[2023] 12 S.C.R. 1118 : 2023 INSC 748

CASE DETAILS

EXPERION DEVELOPERS PRIVATE LIMITED

v.

HIMANSHU DEWAN AND SONALI DEWAN AND OTHERS

(Civil Appeal No. 1434 of 2023)

AUGUST 18, 2023

[SANJIV KHANNA, BELA M. TRIVEDI AND UJJAL BHUYAN, JJ.]

HEADNOTES

Issue for consideration: Impugned order passed by NCDRC directing the appellant-builder/developer to refund to the respondents-allottees/ subsequent buyers, the amount collected towards excess sale area, overruling the contentions of the appellant on the grounds of the principle of *res judicata* and on the rule of binding precedent by applying its decision in Pawan Gupta case (a case related to the same housing project as the present matter) wherein the claim made by the appellant for the increase of the sale area was rejected and appeal thereagainst was dismissed by Supreme Court, if justified.

Constitution of India – Article 141 – Decision in Pawan Gupta challenged by appellant by filing appeals before Supreme Court which were dismissed without any reasons being recorded – Review petitions there against were also dismissed – Article 141, if attracted:

Held: Dismissal of the appeal in the case of Pawan Gupta without any reasons being recorded would not attract Article 141 as no law was declared by the Supreme Court, which will have a binding effect on all courts and tribunals in India – There is a clear distinction between the binding law of precedents in terms of Article 141 and the doctrine of merger and *res judicata* – Order passed by this Court dismissing the appeal in the case of Pawan Gupta would operate as *res judicata* in the said case but does not lay down a binding precedent applicable to other cases – It would not operate as *res judicata* in the case of the respondents against the appellant as they were not parties to the said case, and the proceedings initiated by Pawan Gupta were fact specific and not in a representative capacity – Thus, the order of this Court in Pawan Gupta cannot be read as a precedent and applied to the

cases in hand – Precedents cannot decide questions of fact – In Pawan Gupta there was no material on record placed by the appellant showing the actual increase in the sale area – However, the appellant in the instant case had produced the Architect's certificates and reports to show that there was an actual increase in the sale area, justifying its demand for the extra payment and which documents were not contradicted by the respondents nor had they disputed the contents thereof – The decision in the case of Pawan Gupta was based on evidence adduced by the appellant-builder/developer, which was not found to be sufficient and cogent to justify and substantiate the demand raised in view of the increased sale area – National Commission was therefore required to consider and examine the contentions of the appellant and not overrule the same on the grounds of the principle of *res judicata* and on the rule of binding precedent, which do not apply – Impugned judgment set aside – Matter remanded back in terms of the observations and directions given – Doctrine of merger – *Res judicata* – Code of Civil Procedure, 1908 – Order XLI, r.27 – Consumer Protection. [Paras 31, 32, 35, 36 and 38]

Consumer Protection Act, 2019 – s.69 – Limitation – 'Cause of action':

Held: 'Cause of action' being the foundation of the claim refers to the entire set or bundle of facts necessary and material to prove in order to get a judgment – It refers to a definite point of time when the requisite ingredients constituting that 'cause of action' are complete – The 'cause of action' is complete when they provide the aggrieved party with the right to invoke jurisdiction of the court/forum – The test is to determine when the aggrieved person could have first maintained action for a successful result – In the present case, communication/letter dtd. 27.04.2017 by the appellant was not the starting point of the 'cause of action' – It was an assertion, albeit without any specific details or particulars – The 'cause of action' arose when the appellant insisted and compelled the respondents/allottees to make payment, but did not furnish the details and particulars to enable the respondents/allottees to ascertain the actual allocated sale area – In the context of the present case, it is an accepted position that the sale deeds were executed with the respondents between the period from 13.04.2018 to as late as 09.01.2020 – Thus, the complaints filed by the respondents cannot be dismissed on the ground of being barred by limitation u/s.69. [Para 14]

Doctrine of merger – Logic behind:

Held: The logic behind the doctrine of merger is that there cannot be more than one decree or operative orders governing the same subject matter at a given point of time – When a decree or order passed by an inferior court, tribunal or authority is subjected to a remedy available under law before a superior forum, then the decree or order under challenge continues to be effective and binding; nevertheless, its finality is put in jeopardy – Once the superior court disposes the dispute before it in any manner, either by affirming the decree or order, by setting aside or modifying the same, it is the decree of the superior court, tribunal or authority, which is the final binding and operative decree – The decree and order of the inferior court, tribunal or authority gets merged into the order passed by the superior forum – However, this doctrine is not of universal or unlimited application – The nature of jurisdiction exercised by the superior court and the content or subject matter of challenge laid or could have been laid will have to be kept in view – Constitution of India – Article 136. [Para 32]

Consumer Protection – Acquiescence – Estoppel – Subsequent purchaser – Plea raised by the appellant on acquiescence and estoppel, as the respondents-allottees/subsequent buyers are seeking a refund of the amount paid without any demur or protest about four years after the payments were made – It was also argued that it is not even the case of the respondents that original allottees had made payments under some threat, coercion or duress:

Held: As held in Laureate Buildwell Private Limited v. Charanjeet Singh the nature and extent of relief, to which the subsequent purchaser can be entitled is fact and situation dependent – It cannot be argued that a subsequent purchaser, who steps into the shoes of the original allottee of a housing project in which the builder has not honoured its commitment to deliver the flat within the stipulated time, should not expect even reasonable time for the performance of builder's obligation – Such an argument, if accepted, would lead to a situation where a large number, possibly thousands of flat buyers, waiting for their promised flats or residences would be left without any relief – Such a conclusion would be arbitrary – In these cases, it would be fair to assume that the subsequent purchaser had knowledge of the delay, but such knowledge cannot be extended to accept the submission

that such delay shall continue indefinitely based upon an a priori assumption – The equities have to be properly moulded – As these aspects and questions are essentially factual, albeit have not been ascertained and addressed in the present case, an order of remand to the National Commission is passed to examine the issue in light of the dictum laid down by this Court. [Paras 16, 17]

LIST OF CITATIONS AND OTHER REFERENCES

Experion Developers Pvt Ltd v. Pawan Gupta Decision dtd.12.01.2021 in Civil Appeal Nos. 3703- 3704 of 2020 – held inapplicable.

Laureate Buildwell Private Limited v. Charanjeet Singh 2021 SCC OnLine SC 479; *Kunhayammed and Others v. State of Kerala and Another* (2000) 6 SCC 359: [2000] 1 Suppl. SCR 538; *Khoday Distilleries Limited and Others v. Sri Mahadeshwara Sahakara Sakkare Karkhane Limited* (2019) 4 SCC 376: [2019] 3 SCR 411; *State of Rajasthan v. Nemi Chand Mahela and Others* (2019) 14 SCC 179: [2019] 18 SCR 995; *Malook Singh and Others v. State of Punjab and Others* (2021) SCC OnLine SC 876; *Makhija Construction & Engg. (P) Ltd. v. Indore Development Authority and Others* (2005) 6 SCC 304 – relied on.

Wing Commander Arifur Rahman Khan and Aleya Sultana and Others v. DLF Southern Homes Private Limited and Others (2020) 16 SCC 512: [2020] 9 SCR 136; *Abbai Maligai Partnership Firm and Another v. K. Santhakumaran and Others* (1998) 7 SCC 386: [1998] 1 Suppl. SCR 535; *Fida Hussain and Others v. Moradabad Development Authority and Another* (2011) 12 SCC 615: [2011] 9 SCR 290 – referred to.

Pawan Gupta v. Experion Developers Private Limited 2020 SCC OnLine NCDRC 788 – referred to.

OTHER CASE DETAILS INCLUDING IMPUGNED ORDER AND APPEARANCES

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 1434 of 2023.

From the Judgment and Order dated 16.01.2023 of the National Consumer Disputes Redressal Commission, New Delhi in Consumer Case No. 34 of 2022.

Appearances:

Dr. Abhishek Manu Singhvi, Amit Sibal, Sr. Advs., Debmalya Banerjee, Ms. Manmeet Kaur, Rohan Sharma, Kartik Bhatnagar, Anmol, Nicholas Choudhury, Gurtejpal Singh, Ms. Suditi Batra, Shreesh Chadha, Amit Bhandari, Abhishek Grover, Abhishek Rana, Ms. Ashna Arora, M/s. Karanjawala & Co., Advs. for the Appellant.

Bishwajit Bhattacharyya, Sr. Adv., Chandrachur Bhattacharyya, Sahil Tagotra, Advs. for the Respondents.

JUDGMENT / ORDER OF THE SUPREME COURT

JUDGMENT

SANJIV KHANNA, J.

The instant appeal filed by M/s. Experion Developers Private Limited[1] under Section 67 of the Consumer Protection Act, 2019[2], is directed against the order and judgment dated 16.01.2023 passed by the National Consumer Disputes Redressal Commission[3], in the Consumer Case No. 34/2022, whereby the appellant has been directed to refund to Himanshu Dewan & Sonali Dewan & Others[4], the amount collected towards excess sale area, and to execute supplementary correction deeds within six weeks from the date of the order.

2. The appellant in the instant case had developed and constructed the apartments in a housing project, namely "Windchants", situated in Gurgaon, Haryana. The respondents are the allottees or the subsequent purchasers/ buyers of their apartments. The contractual terms *inter-se* are governed by the "Apartment Buyer Agreement"[5].

3. Clause 8 of the agreement pertains to the *"CHANGES AND VARIATIONS IN THE SALE AREA".* The relevant part of Clause 8.6(ii) and Clause 8.7 read: -

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1 For short, "the appellant".
2 For short, "the Act".
3 For short, "National Commission".
4 For short, "the respondents".
5 For short, "the agreement".

"8.6 While every attempt shall be made to adhere to the Sale Area, in case any changes result in any revision in the Sale Area, the Company shall advise the Buyer in writing along with the commensurate increase/decrease in Total Sale Consideration based, however, upon the BSP as agreed herein. Subject otherwise to the terms and conditions of this Agreement, a maximum of 10% variation in the Sale Area and the commensurate variation in the Total Sale Consideration is agreed to be acceptable to the Buyer and the Buyer undertakes to be bound by such increase/decrease in the Sale Area and the commensurate increase/decrease in the Total Sale Consideration. For any increase/ decrease in the Sale Area, the payment for the same shall be required to be adjusted at the time of Notice of Possession or immediately in case of any transfer of the apartment before the Notice of Possession or as otherwise advised by the Company.

8.7 If any of the Changes leads to any change in sale area of the apartment in excess of Ten Percent (10%) of the Sale Area mentioned herein at any time prior to the execution of the Conveyance Deed for the Apartment and such variation is unacceptable to Buyer, all attempts shall be made by the Company to offer an alternate apartment of a sale area similar to the Sale Area of the Apartment within a maximum of 10% variation in the Sale area within the Group Housing Colony subject to availability. If such alternate apartment is available, the applicable Total Sale Consideration for such alternate apartment shall be payable/refundable, as the case may be, for the sale area of the alternate apartment at the BSP mentioned herein and there shall be no claim against the Company in respect of the Apartment nor shall otherwise be raised by the Buyer in this regard at any time."

4. The expression "Sale Area" as defined in Clause 1(xlviii), reads: -

"1. (xlviii) - 'Sale Area' shall include the covered area, inclusive of areas enclosed by the periphery walls, balconies/ decks, area under the columns and wails, half of the area of walls common with other premises, cupboads, projections/ledges, area utilized for the common services and facilities provided viz. areas in/under staircases, circulation areas, walls atriums, stilts, lift shafts and lobbies, lift machine rooms, service shafts, passages/ corridors, refuge areas, common washrooms/

toilets, mails rooms, all electrical plumbing and fire shafts, community facilities, common service rooms, security rooms, sewage treatment plants, underground and overhead water storage tanks, DG/panel room, terrace gardens, air handling units, pantries and any other areas which have been paid for or are constructed by the Company for common use, but shall exclude the areas under the following:-

a) Sites for retail shops and other commercial areas in the Project.

b) Amenities such as schools, medical centre/dispensary, creche, other health centers and the like.

c) Dwelling units for the economically weaker sections as prescribed under Applicable Laws.

d) Car Parking Spaces"

5. According to the appellant, there was an increase in the sale area, earlier provisionally allotted to the respondents, and therefore *vide* communication/letter dated 27.04.2017, the respective allottees were informed about the increase and revision in the sale area of their apartments. Accordingly, the differential demand letters on account of such increase were issued by the appellant to the allottees of the apartments, including the respondents. The respondents/their respective previous allottees made payments towards the differential demand without any demur or protest between the period December 2017 to August 2018, and the appellant executed the conveyance deeds in their favour between the period April 2018 to September 2019.

6. Subsequently, the respondents on 25.02.2022 filed a complaint being Consumer Case No. 34/2022 before the National Commission seeking a refund of the amounts paid by them towards the increased sale area alleging, *inter alia,* that there was neither increase in the carpet area nor in the built-up area, and that the demand towards increase in the sale area made by the appellant was illegal. The respondents relied upon the decision dated 26.08.2020 rendered by the National Commission in the case of ***Pawan Gupta v. Experion Developers Private Limited.***[6]

6 2020 SCC OnLine NCDRC 788.

7. The case was resisted by the appellant by filing a reply challenging the very maintainability of the consumer case and contending, *inter alia,* that no 'cause of action' had arisen. According to the appellant, respondent nos. 1, 2 and 5 were the subsequent allottees, who came into picture much after the increase in the sale area and raising of demand therefor. Even the payments for the same were made by their concerned predecessor allottees without any protest. In case of respondent no. 6, the predecessor allottee was already intimated about the increase in the sale area and had not objected to the increase. Respondent no. 6 was, thus, well aware of the increase in the sale area and had made payments towards the same without any protest. Other respondents also had made payments towards the increase in the sale area without any protest. It was further contended that as per Section 69 of the Act, a consumer complaint could be filed within two years from the date when the 'cause of action' arises. In the instant case, the 'cause of action' had arisen on 27.04.2017, when the demand for the increased area was raised by the appellant. The complaint was filed before the National Commission on 25.02.2022, that is, about five years after the 'cause of action' had arisen and three years after the lapse of limitation period. Relying upon the certificates, reports and affidavits of the architects, it was contended that there was an actual increase in the sale area of the apartments as mentioned therein and therefore, the charges demanded were valid and legal, in terms of Clause 8 of the agreement.

8. The respondents in the rejoinder had contended that due to the Covid pandemic, the period of limitation was suspended during the period from 15.03.2020 to 28.02.2022 by this Court in terms of the directions issued in *Suo Moto* Writ Petition (Civil) No. 3 of 2020, and hence, the claim of the respondents was within the period of limitation. In the communication/ letter dated 27.04.2017, intimating the purported increase in the sale area, the appellant had not placed any material or evidence to justify the increase in the area. They allege that the reports and certificates of the architects are all post-dated records, which cannot be taken as the basis for justifying the increase in the sale area.

9. The National Commission, as stated herein above, by the impugned judgment has directed the appellant to refund the amount and execute

supplementary/correction deeds. The appellant being aggrieved by the same, has preferred the present appeal.

10. Heard the learned Senior Advocates Dr. Abhishek Manu Singhvi and Mr. Amit Sibal appearing for the appellant, and the learned Senior Advocate Mr. Bishwajit Bhattacharyya appearing for the respondents.

11. At the outset, we must record our disagreement with the finding recorded by the National Commission as to the 'continuing cause of action' till 26.08.2020, which is the date when the question of the excess sale area was decided by the National Commission in CC Nos. 285/2018 and 286/2018 titled ***Pawan Gupta v. Experion Developers Private Limited***. The issue of limitation has to be decided as per the provisions in the enactment, in the instant case Section 69[7] of the Act, which prescribes a two years limitation to file a complaint from the date on which the 'cause of action' has arisen. The 'cause of action' means every fact, which, if traversed, is necessary to prove in order to support the claimant's right to judgment, is not dependant on a decision in another case by an allottee raising a similar issue.

12. As per the respondents, the 'cause of action' arose when the payments towards the increase in the sale area were made, and thereupon, the conveyance deeds were executed between April 2018 to September 2019. They also submit, on account of the Covid pandemic, the period from 15.03.2020 to 28.02.2022 has to be excluded in terms of the directions issued by this Court in *Suo Moto* Writ Petition (Civil) No. 3 of 2020. Since the complaints were made on 25.02.2022, and on exclusion of the period between 15.03.2020 to 28.02.2022, the complaints would be well within the limitation of two years from the date on which the 'cause of action' had arisen as prescribed in Section 69 of the Act.

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7 69. Limitation period.—(1) The District Commission, the State Commission or the National Commission shall not admit a complaint unless it is filed within two years from the date on which the cause of action has arisen.

(2) Notwithstanding anything contained in sub-section (1), a complaint may be entertained after the period specified in sub-section (1), if the complainant satisfies the District Commission, the State Commission or the National Commission, as the case may be, that he had sufficient cause for not filing the complaint within such period:

Provided that no such complaint shall be entertained unless the District Commission or the State Commission or the National Commission, as the case may be, records its reasons for condoning such delay.

13. The appellant, relying upon Section 9[8] of the Limitation Act, 1963, which provides that once limitation starts running no subsequent disability or inability to institute a suit or make an application would stop it, have argued that the 'cause of action' arose and commenced on 27.04.2017, which is when the appellant had intimated the increase in the sale area and, consequently, the enhancement of price. Accordingly, in terms of Section 69 of the Act, which prescribes the limitation of two years from the date on which the 'cause of action' has arisen, the limitation had come to an end on 26.04.2019. Therefore, the respondents would not be entitled to the benefit of exclusion of the period from 15.03.2020 to 28.02.2022.

14. Having gone through the wording of the communication/letter dated 27.04.2017, we do not find any merit in the submission of the appellant. The communication/letter dated 27.04.2017 by the appellant states that the construction work was in progress and that the appellant would soon be starting the occupation certificate process. Further, with the project reaching the handover stage, the appellant had got clarity on the overall areas and subsequent impact on the respective units. As per the calculation, the sale area of the apartment had increased by the square feet as indicated in the communication dated 27.04.2017. We do not read the communication/letter as the starting point of the 'cause of action'. 'Cause of action' being the foundation of the claim refers to the entire set or bundle of facts necessary and material to prove in order to get a judgment. It refers to a definite point of time when the requisite ingredients constituting that 'cause of action' are complete. The 'cause of action' is complete when they provide the aggrieved party with the right to invoke jurisdiction of the court/forum. The test is to determine when the aggrieved person could have first maintained action for a successful result. In our opinion, the communication/letter dated 27.04.2017 was an assertion, *albeit* without any specific details or particulars. The appellant, as per the contractual terms, is well within their right to ask for enhanced

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8 9. Continuous running of time.—Where once time has begun to run, no subsequent disability or inability to institute a suit or make an application stop it:

Provided that, where letters of administration to the estate of a creditor have been granted to his debtor, the running of the period of limitation for a suit to recover the debt shall be suspended while the administration continues.

sale consideration on increase in the sale area as defined. The respondents have not questioned and challenged this right of the appellant. They have challenged the computation and calculations. The respondents have the right to ask for calculations and details, when the appellant had stated that the sale area had increased. On being satisfied with the calculation, the respondents could have accepted the increase in the sale area, if the same was in accordance with the agreement. The 'cause of action' arose when the appellant insisted and compelled the respondents/allottees to make payment, but did not furnish the details and particulars to enable the respondents/allottees to ascertain the actual allocated sale area. One would not expect the allottee or the consumer to challenge the demand, which is in terms of the contract between the parties, and is therefore not questionable. In such cases, no 'cause of action' arises. Further, the onus to justify and substantiate the claim and calculations of increased sale area was, and is on the appellant. In the context of the present case, it is an accepted position that the sale deeds were executed with the respondents between the period from 13.04.2018 to as late as 09.01.2020. In view of the aforesaid, the complaints filed by the respondents cannot be dismissed on the ground of being barred by limitation under Section 69 of the Act. We also observe that the consumer forums have the power to condone the delay when sufficient cause is shown, even after two years of the 'cause of action' having arisen. While no application for condonation of delay was filed, the National Commission could have always granted an opportunity to the respondents.

15. At the same time, we should notice the argument raised by the appellant on acquiescence and estoppel, as the respondents are seeking a refund of the amount paid without any demur or protest about four years after the payments were made. Therefore, it is submitted that the plea of deficiency of service is hit by the legal bar of acceptance and ones' previous action and conduct. It is highlighted that the conveyance deeds were executed by the appellant on the respondents/allottees upon making full payment, including the payments with regard to the increased area, and such payment, it is submitted, was voluntary and without reservation. It is also argued by the appellant that it is not even the case of the respondents that they/original allottees had made payments under some threat, coercion or duress. Therefore, it does not lie in the mouth of the respondents to say,

rather, they were estopped from saying four years after the execution of the conveyance deeds in their favour that there was no actual increase in the sale area and the demand raised by the appellant in that regard was not justified or was illegal.

16. Similar issues had arisen before this Court in ***Wing Commander Arifur Rahman Khan and Aleya Sultana and Others*** v. ***DLF Southern Homes Private Limited and Others***[9]. This Court accepted the argument by the consumers that execution of a deed of conveyance by a flat buyer would not preclude a consumer claim for compensation for delayed possession in a case where the allottees were not given an option, but were rather told that the possession would not be given and the conveyance deed would not be executed without the acceptance of the offer of possession terms. In the said case, the builder/developer had stated that it would not handover the possession and execute the conveyance deed without acceptance of the offer of possession terms. Any request to take over possession and execute the documents under protest was untenable. The consumers were, in fact, asked to file an unconditional affidavit/undertaking to that effect, as execution of documents under protest or claim of coercion was not to be entertained. In this background, this Court in ***Arifur Rahman Khan*** (supra) held that the flat buyers/consumers were essentially presented with an unfair choice of either retaining their right to pursue their claims, in which event they would not get possession or title in the meantime, or to forsake the claims in order to perfect their title to the flats for which they had paid valuable consideration. Accordingly, the question needed to be addressed was whether a flat buyer who seeks to espouse a claim against the developer for delayed possession can, as a consequence of doing so, be compelled to defer the right to obtain a conveyance to perfect their title. This Court held that it would be manifestly unreasonable to expect that in order to pursue a claim for compensation for delayed handing over of possession, the purchaser must indefinitely defer obtaining a conveyance of the premises purchased or, if they seek to obtain a deed of conveyance to forsake the right to claim compensation. The contrary position which the National Commission had espoused, this Court was of the view cannot

9 (2020) 16 SCC 512.

be countenanced and accepted. This Court thus rejected the argument that on the execution of the conveyance deed, the transaction ceases to be a transaction in the nature of "supply of services" covered under the Consumer Protection Act, 1986 and becomes a mere sale of immovable property and, therefore, it is not amenable to the jurisdiction of the consumer fora. At the same time, this Court had refused to interfere and grant relief in cases of purchasers who had entered into specific settlement deeds with the developers observing that it would only be appropriate and proper if the parties were held down by the terms of the bargain. The contention that the settlement deeds were executed under coercion or under undue influence was also not accepted since no specific material had been produced on record to demonstrate the same. This Court also held that subsequent purchasers cannot benefit from the order of this Court therein. However, this view *in re.* the subsequent purchasers stands overruled by a bench of three judges' in ***Laureate Buildwell Private Limited*** v. ***Charanjeet Singh***[10]. In ***Laureate Buildwell Private Limited*** (supra) the larger bench over-ruled the ratio laid down in ***Arifur Rahman Khan*** (supra) to the extent that a subsequent purchaser would not be entitled to the benefit of the order passed in case of the original allottee. On the other hand, it has been held that the nature and extent of relief, to which the subsequent purchaser can be entitled, is fact and situation dependent. It cannot be argued that a subsequent purchaser, who steps into the shoes of the original allottee of a housing project in which the builder has not honoured its commitment to deliver the flat within the stipulated time, should not expect even reasonable time for the performance of builder's obligation. Such an argument, if accepted, would lead to a situation where a large number, possibly thousands of flat buyers, waiting for their promised flats or residences would be left without any relief. Such a conclusion would be arbitrary. In these cases, it would be fair to assume that the subsequent purchaser had knowledge of the delay, but such knowledge cannot be extended to accept the submission that such delay shall continue indefinitely based upon an *a priori* assumption. The equities have to be properly moulded.

10 2021 SCC OnLine SC 479.

17. As these aspects and questions are essentially factual, *albeit* have not been ascertained and addressed in the present case, we would pass an order of remand to the National Commission to examine the issue in light of the *dictum* laid down by this Court. Upon the facts being first ascertained, the legal principles have to be applied.

18. There is yet another and a stronger reason why we are inclined to pass an order of remand. For this purpose and for the sake of convenience, we would reproduce the observations by the National Commission in ***Pawan Gupta*** (supra) on the merits for rejecting the claim made by the builder/developer (the appellant) for the increase of the sale area. These are as under:

> "The complaints have been filed mainly for two reasons. The first is that the opposite party has demanded extra money for excess area and second is the delay in handing over the possession. In respect of excess area, the complainant has made a point that without any basis the opposite party sent the demand for excess area and the certificate of the architect was sent to the complainant, which is of a later date. The justification given by the opposite party that on the basis of the internal report of the architect the demand was made for excess area is not acceptable because no such report or any other document has been filed by the opposite party to prove the excess area. Once the original plan is approved by the competent authority, the areas of residential unit as well as of the common spaces and common buildings are specified and super area cannot change until there is change in either the area of the flat or in the area of any of the common buildings or the total area of the project (plot area) is changed. The real test for excess area would be that the opposite party should provide a comparison of the areas of the original approved common spaces and the flats with finally approved common spaces/ buildings and the flats. This has not been done. In fact, this is a common practice adopted by majority of builders/developers which is basically an unfair trade practice. This has become a means to extract extra money from the allottees at the time when allottee cannot leave the project as his substantial amount is locked in the project and he

> is about to take possession. There is no prevailing system when the competent authority which approves the plan issues some kind of certificate in respect of the extra super area at the final stage. There is no harm in communicating and charging for the extra area at the final stage but for the sake of transparency the opposite party must share the actual reason for increase in the super area based on the comparison of the originally approved buildings and finally approved buildings. Basically the idea is that the allottee must know the change in the finally approved lay-out and areas of common spaces and the originally approved lay-out and areas. In my view, until this is done, the opposite party is not entitled to payment of any excess area. Though the Real Estate Regulation Act (RERA) 2016 has made it compulsory for the builders/developers to indicate the carpet area of the flat, however the problem of super area is not yet fully solved and further reforms are required."

19. The appellant had challenged the said decision of the National Commission by filing the appeals being Civil Appeal Nos. 3703-3704 of 2020 before this Court. However, they were dismissed *vide* the order dated 12.01.2021. The order reads as under:

> "1. We are not inclined to interfere with the order of the National Consumer Disputes Redressal Commission dated 26 August 2020 in Consumer Complaint Nos. 285 and 286 of 2018.
>
> 2. The appeals are accordingly dismissed.
>
> 3. Pending application, if any, stands disposed of."

20. The review petitions, being R.P. (C) Nos. 1357-1358 of 2021, in the said civil appeals filed by the appellant, were also dismissed by this Court on 11.01.2022 by passing the following order:

> "1. Application for oral hearing is dismissed.
>
> 2. We have carefully gone through the review petitions and the connected papers. We find no merit in the review petitions and the same are accordingly dismissed.
>
> 3. Pending applications, if any, stand disposed of."

21. The order dated 12.01.2021 of this Court dismissing the civil appeals and the order dated 11.01.2022 dismissing the subsequent review petitions filed in the case of ***Pawan Gupta*** (supra) are non-reasoned orders that do not state what has weighed with the court while dismissing the appeals and the review petitions. However, the result is that the order passed by the National Commission in the case of ***Pawan Gupta*** (supra) has attained finality and binds the parties to the decision.

22. Learned counsel for the parties have made elaborate submissions on the issue of whether the orders passed by this Court in the case of ***Pawan Gupta*** (supra) by applying the doctrine of merger, principle of *res judicata* and in view of the rule of precedential value, would foreclose the submissions raised by the appellant in the present case. Learned Senior Advocate, Mr. Bhattacharyya, appearing on behalf of the respondents, has submitted that the findings recorded in the judgment by the National Commission in ***Pawan Gupta***'s (supra), which is a case related to the same housing project, has merged with the order passed by this Court in the appeals preferred by the appellant and it will be binding on the appellant on subsequent cases, including the cases filed by the respondents.

23. On the other hand, it is submitted by learned Senior Advocates, Dr. Abhishek Manu Singhvi and Mr. Amit Sibal, that the complaint preferred by Pawan Gupta was in his individual capacity and not in a representative capacity. Pawan Gupta had made specific prayer for handing over possession of his unit, for awarding interest on the amount paid by him for the delay that occurred in handing over possession and also for a refund of the amount charged by the appellant towards service tax, car parking and increase in the common area. Hence, upon the dismissal of the statutory appeals filed by the appellant in case of ***Pawan Gupta*** (supra), the judgment of the National Commission would merge into the order of this Court through a non-speaking order. The result would be that the litigation *inter se* the parties in case of ***Pawan Gupta*** (supra) had attained finality in the said case. Nonetheless, it could not be construed by any stretch of imagination that the National Commission was barred from examining or deciding the issues involved in the instant case as the appellant had placed on record details and evidence in the form of the architect's certificate dated 23.09.2020 and a report of

the same date with calculations to show and justify the increase in the sale area. The architect's certificate and the report dated 23.09.2020 were not placed before the National Commission in the case of ***Pawan Gupta*** (supra). No doubt, the same were filed before this Court as additional documents, but the appeal itself was dismissed *in limine* without taking the additional documents on record, and that too by a non-reasoned order. In the present case, the architect's certificate and the report dated 23.09.2020 were placed before the National Commission, but they were not examined and considered in the reasons set out by the National Commission. Decision in ***Pawan Gupta*** (supra) was simply applied.

24. Specifically on the question of additional documents, it is submitted by Learned Senior Advocate, Mr. Bhattacharyya, appearing on behalf of the respondents, that once an application for additional documents was filed in this Court, the doctrine of merger would apply and, therefore, the present appeal merits dismissal on this short ground.

25. This Court has examined doctrine of merger in several decisions, but we would, for the purpose of this case, refer to only two decisions in ***Kunhayammed and Others*** v. ***State of Kerala and Another***[11] and ***Khoday Distilleries Limited and Others*** v. ***Sri Mahadeshwara Sahakara Sakkare Karkhane Limited.***[12], which approves of the ratio in ***Kunhayammed*** (supra).

26. ***Kunhayammed*** (supra) refers to several other decisions of this Court and has crystallised the legal position as under:

> "**44.** To sum up, our conclusions are:
>
> (*i*) Where an appeal or revision is provided against an order passed by a court, tribunal or any other authority before superior forum and such superior forum modifies, reverses or affirms the decision put in issue before it, the decision by the subordinate forum merges in the decision by the superior forum and it is the latter which subsists, remains operative and is capable of enforcement in the eye of law.

11 (2000) 6 SCC 359.
12 (2019) 4 SCC 376.

(*ii*) The jurisdiction conferred by Article 136 of the Constitution is divisible into two stages. The first stage is upto the disposal of prayer for special leave to file an appeal. The second stage commences if and when the leave to appeal is granted and the special leave petition is converted into an appeal.

(*iii*) The doctrine of merger is not a doctrine of universal or unlimited application. It will depend on the nature of jurisdiction exercised by the superior forum and the content or subject-matter of challenge laid or capable of being laid shall be determinative of the applicability of merger. The superior jurisdiction should be capable of reversing, modifying or affirming the order put in issue before it. Under Article 136 of the Constitution the Supreme Court may reverse, modify or affirm the judgment-decree or order appealed against while exercising its appellate jurisdiction and not while exercising the discretionary jurisdiction disposing of petition for special leave to appeal. The doctrine of merger can therefore be applied to the former and not to the latter.

(*iv*) An order refusing special leave to appeal may be a non-speaking order or a speaking one. In either case it does not attract the doctrine of merger. An order refusing special leave to appeal does not stand substituted in place of the order under challenge. All that it means is that the Court was not inclined to exercise its discretion so as to allow the appeal being filed.

(*v*) If the order refusing leave to appeal is a speaking order, i.e., gives reasons for refusing the grant of leave, then the order has two implications. Firstly, the statement of law contained in the order is a declaration of law by the Supreme Court within the meaning of Article 141 of the Constitution. Secondly, other than the declaration of law, whatever is stated in the order are the findings recorded by the Supreme Court which would bind the parties thereto and also the court, tribunal or authority in any proceedings subsequent thereto by way of judicial discipline, the Supreme Court being the Apex Court of the country. But, this does not amount to saying that the order of the court, tribunal or authority below has stood merged in the order of the Supreme Court rejecting the special leave petition or that the

order of the Supreme Court is the only order binding as res judicata in subsequent proceedings between the parties.

(*vi*) Once leave to appeal has been granted and appellate jurisdiction of Supreme Court has been invoked the order passed in appeal would attract the doctrine of merger; the order may be of reversal, modification or merely affirmation.

(*vii*) On an appeal having been preferred or a petition seeking leave to appeal having been converted into an appeal before the Supreme Court the jurisdiction of High Court to entertain a review petition is lost thereafter as provided by sub-rule (1) of Rule 1 of Order 47 CPC."

27. The aforesaid decision no doubt draws the distinction between a simple non-speaking order passed by this Court rejecting the special leave to appeal filed under Article 136 of the Constitution of India, in which case the doctrine of merger has no application, and cases where this Court exercises its appellate power in terms of the statute or the Constitution. In the former set of cases, the grant of special leave to appeal is discretionary. The effect of a non-speaking order of dismissal of the special leave petition without anything more indicating the grounds or reasons for dismissal by a necessary implication cannot be taken as acceptance of the reasons or the ratio of the judgment under challenge. It is not correct to assume that the Court has implicitly decided all the questions. There could be multiple reasons why in a particular case a special leave to appeal can be refused. It would be incorrect to attempt to embark on such reasons when they have not been so stated. Such reasons can be varied and different, and may not completely and directly relate to the merits of the case as to be construed as an *imprimatur* of this Court on the correctness of the decision appealed against. A case may not raise a question of general principle but turn on its own facts. Facts of the particular case may not be suitable as a foundation for determining some question of a general principle. Due to heavy backlog of work, this Court has to restrict the intake of fresh cases. Thus, there can be a variety of reasons why the court dismisses a special leave petition, and that too by a non-speaking order.

28. Approving this aforesaid ratio, in ***Khoday Distilleries Ltd.*** (supra) it is observed:

> "**20.** The Court thereafter analysed number of cases where orders of different nature were passed and dealt with these judgments by classifying them in the following categories:
>
> (*i*) Dismissal at the stage of special leave petition — without reasons — no res judicata, no merger.
>
> (*ii*) Dismissal of the special leave petition by speaking or reasoned order — no merger, but rule of discipline and Article 141 attracted.
>
> (*iii*) Leave granted — dismissal without reasons — merger results."

29. On the question whether there was any conflict in the legal ratios in ***Kunhayammed*** (supra) and earlier judgment of this Court in ***Abbai Maligai Partnership Firm and Another*** v. ***K. Santhakumaran and Others***[13], the three judges' Bench in ***Khoday Distilleries Ltd.*** (supra) has held:

> **"24.** Having noted the aforesaid two judgments and particularly the fact that the earlier judgment in *Abbai Maligai Partnership Firm* is duly taken cognizance of and explained in the latter judgment, we are of the view that there is no conflict insofar as ratio of the two cases is concerned. Moreover, *Abbai Maligai Partnership Firm* was decided on its peculiar facts, with no discussion on any principle of law, whereas *Kunhayammed* is an elaborate discourse based on well-accepted propositions of law which are applicable for such an issue. We are, therefore, of the view that detailed judgment in *Kunhayammed* lays down the correct law and there is no need to refer the cases to larger Bench, as was contended by the counsel for the appellant.
>
> **25.** While taking this view, we may also point out that even in *K. Rajamouli* this Court took note of both these judgments and explained the principle of res judicata in the following manner: (SCC p. 41, para 4)

13 (1998) 7 SCC 386.

> *"4.* Following the decision in *Kunhayammed* we are of the view that the dismissal of the special leave petition against the main judgment of the High Court would not constitute res judicata when a special leave petition is filed against the order passed in the review petition provided the review petition was filed prior to filing of special leave petition against the main judgment of the High Court. The position would be different where after dismissal of the special leave petition against the main judgment a party files a review petition after a long delay on the ground that the party was prosecuting remedy by way of special leave petition. In such a situation the filing of review would be an abuse of the process of the law. We are in agreement with the view taken in *Abbai Maligai Partnership Firm* that if the High Court allows the review petition filed after the special leave petition was dismissed after condoning the delay, it would be treated as an affront to the order of the Supreme Court. But this is not the case here. In the present case, the review petition was filed well within time and since the review petition was not being decided by the High Court, the appellant filed the special leave petition against the main judgment of the High Court. We, therefore, overrule the preliminary objection of the counsel for the respondent and hold that this appeal arising out of the special leave petition is maintainable.""

30. Reiterating the conclusions in ***Kunhayammed*** (supra), ***Khoday Distilleries Ltd.*** (supra), states:

> **"26.** From a cumulative reading of the various judgments, we sum up the legal position as under:
>
> **26.1.** The conclusions rendered by the three-Judge Bench of this Court in *Kunhayammed* and summed up in para 44 are affirmed and reiterated.
>
> *26.2.* We reiterate the conclusions relevant for these cases as under : (*Kunhayammed case*, SCC p. 384)
>
> "(*iv*) An order refusing special leave to appeal may be a non-speaking order or a speaking one. In either case it does not attract the doctrine of merger. An order refusing special leave to appeal does not stand

substituted in place of the order under challenge. All that it means is that the Court was not inclined to exercise its discretion so as to allow the appeal being filed.

(*v*) If the order refusing leave to appeal is a speaking order i.e. gives reasons for refusing the grant of leave, then the order has two implications. Firstly, the statement of law contained in the order is a declaration of law by the Supreme Court within the meaning of Article 141 of the Constitution. Secondly, other than the declaration of law, whatever is stated in the order are the findings recorded by the Supreme Court which would bind the parties thereto and also the court, tribunal or authority in any proceedings subsequent thereto by way of judicial discipline, the Supreme Court being the Apex Court of the country. But, this does not amount to saying that the order of the court, tribunal or authority below has stood merged in the order of the Supreme Court rejecting the special leave petition or that the order of the Supreme Court is the only order binding as res judicata in subsequent proceedings between the parties.

(*vi*) Once leave to appeal has been granted and appellate jurisdiction of the Supreme Court has been invoked the order passed in appeal would attract the doctrine of merger; the order may be of reversal, modification or merely affirmation.

(*vii*) On an appeal having been preferred or a petition seeking leave to appeal having been converted into an appeal before the Supreme Court the jurisdiction of the High Court to entertain a review petition is lost thereafter as provided by sub-rule (1) of Order 47 Rule 1 CPC."

26.3. Once we hold that the law laid down in *Kunhayammed* is to be followed, it will not make any difference whether the review petition was filed before the filing of special leave petition or was filed after the dismissal of special leave petition. Such a situation is covered in para 37 of *Kunhayammed case."*

31. No doubt, in ***Pawan Gupta's*** case (supra), this Court had not exercised the power or jurisdiction conferred by Article 136 of the Constitution of India, but had exercised its appellate power, which would, in terms of the ratio in ***Kunhayammed*** (supra), becomes the final order which

is executable. Thus, the dismissal of the appeal by this Court in the case of ***Pawan Gupta*** (supra), had put a finality and an end to the litigation in the said case. To this extent, therefore, the application of the general principle of *res judicata* would bar the party from raising the plea once again. The order passed by this Court, on the application of the principle of judicial discipline, bars and prevents any tribunal or parties from canvassing or taking a view which would have the effect of re-examination of the issues and points determined in the case of ***Pawan Gupta*** (supra) *inter-se* the parties to the decision. However, dismissal of the appeal would not operate as *res judicata* in the case of the respondents against the appellant as they were not parties to the said case, and the proceedings initiated by Pawan Gupta were fact specific and not in a representative capacity.

32. The dismissal of the appeal in the case of ***Pawan Gupta***(supra) without any reasons being recorded would not attract Article 141 of the Constitution of India as no law was declared by the Supreme Court, which will have a binding effect on all courts and tribunals in India. There is a clear distinction between the binding law of precedents in terms of Article 141 of the Constitution of India and the doctrine of merger and *res judicata*. To merge, as held in ***Kunhayammed*** (supra), and ***Khoday Distilleries Ltd.*** (supra) means to sink or disappear in something else, to become absorbed or extinguished. The logic behind the doctrine of merger is that there cannot be more than one decree or operative orders governing the same subject matter at a given point of time. When a decree or order passed by an inferior court, tribunal or authority is subjected to a remedy available under law before a superior forum, then the decree or order under challenge continues to be effective and binding; nevertheless, its finality is put in jeopardy. Once the superior court disposes the dispute before it in any manner, either by affirming the decree or order, by setting aside or modifying the same, it is the decree of the superior court, tribunal or authority, which is the final binding and operative decree. The decree and order of the inferior court, tribunal or authority gets merged into the order passed by the superior forum. However, as has been clarified in both decisions, this doctrine is not of universal or unlimited application. The nature of jurisdiction exercised by the superior court and the content or subject matter of challenge laid or could have been laid will have to be kept in view.

33. What is important is the distinction drawn by this Court between the law of precedents and *res judicata.* In ***State of Rajasthan*** v. ***Nemi Chand Mahela and Others***[14], it is held:

> **"11.** The learned counsel for the petitioners had drawn our attention to para 22 of the decision in *Manmohan Sharma case*, (2014) 5 SCC 782 which refers to the case of one Danveer Singh whose writ petition had been allowed and the order had attained finality as it was not challenged before the Division Bench or before the Supreme Court. Termination of services in the case of Danveer Singh, it was accordingly held, was not justified and in accordance with law. The reasoning given in paras 22 and 23 in *Manmohan Sharma case* relating to the case of Danveer Singh would reflect the difference between the doctrine of res judicata and law of precedent. Res judicata operates in personam i.e. the matter in issue between the same parties in the former litigation, while law of precedent operates in rem i.e. the law once settled is binding on all under the jurisdiction of the High Court and the Supreme Court. Res judicata binds the parties to the proceedings for the reason that there should be an end to the litigation and therefore, subsequent proceeding inter se parties to the litigation is barred. Therefore, law of res judicata concerns the same matter, while law of precedent concerns application of law in a similar issue. In res judicata, the correctness of the decision is normally immaterial and it does not matter whether the previous decision was right or wrong, unless the erroneous determination relates to the jurisdictional matter of that body."

This ratio was followed and approved by a three judges' Bench in ***Malook Singh and Others*** v. ***State of Punjab and Others***[15].

34. In ***Makhija Construction & Engg. (P) Ltd.*** v. ***Indore Development Authority and Others***[16], after referring to several earlier decisions, this Court has observed that a precedent operates to bind in similar situations in a distinct case, whereas *res judicata* operates to bind parties to proceedings for no other reason, but that there should be end to litigation. Principle of

14 (2019) 14 SCC 179.
15 (2021) SCC OnLine SC 876.
16 (2005) 6 SCC 304.

res judicata should apply where the *lis* was inter-parties and has attained finality on the issues involved. The principle of *res judicata* will have no application in cases where the judgment or order has been passed by the Court having no jurisdiction thereof or involving a pure question of law.[17] Law of binding precedents, in terms of Article 141 of the Constitution of India, has a larger connotation as it settles the principles of law which emanates from the judgment, which are then treated as binding precedents.

35. In the context of factual background of the present case, and on examining the judgment in the case of ***Pawan Gupta*** (supra) passed by the National Commission, we are clearly of the view that the order passed by this Court dismissing the appeal in the case of ***Pawan Gupta*** (supra) would operate as *res judicata* in the said case but does not lay down a binding precedent which would be applicable to other cases. As it transpires from the judgment in the case of ***Pawan Gupta*** (supra), the National Commission itself had specifically observed *inter alia* that "there was no harm in communicating and charging for the extra area at the final stage, but for the sake of transparency opposite party must share the actual reason for the increase in the super area based on comparison of the originally approved buildings and finally approved buildings. Basically, the idea is that the allottee must know the change in the finally approved layout and areas of common spaces and the originally approved layout and areas". It is true that there was no material on record placed by the appellant in the said case of ***Pawan Gupta*** (supra) showing the actual increase in the sale area. Nonetheless, the appellant in the instant case, along with its detailed reply, had produced the documents, i.e. the certificate dated 23.09.2020 given by the Architects D-idea, the Report dated 23.09.2020 given by Knight Frank (India) Private Limited, the affidavit dated 31.08.2021 by Mr. Muninder Pal Singh, and the affidavit dated 26.04.2022 by Mr. Anurag Mahajan, to show that there was an actual increase in the sale area, justifying its demand for the extra payment. The respondents, in rejoinder, had neither placed any material to contradict the said Architect's certificates and reports nor had they disputed the contents thereof. The only contention raised by them was that the said documents were produced as an afterthought and, therefore,

17 See *Fida Hussain and Others v. Moradabad Development Authority and Another,* (2011) 12 SCC 615.

could not be taken into consideration. At this juncture, it is also pertinent to note that clause 8.6 of the agreement, provided for an increase/decrease in the sale area as defined and also the corresponding sale price increase of upto 10%. The appellant, by producing the said documents, had sought to justify that the variance, i.e. increase in the built up area of the project, which was less than 5% and such variance was within the permissible limits.

36. Thus, we are clearly of the view that the order of this Court dismissing the appeal in the case of ***Pawan Gupta*** (supra) cannot be read as a precedent and applied to the cases in hand. In fact, precedents cannot decide questions of fact. The decision in the case of ***Pawan Gupta*** (supra) was based on evidence adduced by the appellant/builder/developer, which in the said case was not found to be sufficient and cogent to justify and substantiate the demand raised in view of the increased sale area. No doubt, the architect's certificate and report dated 23.09.2020 was filed before this Court as additional documents, but a non-reasoned order passed by this Court dismissing the case cannot be read as accepting and considering the additional evidence, or as rejecting justification and reasons given therein for claiming additional/increased sale area. Any additional evidence sought to be produced at the appellate stage can only be introduced when an appropriate application under Rule 27 to Order XLI of the Code of Civil Procedure,1908 is moved and an order is passed taking them on record. Therefore, the order passed by this Court dismissing the appeal in the case of ***Pawan Gupta*** (supra) is confined to the facts of the said case, including the evidence led by the parties before the National Commission. The National Commission was therefore required to consider and examine the contentions of the appellant and not overrule the same on the grounds of the principle of *res judicata* and on the rule of binding precedent, which do not apply. An order of remand on the question of merits as to the stipulation and increase in the sale area is therefore required.

37. However, we wish to clarify that the observations made in this order, insofar as limitation is concerned, would be binding and has attained finality. Observations made in this order on the question of acquiescence/ estoppel and merits/justification of the increase in the sale area would be aspects which would have to be considered by the National Commission afresh in terms of the observations contained in the present judgment. We

have not specifically commented on whether or not, in the facts of the present case, principles of acquiescence/estoppel will apply or whether or not the appellant has been able to justify and substantiate the claim for the increase in the sale area. These aspects would be examined by the National Commission by ascertaining the facts and on merits.

38. Accordingly, for the reasons stated above, the impugned order and judgment passed by the National Commission is set aside and the appeal is disposed of with a direction of remand in terms of the observations and directions given herein. There would be no order as to costs.

Headnotes prepared by:
Divya Pandey

Appeal disposed of with direction of remand.