figures for that year are taken into account then the financial qualification criteria stands satisfied. [Para 21] [1173-H; 1174-A-B]

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**5. The Technical and Financial Proposals submitted by the Consortium (respondent no. 1) are liable to be considered within 15 days from the date of this judgment. [Para 22] [1174-E]**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 841-842 of 2009.

From the Judgment & Order dated 4.1.2008 in R.P. No. 1329/2008 & WA No. 1460/2008 of the High Court of Kerala at Ernakulam.

A. Sharan, ASG, K. Prasaran, K.K. Venugopal, T.B. Hood, Pradeep Ranjan Tiwary, R. Satish, P.V. Dinesh, Sindhu T.R., Kamkal Bhundhiraj, Nishant Menon, Manu Seshadri, Sidharth Bawa, Gopal Shankarnarayanan (for M/s. Dua Associates) for the Appellants.

Arun Jaitely, U.U. Lalit, Maninder Singh, Pratibha, M. Singh, Santosh Mathrew, Gaurav Sharma, Surbhi Mehta, Sumeet Bhatia, Ankit Gupta, Meenakshi Grover, Ramesh Singh, K.S. Rama Rao, Bela Maheshwari and Joydeep Nath for the Respondents.

The Judgment of the Court was delivered by

**S.H. KAPADIA, J.1.** Leave granted.

2. A short question which arises for determination in these civil appeals is - whether the decision of the Bid Evaluation Committee ("EC" for short) dated 6.5.2008 rejecting the Bid Proposal made by the Consortium led by M/s Zoom Developers Pvt. Ltd. as non-admissible in terms of RFP and thus excluding the said Consortium from the zone of consideration was unjustified, arbitrary and bad in law, as held by the impugned judgment of the Kerala High Court dated 4.12.2008 in Writ Appeal No. 1460/2008.

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**A Facts:**

3. Government of Kerala (GoK) vide G.O. No. 9/07/F&PD dated 9.3.2007 decided to invite bids for the Development of International Deepwater Seaport and Container Transshipment Terminal at Vizhinjam under Public-Private Partnership. Vide G.O. dated 15.6.2007 GoK decided on the key provisions in the Request For Proposal ("RFP" for short) documents for the bidding of the above Project. A competitive bid process was thus initiated by M/s Vizhinjam International Seaport Ltd. ("VSL" for short). VSL was the Sponsor. IL & FS Infrastructure Development Corporation ("IDC" for short) was the Project Advisor. Accordingly, on 8.8.2007, Press Notification was issued by M/s VSL inviting RFP for the development of the Project. On 23.1.2008 a Bid Opening Committee was constituted vide G.O. of the same date. Thirty-three firms obtained the RFP documents. Vide G.O. dated 19.2.2008, Bid Evaluation Committee headed by the Chief Secretary was also constituted to Evaluate the Bid Proposals. Ultimately, bids were received from the following five Consortia by 31.1.2008 (which was the last date stipulated for receiving the Bids), they were:

- (i) Apollo Enterprises led consortium
- (ii) Nagarjuna Construction Co. led consortium
- (iii) Videocon Industries Ltd. led consortium
- (iv) Lanco Kondapalli Power Pvt. Ltd., Hyderabad, led consortium
- (v) Zoom Developers Pvt. Ltd., Mumbai led consortium.

4. The bidders were required to submit their proposals in four covers, namely, the Outer Cover (containing details of the bidder, power of attorney in favour of the lead member, consortium agreement entered amongst the members of the consortium, legal opinion, security of Rs. 50 million in the form

of bank guarantee etc.), Cover-1 (Statement of Qualification), A  
Cover-2 (Technical Proposal) and Cover-3 (Financial  
Proposal). In this case, evaluation was done in three stages.  
In the first stage, there was evaluation of Outer Cover and  
Cover-1 to check the admissibility of bids and evaluation of  
qualifications as stipulated in the RFP. It may be noted that B  
evaluation of the Technical Proposal had to be done only of  
those bidders who met the "Qualification Criteria" (vide second  
stage). The third stage contemplated evaluation of the Technical  
Proposal. As stated above, only five bids were received. These  
bids (Outer Cover and Cover-1) were opened on 31.1.2008 by C  
the Bid Opening Committee. The said firms were found to have  
satisfied *prima facie* the requisite requirements. The bids were  
accepted by the Bid Opening Committee for further scrutiny.  
The bids submitted were considered at the meeting of the EC D  
on 25.2.2008. In the said meeting it was observed that, with  
regard to the bid submitted by the consortium led by M/s Zoom  
Developers Pvt. Ltd. ("ZDL" for short), the Power of Attorney  
and the Consortium Agreement were unstamped and they  
needed to be stamped. It was further pointed out by the EC  
that the lead member in terms of the RFP, namely, M/s ZDL was E  
required to hold a minimum equity of 26% in the Special  
Purpose Company ("SPC" for short), which has not been  
expressly mentioned in the Consortium Agreement. The EC  
further pointed out to M/s ZDL that one of the consortium  
member, namely, M/s Portia Management Services Ltd. ("PMS" F  
for short) had signed the consortium agreement on behalf of  
Peel Ports Ltd. ("PPL" for short) but M/s PPL is not a member  
of the consortium. Additional information regarding the  
financials of M/s PMS (on its own) and of M/s ZDL were also  
called for. On 25.2.2008, accordingly the EC granted ten days G  
time to remove the above defects. M/s ZDL sought extension  
of time. Ultimately, time was extended up to 4.4.2008. In short,  
meetings of the EC took place on 25.2.2008, 13.3.2008,  
8.4.2008 and 6.5.2008. By 2.4.2008, M/s ZDL submitted all the  
relevant documents duly updated. It may be noted that M/s  
Universal Legal, Bangalore, were appointed as Legal Advisor H

A of the Project by the EC.

5. As stated above, on 2.4.2008 M/s ZDL submitted their modified documents. On 4.4.2008 the said M/s Universal Legal furnished their opinion that the Consortium Agreement submitted by the Consortium led by M/s ZDL had complied with the requirements of the RFP and that they had removed all defects pointed out to them by the EC and accordingly the EC may consider their Bid Proposals. However, in the third meeting held on 8.4.2008, the EC after having considered the documents submitted by the Consortium led by M/s ZDL came to the conclusion that in the modified consortium agreement dated 11.3.2008, M/s PMS has signed the consortium agreement *on its own* whereas in its original consortium agreement dated 4.10.2007, M/s PMS has signed the consortium agreement on behalf of M/s PPL. Accordingly, the opinion of the Law Secretary (Invitee to the Meeting) was sought. The Law Secretary opined that the modified consortium agreement dated 11.3.2008 cannot be treated as a part of the Original Proposal as the modified consortium agreement stood entered into by a new member, namely, M/s PMS, without the authorization of M/s PPL. According to the Law Secretary, there was one more defect. There was no provision in the modified consortium agreement to the effect that the consortium members shall be jointly and severally *liable* for the execution of the Project and that the only expression used was joint and several "responsibility", which, according to the Law Secretary, was a concept different from joint and several "liability". This opinion of the Law Secretary was placed before the EC in its meeting held on 6.5.2008 in which meeting the EC concluded that the Bid submitted by the consortium led by M/s ZDL was "non-responsive"/"non-admissible" in terms of the RFP. Accordingly on 24.5.2008, GoK issued Government Order approving the proposal given by Lanco Kondapalli Power Pvt. Ltd., Hyderabad (hereinafter referred to as "Lanco led Consortium"). Thus, the Bid Proposal of the consortium led by M/s ZDL came to be rejected.

6. Aggrieved by the said decision, M/s ZDL preferred Writ Petition (C) No. 15570/2008 in the Kerala High Court which came to be dismissed by the learned single Judge on 3.7.2008. It was held by the learned Single Judge that the concept of "liability" was different from "responsibility". It was further held that since the consortium members led by M/s ZDL had not undertaken "joint and several liability", the EC was right in treating the bid proposal as non-responsive. It was further held by the learned single Judge that the original consortium agreement dated 4.10.2007 was signed by M/s PMS on behalf of M/s PPL though no such authorization was found in that regard. According to the learned single Judge, in the modified consortium agreement dated 11.3.2008, M/s PPL, which was the party to the original consortium agreement, stood deleted and M/s PMS had emerged as a member of consortium for the first time only under the modified consortium agreement dated 11.3.2008 without explaining under whose authority such change was made and consequently, the EC was right in treating the Bid Proposal made by M/s ZDL as non-responsive. Accordingly, the writ petition stood dismissed. Aggrieved by the said decision, M/s ZDL preferred Writ Appeal No. 1460/2008, which stood allowed by the Division Bench of the Kerala High Court, hence, these civil appeals are filed by the State of Kerala (licensor), M/s Lanco Kondapalli Power Pvt. Ltd. and M/s Vizhinjam International Sea Port Ltd. (Sponsors).

**Contention:**

7. On behalf of State of Kerala, Shri K. Parasaran, learned senior counsel submitted that after 31.1.2008 (the cut-off date) there was a change in M/s ZDL led Consortium which was impermissible in terms of the RFP and, therefore, the Bid Evaluation Committee was right in treating the Bid submitted by M/s ZDL led Consortium as non-responsive/non-admissible in terms of the RFP. In support of his contention, learned senior counsel submitted that as per clause 3.4 of RFP, only the Lead Member could be changed and that too with the written consent

A of M/s VSL (Sponsor). According to the learned counsel, RFP did not permit change of consortium member after the cut-off date. It may be noted that the Proposals of the Bidders were to be submitted on or before 31.1.2008. Learned counsel pointed out that along with the Proposal, M/s ZDL submitted

B the Consortium Agreement dated 4.10.2007 in which M/s PMS signed the consortium agreement *on behalf of M/s PPL, UK*. Therefore, according to the learned counsel, M/s PMS signed the Consortium Agreement dated 4.10.2007 as an agent of M/s PPL, UK. According to the learned counsel, in the Consortium

C Agreement dated 4.10.2007, M/s ZDL did not stipulate that as a Lead Member it would hold a minimum equity of 26% in the SPC. The Consortium Agreement dated 4.10.2007 was not notarized and stamped. That apart, the said consortium did not submit documents from M/s PPL, UK authorizing M/s PMS to sign the Consortium Agreement on behalf of M/s PPL, UK.

D According to the learned counsel, all the above circumstances came to be considered by the EC in its meeting held on 25.2.2008. The EC, according to the learned counsel, recorded in its Minutes that since M/s PPL was the member of the Consortium in terms of Consortium Agreement dated

E 4.10.2007, but, since M/s PPL was not shown in the Outer Cover, therefore, a query was raised by the EC in its letter dated 3.3.2008 to the effect that although M/s PMS has signed the Consortium Agreement on behalf of M/s PPL, the latter was not a member of the Consortium. According to the learned counsel,

F in the said letter dated 3.3.2008, there was no direction from the EC to M/s ZDL to delete the words "on behalf of M/s PPL" and consequently, after the cut-off date, it was not open to M/s ZDL led Consortium to submit a fresh Consortium Agreement dated 11.3.2008 deleting the words "on behalf of M/s PPL".

G According to the learned counsel, therefore, there was a change in the membership of the Consortium led by M/s ZDL and that too after 31.1.2008. Therefore, according to the learned counsel, it was not a case of curing of defect. According to the learned counsel, change of consortium membership after the

H cut-off date made the Proposal of M/s ZDL led Consortium

\* non-admissible in terms of the RFP.

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8. Shri K. Parasaran, learned senior counsel, next contended that *vide* clause 3.5 of the RFP, all members of the Consortium were “jointly and severally liable” for execution of the Project *in terms of the Licence Agreement* and a statement to that effect was required to be stated in the consortium agreement, which statement was not incorporated in consortium agreement dated 4.10.2007 nor in the consortium agreement dated 11.3.2008. According to the learned senior counsel, the two words, namely, “liabilities” and “responsibilities” are not interchangeable. They are distinct and different concepts. According to the learned counsel, RFP required a statement regarding “joint and several liability” to be incorporated in the consortium agreement because the word “liability” represented an objective criteria, which criteria has not been satisfied despite opportunity being given to M/s ZDL led Consortium to incorporate such a statement in the consortium agreement. Learned counsel submitted that despite opportunity being given to M/s ZDL led Consortium, even in the fresh Agreement dated 11.3.2008, M/s ZDL led Consortium had insisted on using the words “joint and several *liabilities*” in support of the words “joint and several *responsibilities*”. Therefore, for non-compliance of the said criteria, the EC was right in treating the Bid Proposal of M/s ZDL led Consortium as non-admissible/non-responsive in terms of RFP.

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9. In short, on two of the aforesaid grounds, namely, change of consortium membership and non incorporation of joint and several liability Clause in the consortium agreement, learned counsel for the State of Kerala submitted that the EC was right in treating the Bid Proposal of M/s ZDL as non-responsive.

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9A. Shri A. Sharan, learned Additional Solicitor General appearing on behalf of M/s VSL substantially adopts the contentions advanced by Shri K. Parasaran, learned senior counsel for the State of Kerala.

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A 10. Shri K.K. Venugopal, learned senior counsel appearing on behalf of M/s Lanco led Consortium submitted in addition to the above contentions that, in any event, the figures submitted by M/s ZDL led Consortium indicated that, on its own M/s PMS did not fulfill the financial parameters of net worth, total turnover and cash accruals and that M/s PMS was solely dependent upon the financials of M/s PPL, UK, consequently, the Bid Proposal of M/s ZDL led Consortium was not admissible in terms of RFP. Learned senior counsel further submitted that in the Consortium Agreement dated 4.10.2007, there was a clause under the caption "Relationship of Parties". Reading of that clause, according to the learned counsel, indicated that the consortium members were to act on principal-to-principal basis and despite opportunity, even in the fresh Consortium Agreement dated 11.3.2008, the said clause stood retained. Therefore, according to the learned counsel, the criteria of joint and several liability was not satisfied by M/s ZDL led Consortium.

E 11. On the other hand, it was submitted on behalf of M/s ZDL led Consortium that the interpretation given by the Sponsor/Advisor on various terms and conditions of the RFP should be read as a standard to evaluate the admissibility of the bids. According to Shri Harish N. Salve, learned senior counsel appearing on behalf of M/s ZDL, the Minutes of the EC held on 25.2.2008 indicated that the words "responsibility" and "liability" were used interchangeably. That, it is only after the Law Secretary gave his opinion that the question of the connotation of the two words "liability" and "responsibility" were made an issue, which was clearly an afterthought. According to the learned counsel, the said hair-splitting exercise was undertaken as an afterthought only after the Law Secretary gave his opinion, which opinion was "off the record" advice (which expression is used by the Law Secretary in his affidavit). According to the learned counsel, there was no change in the membership of the Consortium led by M/s ZDL because right from the inception, at the time of submitting the Proposals, it

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was made clear that M/s PMS would be the member of M/s ZDL led Consortium. It was submitted that M/s PMS was the subsidiary of M/s PPL, UK, and the words "on behalf of" were used in the Consortium Agreement dated 4.10.2007 only to indicate the relationship between M/s PMS and M/s PPL, UK. This position, according to the learned counsel, is indicated by the Bid documents submitted on 31.1.2008, Power of Attorney dated 18.10.2007, Notary Certificate, Covering letter dated 31.1.2008 and annexures to the Bid documents submitted by M/s ZDL.

12. On the question of financials, Shri Arun Jaitley, learned senior counsel for M/s ZDL, submitted that the Chart submitted before this Court by the learned counsel for M/s Lanco led Consortium was defective because the Financials for FY 2006-2007 has not been projected. In this connection, it was pointed out that M/s ZDL had submitted the details for FY October, 2003 to September, 2004, October, 2004 to September, 2005 and October, 2005 to September, 2006 as on 31.1.2008. It was pointed out that, M/s ZDL was following the Accounting Year from October to September. It was submitted that the last date for submission of Bids was 31.10.2007 initially, which stood extended later on till 31.1.2008. According to the learned counsel, the Balance Sheet for FY 2006-2007 was in the process of being prepared when the Bid documents were submitted on 31.1.2008 and consequently, the Balance Sheet for FY 2006-2007 could not be submitted. According to the learned counsel, if the Financials for the year including FY 2006-2007 are taken into account, then M/s ZDL lead Consortium satisfies all the financial parameters of net worth, turnover and cash accruals.

13. *Points for Consideration:*

- (A) Whether the modified Consortium Agreement dated 11.3.2008 resulted in a change in the constituents membership of the Consortium led by M/s ZDL.

A (B) Whether use of the expression "joint and several responsibility" in place of "joint and several liability" would justify rejection of the Bid Proposal made by the Consortium led by M/s ZDL as non-responsive/non-admissible in terms of the RFP.

B **Findings on Point No. (A):**

14. As per the scheme of RFP, at the stage of Submission of Proposals, the bidders were required to furnish the names of the Lead Member and other members of the consortium. In this case, one of the members of the consortium was M/s PMS. While furnishing "Details of Bidders", the name of the consortium member was shown as PMS. Similarly, against the column "Brief Description of the Company", the name of M/s PMS was mentioned as the international arm of M/s PPL. Therefore, at the stage of Submission of Proposals, M/s ZDL had stated that M/s PMS was the member of its Consortium. There was one more column which was required to be filled-in by the bidders, namely, "Ownership of the Organisation". In this column, M/s ZDL indicated that M/s PMS was a consortium member which was the wholly subsidiary company of M/s PPL, UK. It may be noted that, under the Scheme of RFP, the bidders had to offer a firm commitment to form SPC to implement and operate the above Project in Kerala, should the Sponsor (M/s VSL) select one of the five bidders as Licensee. Therefore, the Proposal had to be made in a prescribed format. On reading the said Proposal, therefore, it becomes clear that on the date, namely, 31.1.2008, being the cut-off date (when the bids were opened), M/s PMS was the member-constituent of the consortium led by M/s ZDL. At this stage, one must keep in mind that Section 212 of the Companies Act, 1956 which makes it obligatory on behalf of the holding company to annex to its Balance Sheet the Balance Sheet and P&L account and other financial particulars of its subsidiary. Section 212 requires the legal relationship of holding company and subsidiary company to be disclosed to all its members. In the world of

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globalization, we have consortium agreements/ joint venture agreements. It appears from the particulars given by the consortium led by M/s ZDL that M/s PMS is a part of an international group of companies headed by M/s PPL, UK. The prescribed Form warranted Disclosure giving particulars of the consortium members. The particulars furnished indicate that the Lead Member was M/s ZDL. It is an Indian company. One of the consortium member was M/s PMS, which is incorporated in UK. It is the 100% subsidiary of M/s PPL, UK. This information also became necessary because the format required the Bidder to disclose "Ownership" of the member-company. Therefore, if one reads the Proposal of the Lead Member, M/s ZDL, in the form prescribed, which Proposal was of 31.1.2008, one finds that M/s PMS alone *on its own* was indicated as a member of the consortium and M/s PPL was not shown as the member of the consortium. However, the original consortium/joint venture agreement dated 4.10.2007 signed by the member-constituent of the consortium led by M/s ZDL stood signed by M/s PMS on behalf of M/s PPL, UK. Therefore, on 3.3.2008, IDC (Project Advisor) wrote to M/s ZDL *inter alia* pointing out the defect in the consortium agreement dated 4.10.2007 in the following words:

"M/s PMS has signed consortium agreement dated 4.10.2007 on behalf of M/s PPL but *M/s PPL is not a member of the consortium.*"

Thus, the Project Advisor treated the above irregularity in the execution of the consortium agreement dated 4.10.2007 as a curable defect for which time was given to M/s ZDL up to 4.4.2008. Further, the Project Advisor clearly understood the Proposal to have had been given by M/s ZDL as the Lead Member of the Consortium, whose constituent *inter alia* included M/s PMS and not M/s PPL. By the said letter, the Project Advisor also called for Annual Reports of three financial year of M/s ZDL and Annual Reports of last 3 years of M/s PMS (*its own*). This query indicates that the Project

- A Advisor not only treated the above irregularity in the execution of the consortium agreement dated 4.10.2007 as the curable defect but it further shows that even, according to the Project Advisor, M/s PMS alone was the constituent member of the consortium led by M/s ZDL and it is for this reason that the
- B Project Advisor called for the annual reports of M/s PMS (its own). This defect was cured by M/s PMS within the extended period. It is interesting to note that the question of "authorization" by M/s PPL,UK, was not raised by the Project Advisor in its letter dated 3.3.2008. That aspect was raised only by the Law
- C Secretary who came to be Invited as a special invitee by the Chief Secretary in the meetings of the EC held on 8.4.2008 and 6.5.2008 (which is after the extended date 4.4.2008). It is not in dispute that M/s PPL, UK is the holding company of M/s PMS. M/s PMS is a subsidiary company. It is the separate legal entity. We are satisfied that at the stage of Submission
- D of Proposal itself and right from the inception, it was M/s PMS, who alone was the constituent member of the consortium. The question of authorization raised by the Law Secretary, in his opinion, is clearly an afterthought. In fact, there is a contradiction in his opinion. If M/s PPL was the member of the consortium,
- E as construed by the Law Secretary, there was no need for M/s PPL to authorize M/s PMS to execute the consortium agreement. On the other hand, if M/s PMS being the separate legal entity was a member of the consortium it had to sign the consortium agreement in its own capacity. The modified
- F consortium agreement dated 11.3.2008 is supported by a Resolution. The said consortium agreement is in line with the Proposal submitted on 31.1.2008.

15. One more aspect needs to be pointed out. The RFP
- G prescribes the form in which a bidder has to make his proposal. However, bidder was free to submit the consortium agreement in its own format. M/s Universal Legal (legal advisor to the Sponsor) cleared the proposal on 4.4.2008 stating that all requisite defects stood cured. It is only after 4.4.2008 that the
- H Law Secretary came into picture and gave an opinion to the

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contrary. Moreover, as found by the High Court in the impugned judgment, when the Law Secretary was asked to file his affidavit he came out with the statement that his advice was "off the record" advice. It was not given through Official Channel. At this stage, we may also point out that no material has been placed before the High Court as to the reference made by the Chief Secretary to the Law Secretary. Whenever opinion is sought, the persons seeking opinion has to formulate the query for which opinion is sought. We do not know the query raised by the Chief Secretary before the Law Secretary. No material has been placed before us in this regard. In fact, the very purpose of routing the query through Official Channel is that the querist formulates the query on which opinion is given. In this case, there is no formulation of such a query. In the circumstances, we find that the High Court was right in not giving weightage to the "off the record" advice of the Law Secretary. This is one of the circumstances which vitiates the process of decision making by the EC. The bid was declared as non-admissible in the IVth meeting of the EC held on 6.5.2008. The Minutes indicate that, before the EC, there were two Opinions. First opinion was that of M/s Universal Legal and the second opinion was that of the Law Secretary. There is nothing to indicate in the Minutes as to why the opinion of the legal advisor, M/s Universal Legal, stood rejected. There is no reason given as to why the opinion of the Law Secretary came to be accepted. Be that as it may, we are of the view that the modified consortium agreement was between members of the consortium led by M/s ZDL in which the member was M/s PMS and not M/s PPL, UK, right from the inception. Therefore, the entire exercise was to cure the defect. Time was given to M/s ZDL to cure the defect which in fact was cured before 4.4.2008. For the aforestated reasons, we hold that there was no change in the membership of the consortium led by M/s ZDL after 31.1.2008. In fact, even prior to the IVth meeting the EC did not call upon M/s ZDL/PMS to obtain Letter of Authority from M/s PPL, UK.

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A 16. For the above reasons we hold that there was no change in the membership of the Consortium led by M/s ZDL.

**Findings on Point No. (B):**

B 17. As stated above, the second ground for treating the Bid Proposal of the consortium led by M/z ZDL as non-responsive was that, in the consortium agreement, M/s ZDL has failed to incorporate the expression "joint and several liability". That, M/s ZDL has incorporated the clause under the expression "joint and several responsibility" in place of "joint and several liability" and consequently, the Bid Proposal became non-admissible/non-responsive in terms of the RFP. This was the basic argument advanced on behalf of GoK.

D 18. At the outset, it may be stated that in letter dated 3.3.2008 no such point was ever raised by the Project Advisor. As stated above, by the said letter dated 3.3.2008 curable defects were pointed out regarding M/s PMS having signed the consortium agreement dated 4.10.2007 on behalf of M/s PPL, UK, but no query was ever raised on the above point. On the contrary, as can be seen from the Minutes of the meetings held prior to 8.4.2008, the Project Advisor/Sponsor has used the word "responsibility" interchangeably with the word "liability". It is only in the opinion of the Law Secretary that, for the first time, the above objection is taken.

F 19. Be that as it may, the question is whether in the modified consortium agreement dated 11.3.2008 responsibilities and allocation of works stood clearly demarcated between the members of the consortium? We have examined the consortium agreement dated 11.3.2008. It clearly indicates that M/s ZDL is an Indian company. It is a lead member of the consortium. The agreement further indicates that there were two members in the consortium apart from M/s ZDL, namely, M/s PMS and M/s Peter Fraenkel & Partners. The agreement indicates that M/s ZDL shall be responsible for implementation of the Project along with M/s PMS and M/s

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Peter Fraenkel & Partners. M/s ZDL had to submit technical and financial bids. M/s ZDL had to act as project developers and principal coordinators. M/s ZDL had to arrange finances. On the other hand, M/s Peter Fraenkel & Partners had to do the work of designing and budget preparations whereas M/s PMS had to provide operational support during the implementation of the Project. Therefore, under the said Agreement, duties and responsibilities of each of the members stood carved out. Vide clause 7, members of the consortium were made "jointly and severally responsible" for every stage of implementation of the Project. The only objection raised by the GoK is that the word "liable" ought to have been used instead of the word "responsible" in clause 7 and since that word has not been used, the Bid Proposal of M/s ZDL needs to be dismissed. As stated above, in the meetings held prior to 8.4.2008, no such objection was ever raised. In fact, no opportunity was given to M/s ZDL to cure this defect though it was given to the consortium led by M/s Apollo (see page 81 of the SLP paper book in SLP (C) Nos. 30204-30205/2008 entitled State of Kerala v. M/s Zoom Developers Pvt. Ltd. & Ors.). The important point is that the EC treated the above objection as a curable defect. It is only after the Law Secretary came on the scene that the above objection was raised even after the clearance by M/s Universal Legal. Therefore, it is clearly an afterthought. Further under the consortium agreement dated 11.3.2008, it was stated that M/s ZDL, PMS and Peter Fraenkel & Partners shall be fully responsible for their individual portions of work. Under the said Agreement, it was further stated that, in case the Project stood awarded to the Consortium, the Consortium commits to hold a minimum stake of 51% in the SPC. This shows that in the matter of liability, the Consortium Agreement was only a step-in-aide to the formation of SPC. Further, as rightly held by the High Court in the impugned judgment, the apprehension of GoK that in the event of disputes between members of the consortium or in the event of non-implementation of the Project, GoK would not be in a position to enforce its claim was ill-founded because the licence

- A agreement between the successful bidder and the licensor (GoK) was yet to be entered into in which a provision as to "joint and several liability" had to be made, as mentioned in the RFP. The consortium agreement was only an assurance or a commitment to abide by the licence agreement. Lastly, it may
- B be stated that the word "responsibility" is no doubt different from the word "liability". What is submitted before us is that the expression "joint and several liability" was required to be incorporated in the consortium agreement in terms of RFP. What was submitted before us was that the said expression
- C constituted an objective criteria. What was submitted before us was that since the above expression in the RFP was treated as an objective criteria, the manner in which the said expression stood understood by the EC was irrelevant. We do not find merit in this argument. As stated above, though the
- D Form of Proposal was prescribed, the bidder was free to submit the consortium agreement in its own Form. In our view, in the absence of a prescribed format and in the absence of the definition of the word "responsibility" vis-à-vis the word "liability" in the RFP, it cannot be said that the said expression
- E "joint and several liability" was an objective criteria. It is true that in terms of RFP, the bidder was required to stipulate the words "joint and several liability" in the consortium agreement. But it is equally true that in certain cases objective words can be interpreted subjectively. For example, the word "regulate". It has
- F several times been decided that the power to regulate does not extend to a power to prohibit. But this very word has been held in some other cases to include the power to prohibit. In U.K., the Railway Board was entitled to impose a ban on smoking in trains under this very power to regulate. Therefore, one has to construe each of these words in that context. (see
- G Administrative Law by H.W. Wade and Forsyth- 9th ed. at pp. 432-435). In this very case, various bids were considered by the Project Advisor/Sponsor. They have themselves used the words "liability" and "responsibility" interchangeably. They have treated this defect as a curable defect. They have not rejected
- H the Bid Proposal on 25.2.2008 in the first meeting on the above

ground because the EC thought that the said defect was a curable defect. A

20. It was vehemently urged on behalf of M/s Lanco led Consortium that in the consortium agreement dated 4.10.2007 as well as in the consortium agreement dated 11.3.2008, there was a clause under the heading "Relationship of Parties" which indicated that each member of the consortium shall deal with the other on principal-to-principal basis till the formation of SPC. In the said clause, it was further stated that, nothing contained in the agreement shall be deemed to constitute any of the parties as agent of the other. Therefore, the members of the consortium led by M/s ZDL cannot be said to be jointly and severally liable at every stage of implementation of the Project. We do not find merit in this argument. As stated above, the consortium agreement dated 11.3.2008 spelt out the work allocation and the responsibility of each member of the consortium. It made the consortium responsible jointly and severally for implementation of the Project. The clause dealing with "relationship of the parties" merely stated that *till the formation of the SPC*, each member shall be related to each other on principal-to-principal basis. This is because the consortium is formed to make a bid for this Project only. Till the formation of SPC and till the consortium becomes a successful bidder, the parties relate to each other on principal-to-principal basis. But once that consortium becomes a successful bidder and commits to hold the minimum equity stake of 51% in the SPC, then the question of joint and several liability would certainly arise. Therefore, the High Court rightly held that the licence agreement between GoK and the successful bidder (consortium) has still to be executed and it is at that stage that, in any event, the clause of joint and several liability shall stand incorporated in the licence agreement. B  
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21. Before concluding, an attempt was made on behalf of M/s Lanco Kondapalli Power Pvt. Ltd. (appellant in the civil appeal arising out of SLP (C) No. 30305/2008) to demonstrate H

A before us that but for the financials of M/s PPL, the consortium led by M/s ZDL would not have met the financial qualification criteria as on the date of the submission of the Bid Proposal (31.1.2008). Learned counsel appearing on behalf of M/s Lanco Kondapalli Power Pvt. Ltd. submitted a Chart in support of his  
B above contention. We find no merit in this argument. The said Chart refers to the Financial Years October, 2003 to September, 2004, October 2004 to September, 2005, October, 2005 to September, 2006 as far as M/s ZDL is concerned. However, it may be noted that initially the last date for submitting the bid was 31.10.2007, which was extended to 31.1.2008. The  
C Balance Sheet and P&L account of M/s ZDL for the year ending 30.9.2007 stood adopted after audit only on 20.3.2008. If the figures for that year are taken into account then the financial qualification criteria stands satisfied.

D 22. For the aforesaid reasons, we find no infirmity in the impugned judgment of the Division Bench of the Kerala High Court which has given a declaration to the effect that the Outer Cover and Cover-1 submitted by the consortium led by M/s ZDL is admissible/responsive in terms of RFP. Consequently,  
E we declare that the Technical and Financial Proposals submitted by the said Consortium (respondent no. 1) are liable to be considered within 15 days from the date of this judgment.

F 23. Accordingly, the civil appeals stand dismissed with no order as to costs.

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Appeals dismissed.