

**NATIONAL COMPANY LAW TRIBUNAL**  
**PRINCIPAL BENCH**  
**NEW DELHI**

C.P NO. (IB)-66(PB)/2017  
CA NO.

CORAM:

PRESENT: CHIEF JUSTICE M. M. KUMAR  
Hon'ble President

SH. R.VARADHARAJAN  
Hon'ble Member (J)

ATTENDANCE-CUM-ORDER SHEET OF THE HEARING BEFORE PRINCIPAL BENCH OF  
THE NATIONAL COMPANY LAW TRIBUNAL ON 24.04.2017

NAME OF THE COMPANY: Mr. Satish Mittal  
Vs.  
Ozone Builders & Developers Pvt. Ltd.

SECTION OF THE COMPANIES ACT: U/s 9 of Insolvency and Bankruptcy Code 2016

S.NO.	NAME	DESIGNATION	REPRESENTATION	SIGNATURE
1.	RISHI SOOD	Adv.	Petitioner/Applicant	[Signature]

**ORDER**

This is an application filed under Section 9 of the Insolvency and Bankruptcy Code, 2016 (for brevity the 'Code') with a prayer for triggering insolvency process against M/s. Ozone Builders & Developers Private Limited. The Applicant has claimed that he is, an operational creditor, within the meaning of Section 9 read with Section 5(20) of the Code. He has named the respondent as Corporate Debtor.

2. Brief facts of the case necessary for disposal of the controversy may first be noticed. The Applicant has averred that

in pursuance of the representations made by the respondent, he was induced to deposit advance amount for purchase of a plot in the Ozone City which is a residential township belonging to respondent with a promise for its allotment within a period of one year from the date of payment. Accordingly, he deposited a sum of Rs. 50,00,000/- (Rupees Fifty Lakhs only) for booking of plots. A sum of Rs. 30,00,000/- (Rupees Thirty Lakhs only) was paid on 22.02.2013 in cash against the receipt issued by the respondent. After a gap of three months, the balance amount of Rs. 20,00,000/- (Rupees Twenty Lakhs only) was again paid in cash, although no receipt was issued in respect of the balance payment despite the commitment to issue the same. According to the Applicant, the entire amount was to be refunded in case of non-confirmation of booking in the project within a period of one year. On the aforesaid basis, the Applicant has claimed that a sum of Rs.30,00,000/- (Rupees Thirty Lakhs only) became due for refund after a period of one year on 22.2.2014 alongwith interest @18% per annum. It has been asserted by the Applicant that he made it absolutely clear to the respondent that he was no longer interested in the Project because the respondent had violated the terms and conditions on the basis of which the amount was deposited by the

Applicant. The aforesaid facts have been admitted on 01.09.2016 before the Investigating Officer of Economic Offence Wing, Central Zone, Faridabad by the respondent. However, the Applicant has remained unsuccessful to recover the principal amount of Rs.30,00,000/- (Rupees Thirty Lakhs only) plus interest.

3. The Applicant has claimed that a copy of the Demand Notice has already been served as per the requirement of Rule 5 of the Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016 and has called upon the respondent to make payment of the due amount. According to the Applicant, in the reply sent on 06.02.2017, a motivated and false defence has been raised to dispute the demand raised by the Applicant. It has not been shown by the respondent that any suit or arbitration proceedings in terms of Section 8(2)(a) of the Insolvency and Bankruptcy Code are pending so as to stop initiation of insolvency process. It is pertinent to notice that in their reply dated 06.02.2017, the respondent has taken a stand that a sum of Rs.30,00,000/- (Rupees Thirty Lakhs only) was deposited by the Applicant for taking allotment of plot/flat in Ozone City, Aligarh and the money was invested in the project. It was further clarified that the refund was not possible but they were committed to allot a unit to the

Applicant and has given two options namely allotment of flats or land lying vacant with the respondent.

4. We have heard the learned counsel at a considerable length and are of the view that the matter is covered against the Applicant by our order dated 20.02.2017 passed in C.P. No. (IB)-10(PB)/2017, titled as Col. Vinod Awasthy v. AMR Infrastructures Ltd. In the aforesaid case, we have taken the view on Section 9 and Section 5(20) & (21), which is evident from the perusal of following paras:

*“7. A perusal of section 9 of the code would show that in order to maintain an application as an ‘Operational Creditor’ the Petitioner has to satisfy the requirements of section 5(20) and (21) of the Code. According to section 9(1) a petition like the one in hand could be maintained only by an ‘Operational Creditor’ against the ‘Corporate Debtor. The aforesaid expression has been defined in section 5(20) & (21) which would also be attracted and applicable. Section 5 (20) & (21) of the code read thus:*

*“5. In this Part, unless the context otherwise requires,—*

*(20) operational creditor” means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred*

*(21) operational debt” means a claim in respect of the provision of goods or services including employment or a debt in respect of the repayment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority;”*

8. It is evident from the perusal of the aforesaid definition of ‘Operational Debt’ that it is a claim in respect of provision of goods or services including dues on account of employment or a debt in respect of repayment of dues arising under any law for the time being in force and payable to Centre or State Government or local authority. It is thus clear

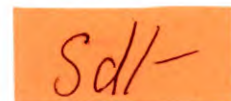
that debt may arise out of provision of goods or services or dues arising out of employment or dues arising under any law for time being in force and payable to the Centre/State Government. The framer of the Code have also defined the expression 'Financial Debt' in section 5(8) to mean a debt which is disbursed against the consideration of time value of money. However the framer of the Code has not included in the expression 'Operation Debt' as any debt other than the 'Financial Debt'. It is thus confined to aforesaid four categories like goods, services, employment and Government dues. In the present case the debt has not arisen out of the provisions of goods or services. The debt has also not arisen out of employment or the dues which are payable under the statute to the Centre/State Government or local body. The refund sought to be recovered is necessarily associated with the delivery of the possession of immovable property which has been delayed.

9. The next question is whether the Petitioner could be regarded as an 'Operational Creditor' within the meaning of section 5(20). The 'Operational Creditors' are those persons to whom the 'Corporate Debt' is owed and whose liability from the entity comes from a transaction on operations. The final report of the Committee in para 5.2.1 defines 'Operational Creditor' like the wholesale vendor of spare parts whose spark plugs are kept in inventory by Car Mechanic and who gets paid only after spark plugs are sold to acquire the status of 'Operational Creditor' so and so forth. The Petitioner in the present case has neither supplied any goods nor has rendered any service to acquire the status of an 'Operational Creditor'.

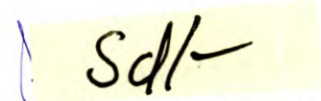
10. We are further of the view that given the time line in the code it is not possible to construe section 9 read with section 5(20) & (21) of the Code so widely to include within its scope even the cases where dues are on account of advance made to purchase the flat or a commercial site from a construction company like the Respondent in the present case especially when the Petitioner has remedy available under the Consumer Protection Act and the General Law of the land. Therefore we are not inclined to admit the petition".

5. When the facts of the present case are examined in the light of the law laid down in the case of Col. Vinod Awasthy (supra) no doubt is left that the application is liable to be dismissed. On facts and law, it is covered by the aforesaid judgment against the applicant.

6. For the aforesaid reasons, we find no merit in this application and the same is hereby dismissed. Keeping in view the tenderness of the provisions of IBC we refrain from saddling the Applicant with cost. We make it further clear that any observations made in this order shall not be construed as an expression of opinion on the merit of the controversy as we have refrained from entertaining the application at the initial stage itself when the respondent has not even entered appearance. Therefore, the right of the Applicant before any other forum shall not be prejudiced on account of dismissal of instant application.



**(CHIEF JUSTICE M.M.KUMAR)  
PRESIDENT**



**(R.VARDHARAJAN)  
MEMBER(JUDICIAL)**



27.

**Dated: 27.04.2017**

V.Sethi