

[2021] 1 S.C.R. 953

ASHA JOHN DIVIANATHAN

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v.

VIKRAM MALHOTRA & ORS.

(Civil Appeal No. 9546 of 2010)

FEBRUARY 26, 2021

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**[A. M. KHANWILKAR, INDU MALHOTRA
AND AJAY RASTOGI, JJ.]**

Foreign Exchange Regulation Act, 1973 – ss.31, 47, 50, 63 – A foreigner who was the owner of property in question, executed an agreement of sale in favour of predecessor of the appellant and respondent no.4 after previous permission of the RBI – However, around the same time she gifted portion of the property to respondent no.1 though without any previous permission of the RBI – Suit filed by appellant and respondent no.4's predecessor against the respondent no.1 inter alia for declaring the gift deeds in his favour as null and void and not binding – Dismissed by Trial Court – First appeal filed by the appellant and respondent no.4, dismissed by High Court – On appeal, held: The condition predicated in s.31 of obtaining previous general or special permission of the RBI for transfer/disposal of immovable property situated in India by a person who is not a citizen of India is mandatory – Resultantly, any sale or gift of property situated in India by a foreigner in contravention thereof would be unenforceable in law – Gift deeds in favour of respondent no.1 being unenforceable in law, he had no clear title to further transfer the same – Impugned judgment and decree of the Trial Court as confirmed by the High Court, set aside – Suit filed by predecessor of the appellant and respondent no.4 decreed in toto – Appellant being the legal representative of the plaintiff is entitled for possession of the suit property being the owner thereof and also for mesne profits for the relevant period – Interpretation of Statutes – Contract Act, 1872 – s.23 – Code of Civil Procedure, 1908 – Or.20, r.12 – Constitution of India – Article 142.

Foreign Exchange Regulation Act, 1973:

Object and purpose of – s.31 – Discussed.

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- A *s.47 – Application of – Held: s.47 applies to all the contracts or agreements covered under the 1973 Act, which require previous permission of the RBI.*

Proviso to s.31 – Exception under – Discussed.

- B *ss.29, 31 – Held: There is no possibility of ex post facto permission being granted by the RBI u/s.31 unlike in the case of s.29.*

- ss.31, 63 – “property” in s.63 – Held: Expression “property” in s.63 takes within its sweep immovable property referred to in s.31.*

- C *Interpretation of Statutes – Prohibition; negative words – Held: A contract is void if prohibited by a statute under a penalty, even without express declaration that the contract is void, because such a penalty implies a prohibition – Prohibition and negative words can rarely be directory – Foreign Exchange Regulation Act, 1973 – ss.31, 47, 50, 63.*

Words & Phrases – void, voidable – Purport of – Discussed.

Allowing the appeal, the Court

HELD: 1.1 The object and purpose for which the Foreign

- E **Exchange Regulation Act, 1973 was brought into force was to consolidate and amend the law relating to certain payments, dealings in foreign exchange and securities, transactions indirectly affecting foreign exchange and the import and export of currency, for the conservation of the foreign exchange resources of the country and the proper utilisation thereof in the interests of the economic development of the country. The avowed object of Section 31 of the 1973 Act was to minimise the drainage of foreign exchange by way of repatriation of income from immovable property and sale proceeds in case of disposal of property by a person, who is not a citizen of India. As is noticed from the title of**

- F **Section 31, it is to put restriction on acquisition, holding and disposal of immovable property in India by foreigners-non citizens. On a bare reading of sub-Section (1), it is crystal clear that a person, who is not a citizen of India, is not competent to dispose of by sale or gift, as in this case, any immovable property situated in India without previous general or special permission of the**

- G **Government.**
- H **Section 31, it is to put restriction on acquisition, holding and disposal of immovable property in India by foreigners-non citizens. On a bare reading of sub-Section (1), it is crystal clear that a person, who is not a citizen of India, is not competent to dispose of by sale or gift, as in this case, any immovable property situated in India without previous general or special permission of the Government.**

RBI. The only exception provided in the proviso is that of acquisition or transfer of immovable property by way of lease for a period not exceeding five years. This provision applies to foreign citizens and foreign and FERA companies only. A non--resident Indian citizen is not covered thereunder. Sub-Section (2) mandated such person, who is not a citizen of India, to make an application to the RBI in the prescribed form making necessary disclosures. Sub- Section (3) postulates that on receipt of such an application, the RBI after due inquiry as it deems fit, either may grant or refuse to grant the permission applied for. The second proviso to sub- Section (3) provides for a default permission, if no response is received to the application within the specified period. What is significant to notice is that as per sub-Section (4), every person, who is not a citizen of India, holding immovable property situated in India at the time of commencement of the 1973 Act, is obliged to make declaration within ninety days from the commencement of the 1973 Act or such further period as may be allowed by the RBI. A person, who is not a citizen of India, holding immovable property situated in India was obliged to make disclosure and declaration in that behalf to the RBI; and in any case, if he/she intended to dispose of such property by sale, mortgage, lease, gift, settlement or otherwise, was expected to obtain previous general or special permission from the RBI. Only then, transfer so intended could be given effect to. It is true that the consequences of failure to seek such previous permission has not been explicitly specified in the same provision or elsewhere in the Act, but then the purport of Section 31 must be understood in the context of intent with which it has been enacted, the general policy not to allow foreign investment in landed property/buildings constructed by foreigners or to allow them to enter into real estate business to eschew capital repatriation, including the purport of other provisions of the Act, such as Sections 47, 50 and 63. [Paras 13- 15][969-E-F; 970-B-C; 971-D-H; 972-A-C]

1.2 Section 47, sub--Section (1) clearly envisages that no person shall enter into any contract or agreement which would directly or indirectly evade or avoid in any way the operation of any provision of the 1973 Act or of any rule, direction or order made thereunder. What is significant to notice is that sub-Section

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- A (2) declares that the agreement shall not be invalid if it provides that thing shall not be done without the permission of the Central Government or the RBI. That would be the implied requirement of the agreement in terms of this provision. In other words, though ostensibly the agreement would be a conditional one made subject to permission of the Central Government or the RBI, as the case may be and if such term is not expressly mentioned in the agreement, it shall be an implied term of every contract governed by the law - of obtaining permission of the Central Government or the RBI before doing the thing provided for in the agreement. In that sense, such a term partakes the colour of a statutory contract.
- B Notably, Section 47 of the 1973 Act applies to all the contracts or agreements covered under the 1973 Act, which require previous permission of the RBI. Section 50 reinforces the position that transfer of land situated in India by a person, who is not a citizen of India, would visit with penalty. Section 63 of the 1973 Act empowers the court trying a contravention under Section 56 which includes one under Section 51 of the 1973 Act, to confiscate the currency, security or any other money or property in respect of which the contravention has taken place. The expression "property" in Section 63, takes within its sweep immovable property referred to in Section 31 of the 1973 Act. To put it differently, the requirement specified in Section 31 is mandatory and, therefore, contract or agreement including the gift pertaining to transfer of immovable property of a foreign national without previous general or special permission of the RBI, would be unenforceable in law. [Paras 16-18][974-E-H; 975-B-C]
- F *Dhurandhar Prasad Singh v. Jai Prakash University & Ors.* (2001) 6 SCC 534 : 2001 (3) SCR 1129 – relied on.
- G *R. v. Paddington Valuation Officer, ex p Peachey Property Corp. Ltd.* (1965) 2 All ER 836 – referred to.
- H 1.3 A contract is void if prohibited by a statute under a penalty, even without express declaration that the contract is void, because such a penalty implies a prohibition. Further, it is settled that prohibition and negative words can rarely be directory. In

the present dispensation provided under Section 31 of the 1973 Act read with Sections 47, 50 and 63 of the same Act, although it may be a case of seeking previous permission it is in the nature of prohibition. In every case where a statute imposes a penalty for doing an act, though, the act not prohibited, yet the thing is unlawful because it is not intended that a statute would impose a penalty for a lawful act. When penalty is imposed by statute for the purpose of preventing something from being done on some ground of public policy, the thing prohibited, if done, will be treated as void, even though the penalty if imposed is not enforceable. [Para 20][977-D-G]

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Mannalal Khetan & Ors. v. Kedar Nath Khetan & Ors.
(1977) 2 SCC 424: 1977 (2) SCR 190 – relied on.

1.4 From the analysis of Section 31 of the 1973 Act and upon conjoint reading with Sections 47, 50 and 63 of the same Act, it is held that the requirement of taking “previous” permission of the RBI before executing the sale deed or gift deed is the quintessence; and failure to do so must render the transfer unenforceable in law. The dispensation under Section 31 mandates “previous” or “prior” permission of the RBI before the transfer takes effect. For, the RBI is competent to refuse to grant permission in a given case. The sale or gift could be given effect and taken forward only after such permission is accorded by the RBI. There is no possibility of *ex post facto* permission being granted by the RBI under Section 31 of the 1973 Act unlike in the case of Section 29. Before grant of such permission, if the sale deed or gift deed is challenged by a person affected by the same directly or indirectly and the court declares it to be invalid, despite the document being registered, no clear title would pass on to the recipient or beneficiary under such deed. The clear title would pass on and the deed can be given effect to only if permission is accorded by the RBI under Section 31 of the 1973 Act to such transaction. In light of the general policy that foreigners should not be permitted/allowed to deal with real estate in India; the peremptory condition of seeking previous permission of the RBI before engaging in transactions specified in Section 31 of the 1973 Act and the consequences of penalty in case of contravention, the transfer of immovable property situated in India

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- A by a person, who is not a citizen of India, without previous permission of the RBI must be regarded as unenforceable and by implication a prohibited act. That can be avoided by the RBI and also by anyone who is affected directly or indirectly by such a transaction. There is no reason to deny remedy to a person, who is directly or indirectly affected by such a transaction. He can set up challenge thereto by direct action or even by way of collateral or indirect challenge. Thus, until permission is accorded by the RBI, it would not be a lawful contract or agreement within the meaning of Section 10 read with Section 23 of the Contract Act. For, it remains a forbidden transaction unless permission is obtained from the RBI. The fact that the transaction can be taken forward after grant of permission by the RBI does not make the transaction any less forbidden at the time it is entered into. It would nevertheless be a case of transaction opposed to public policy and, thus, unlawful. [Paras 25-27][982-B-H; 983-A]
- D *Life Insurance Corporation of India v. Escorts Ltd. & Ors.* (1986) 1 SCC 264 : 1985 (3) Suppl. SCR 909 – followed.
 - 1.5 Provision for penalty under Section 50 for contravention referred to in Section 31, does not mean that the requirement of previous permission of RBI is directory or a mere formality. It is open to the legislature to provide two different consequences for the violation. Further, Section 63 of the 1973 Act clearly refers to property in respect of which contravention has taken place for being confiscated to the Central Government. The expression “property” therein would certainly take within its sweep an immovable property referred to in Section 31 of the Act. The expression “property” in Section 63 is an inclusive term and, therefore, there is no reason to assume that consequence of confiscation may not apply to immovable property in respect of which contravention of the provisions of sub-Section (1) of Section 31 had taken place. The transaction of gift deed without previous permission of the RBI may not be nullity, but certainly not enforceable in law until such permission is granted. [Paras 29, 30][983-G-H; 984-C-E]
 - 1.6 The requirement of seeking previous general or special permission of the RBI in respect of transaction covered by Section 31 of the 1973 Act is mandatory. Resultantly, any sale or gift of
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property situated in India by a foreigner in contravention thereof would be unenforceable in law. The stated gift deeds dated 11.03.1977 and 19.04.1980 in favour of respondent no.1 being unenforceable in law, respondent no.1 had no clear title to transfer the same to Dr. 'TC' vide purported sale deed dated 15.09.2005. The condition predicated in Section 31 of the 1973 Act of obtaining "previous" general or special permission of the RBI for transfer or disposal of immovable property situated in India by sale or mortgage by a person, who is not a citizen of India, is mandatory. Until such permission is accorded, in law, the transfer cannot be given effect to; and for contravening with that requirement, the concerned person may be visited with penalty under Section 50 and other consequences provided for in the 1973 Act. [Paras 35, 36, 38][987-D-E; 988-A-C]

1.7 *A priori*, the decisions of concerned High Courts taking the view that Section 31 of the 1973 Act is not mandatory and the transaction in contravention thereof is not void or unenforceable, is not a good law. However, transactions which have already become final including by virtue of the decision of the court of competent jurisdiction, need not be reopened or disturbed in any manner because of this pronouncement. This declaration/direction is being issued in exercise of the plenary power under Article 142 of the Constitution of India. For, there has been a paradigm shift in the general policy of investment by foreigners in India and more particularly, the 1973 Act itself stands repealed. The decisions of the High Courts taking contrary view, are overruled, albeit, prospectively. The impugned judgment and decree of the Trial Court, as confirmed by the High Court, is set aside. O.S.No.10079 of 1984 filed by predecessor of the appellant and respondent no.4 stands decreed in toto in favour of the plaintiff. The appellant (being the legal representative of the plaintiff) is entitled for possession of the suit property being the owner thereof and also for mesne profits for the relevant period for which a separate inquiry be conducted under Order 20 Rule 12 of the Code of Civil Procedure, 1908. [Paras 39, 40] [988-D-G]

Piara Singh v. Jagtar Singh and Anr. AIR 1987 Punjab and Haryana 93; R. Sambasivam v. Thangavelu

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- A *Dhanabagyam* **2001-1-L.W. 161**; *Ajit Prashad Jain v. N.K. Widhani & Ors.* **AIR 1990 Del 42**; *Tufanu Chouhan & Ors. v. Md. Abdur Rahman & Ors.* **(1993) 1 Gau LR 306**; *Geeta Reinboth v. Mrs. J. Clairs Brohier through LRs. Mrs. Cheryl Brohier Gosens & Ors.* **(2005) 1 MP LJ 122**; *Sivaprakasam v. Ilangovan & Ors.* **(2010) 3 MWN (Civil) 525**; *Mathu Sree Akkabai Ammani Charitable Trust & Ors. v. Samikannu* **(2013) 1 LW 136** – overruled.
- B *Renusagar Power Co. Ltd. v. General Electric Co.* **1994 Supp (1) SCC 644**; **1993 (3) Suppl. SCR 22**; *Vijay Karia & Ors. v. Prysmian Cavi E Sistemi SRL & Ors.* **(2020) 11 SCC 1**; *Dhurandhar Prasad Singh v. Jai Prakash University & Ors.* **(2001) 6 SCC 534**; **2001 (3) SCR 1129** – relied on.
- C *Janki Bai v. Ratan Melu* **AIR 1962 MP 117** – distinguished.
- D *Joaquim MascarenhasFiuza v. Jaime Rebello & Anr.* **1986 SCC OnLine Bom 234**; *Mrs. Shoba Viswanatha v. D.P. Kingsley* **1996 (I) CTC 620** – approved.
- E *Union of India & Ors. v. A.K. Pandey* **(2009) 10 SCC 552**; **2009 (14) SCR 528**; *Union of India v. Colonel L.S.N. Murthy & Anr.* **(2012) 1 SCC 718**; **2011 (13) SCR 295**; *Shri Lachoo Mal v. Shri RadheyShyam* **(1971) 1 SCC 619**; *Waman Rao & Ors. v. Union of India & Ors.* **(1981) 2 SCC 362**; **1981 (2) SCR 1**; *Gherulal Parakh v. Mahadeodas Maiya & Ors.* **AIR 1959 SC 781**; **1959 Suppl. SCR 406**; *Rattan Chand Hira Chand v. Askar Nawaz (Dead) by L.Rs. & Ors.* **1991 (3) SCC 67**; **1991 (1) SCR 327** – referred to.
- F *Sahruvan Nachair & Anr. v. V.S. Mohammed Hussain Maracair* **(2001) 1 Mad LJ 188**; *William Babu &Anr. v. Helma Roy Alias Emily Carmel* **(2018) 1 KLJ 525**; *Beharilal Maudgi v. The Secretary to Govt. of A.P. Home Department, Hyderabad & Ors.* **1986 (2) ALT 241** – referred to.
- G H

Herbert Wagg & Co. Ltd., Re (1956) 1 Ch 323 A
 – referred to.

<u>Case Law Reference</u>		
[1985] 3 Suppl. SCR 909	followed	Para 7
[1993] 3 Suppl. SCR 22	relied on	Para 7 B
(2020) 11 SCC 1	relied on	Para 7
[1981] 2 SCR 1	referred to	Para 9
[2001] 3 SCR 1129	relied on	Para 19
[1977] 2 SCR 190	relied on	Para 20 C
[2009] 14 SCR 528	referred to	Para 21
[2011] 13 SCR 295	referred to	Para 21
(1971) 1 SCC 619	referred to	Para 21
[1959] Suppl. SCR 406	referred to	Para 34 D
[1991] 1 SCR 327	referred to	Para 34

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 9546
 of 2010.

From the Judgment and Order dated 01.10.2009 of the High Court E
 of Karnataka at Bangalore in RFA No. 1001 of 2001.

C. Aryama Sundaram, Sr.Adv., Navkesh Batra, Sandeep Narain,
 B.R. Dhanlaxmi, M/S. S. Narain & Co., Yatish Mohan, Subhash Chandra
 Sagar, E. C. Vidya Sagar, Advs. for the appearing parties.

The Judgment of the Court was delivered by F

A. M. KHANWILKAR, J.

1. The central issue in this appeal is in reference to Section 31 of
 the Foreign Exchange Regulation Act, 1973¹. To wit, transaction (specified
 in Section 31 of the 1973 Act) entered into in contravention of that provision
 is void or is only voidable and it can be voided at whose instance? G

2. The undisputed facts are that one Mrs. F.L. Raith, widow of
 late Mr. Charles Raith, a foreigner and the owner of the property in
 question, gifted it to respondent No.1 (Vikram Malhotra) without obtaining

¹ For short, “the 1973 Act” H

- A previous permission of the Reserve Bank of India² under Section 31 of the 1973 Act. Further, before executing the gift deed, she had executed an agreement of sale in favour of one Mr. R.P. David, father of appellant (Asha John Divianathan) and husband of respondent No.4 (Mrs. R.P. David, wife of Mr. R.P. David). That agreement was executed on 05.04.1976 whereunder the title deed of the schedule property was delivered by Mrs. F.L. Raitt to late Mr. R.P. David. However, Mrs. F.L. Raitt gifted the portion of schedule property admeasuring 12,306 square feet, vide gift deed dated 11.03.1977, in favour of respondent No.1 without seeking previous permission of the RBI under Section 31 of the 1973 Act. She then executed a supplementary gift deed in favour of respondent No.1 on 19.04.1980. Even this deed was executed by Mrs. F.L. Raitt without seeking previous permission of the RBI. The respondent claimed that a power of attorney was executed in his favour by Mrs. F.L. Raitt on 09.01.1982, which it appears, was revoked by Mrs. F.L. Raitt on 03.06.1982. Thereafter, Mrs. F.L. Raitt executed a ratificatory agreement to sell the schedule property in favour of Mr. R.P. David (predecessor of the appellant and respondent no.4) on 04.12.1982, followed by a power of attorney in favour of Mr. Peter J. Philip dated 26.01.1983. That a formal permission of RBI under Section 31 of the 1973 Act was then sought for completing the transaction in favour of Mr. R.P. David (predecessor of the appellant and respondent no.4). The RBI granted that permission on 02.04.1983, permitting transfer of the immovable property No.12 (old No.10A), Magrath Road, admeasuring 35,470 square feet in favour of Mr. R.P. David (predecessor of the appellant and respondent no.4). Consequent to the said permission of the RBI, a registered sale deed came to be executed by Mrs. F.L. Raitt in favour of Mr. R.P. David (predecessor of the appellant and respondent no.4) on 09.04.1983. However, Mrs. F.L. Raitt filed a suit being O.S. No.10328 of 1983, on 30.07.1983, to declare the power of attorney dated 26.01.1983 given to Mr. Peter J. Philip as null and void and for cancellation and setting aside of the registered sale deed dated 09.04.1983 executed in favour of Mr. R.P. David (predecessor of the appellant and respondent no.4) - pertaining to the entire property admeasuring 35,470 square feet. The said Mrs. F.L. Raitt, however, expired on 08.01.1984 and after her death, Mrs. Ingrid L. Greenwood was substituted as her legal representative in the pending suit. Mr. R.P. David (predecessor of the appellant and respondent no.4) and others then filed O.S. No.10079 of
- H ²For short, "the RBI"

1984 on 10.02.1984 against respondent No.1 (Vikram Malhotra) praying that the gift deed and the supplementary deed allegedly executed in his favour in respect of portion of the larger property to the extent of 12,306 square feet bearing No.12 (Old No.10A) be declared as null and void and not binding and consequentially for relief of possession, permanent injunction and mesne profits. Mr. R.P. David (predecessor of the appellant and respondent no.4) also filed O.S. No.10155 of 1984 against Mrs. Ingrid L. Greenwood and Mr. Clive Greenwood, who were claiming to be successor in title of Mrs. F.L. Raitt, for declaration and possession of entire property No.12 (Old No.10) admeasuring 35,470 square feet. All the three suits were tried and decided by the City Civil & Sessions Judge, Mayo, Bangalore³.

3. As regards the suit filed by Mrs. F.L. Raitt and Mrs. Ingrid L. Greenwood bearing suit No.10328 of 1983, the Trial Court had framed as many as 11 issues, which read thus:

"1) Whether the plaintiffs prove that the power of attorney dated 26.1.83 executed by the first plaintiff in favour of the 2nd defendant was procured by fraud, mis-representation and undue influence and the same was taken without her knowledge?

2) Whether the plaintiff proves that the power of attorney dated 26.1.83 executed by the first plaintiff in favour of the second defendant is null and void and not binding on the first plaintiff?

3) Whether the plaintiffs are entitled for permanent injunction restraining the defendant – 2 from acting in any way on the strength of the alleged power of attorney dated 26.1.1983?

4) Whether the plaintiff proves that the 2nd defendant fraudulently and without any legal authority of the first plaintiff executed the sale deed dated 9.4.1983 in favour of the 1st defendant in respect of the suit schedule property?

5) Whether the plaintiff further proves that the said sale deed was never intended to be registered by the first plaintiff nor the second defendant was authorized or empowered to act as her General Power of attorney holder for that purpose?

6) Whether the plaintiffs are entitled for declaration for the cancellation of the sale deed dt. 9.4.1983?

³ For short, "the Trial Court"

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- A 7) Whether the plaintiffs further prove that they are in actual and lawful possession of the suit schedule property?
- 8) Whether the defendants prove that the sale deed is a genuine document and the same is binding on the plaintiff?
- B 9) Whether the plaintiffs are entitled for permanent injunction as prayed for?
- 10) To what reliefs are the parties entitled?
- 11) What order or decree?"
- C After analysing the pleadings and evidence on record, the Trial Court vide judgment and decree dated 31.08.2001 proceeded to dismiss this suit. This judgment is not the subject matter of the present appeal.
4. In the suit filed by Mr. R.P. David (predecessor of the appellant and respondent no.4) being O.S.No.10079 of 1984, the Trial Court framed 9 issues as follows:
- D "1. Do Plaintiffs prove that the late Florence L. Raitt agreed to sell the entire suit property in favour of deceased R.P. David?
2. Do they next prove that Florence L. Raitt executed a ratified agreement dated 04.12.1982 after receiving Rs.One lakh as contended?
- E 3. Are the gift deed dated 11.03.1977 and the supplementary deed dated 19.04.1980 in favour of the defendant void being hit by the provisions of the Foreign Exchange Regulation Act, 1973, as alleged?
- F 4. Does defendant prove that the said documents and transactions are not hit by the Foreign Exchange Regulation Act, 1973 and they are valid in law?
5. Does defendant prove the General Power of Attorney executed by Florence L. Raitt in favour of Mr. Peter Philip is not true and genuine?
- G 6. Do plaintiffs prove that deceased David purchased the entire suit property as contended and the same is binding on the defendant?
7. Do plaintiffs prove that they are entitled to recover past mesne profits at the rate of Rs.200/- per month?
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8. Are plaintiffs entitled to declaration, possession and injunction? A

9. What relief or decree?"

After analysing the pleadings and evidence on record, the Trial Court vide separate judgment and decree dated 31.08.2001 was pleased to dismiss even this suit.

5. While dealing with the third suit filed by Mr. R.P. David (predecessor of the appellant and respondent no.4), the Trial Court framed 10 issues, which read thus:

"1) Whether the plaintiff proves that they are the owner of the suit schedule property under the terms of the sale deed dated 9.4.83? C

2) Whether the plaintiff further proves that Mrs. Florence L. Raitt executed the General Power of Attorney dated 26.1.83 in favour of Mr. Peter Philip on her own free will?

3) Whether the defendant proves that General Power of Attorney dt. 26.1.1983 was procured by fraud, misrepresentation, coercion, undue influence and in breach of trust? D

4) Whether the defendants further prove that the suit schedule property was bequeathed to defendant – 1 under the will executed by Mrs. Florence Raitt absolutely and unconditionally? E

5) Whether the defendants further prove that defendant 1 is the absolute owner in actual possession of the suit schedule property?

6) Whether the second defendant is a necessary party to the suit?

7) Whether the plaintiff is entitled for a declaration as prayed for? F

8) Whether the plaintiff is entitled for mesne profits? If so, at what rate?

9) Whether the plaintiff is entitled to the possession of the suit schedule property?

10) What order or decree?" G

After analysing the pleadings and evidence on record, the Trial Court vide separate judgment and decree dated 31.08.2001 was pleased to allow the suit in the following terms:

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“ORDER”

The suit of the plaintiff is decreed. The plaintiff is hereby declared that he is the absolute owner of the suit property and he is entitled to mesne profits from 9.1.84 till the end of 1990. Separate enquiry shall be initiated under Order 20 Rule 12 CPC for its determination.

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Having regard to the circumstances of the case, no order as to costs.

Draw the decree accordingly.”

Even this judgment is not the subject matter of the present appeal.

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6. The appellant along with respondent No.4, however, had filed first appeal before the High Court of Karnataka at Bangalore being R.F.A. No.1001 of 2001 against the judgment and decree dated 31.08.2001 passed by the Trial Court in O.S. No.10079 of 1984. In this appeal, therefore, the limited issue is about the validity of the gift deed

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dated 11.03.1977 and the supplementary deed dated 19.04.1980 both executed in favour of respondent No.1 by Mrs. F.L. Raitt in respect of portion of the larger property admeasuring 12,306 square feet. As regards the finding of fact recorded by the Trial Court in reference to the said challenge, the High Court concurred with the same, but proceeded to examine the solitary legal point raised by the appellant before the High

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Court regarding validity of the stated gift deeds being in violation of Section 31 of the 1973 Act and, therefore, void and unenforceable in law. The learned Single Judge of the High Court essentially relying on the decision of the Punjab & Haryana High Court in the case of *Piara Singh v. Jagtar Singh and Anr.*⁴, proceeded to negative the said

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challenge and held that lack of permission under Section 31 of the 1973 Act does not render the subject gift deeds as void much less illegal and unenforceable. Accordingly, the first appeal jointly filed by the appellant and respondent No.4 herein came to be dismissed vide impugned judgment and decree dated 01.10.2009.

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7. In the present appeal, the sole point urged by the appellant is that the stated gift deeds dated 11.03.1977 and 19.04.1980 in favour of respondent No.1 are null and void and not binding on the appellant and respondent no.4; and in any case are unenforceable in law, in light of the mandate of Section 31 of the 1973 Act. According to the appellant, the

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⁴ AIR 1987 Punjab and Haryana 93

dispensation specified in the said provision is mandatory and no transaction in contravention thereof would be enforceable in law. That position is reinforced by Section 47 of the same Act. Further, violation of Section 31 has also been made punishable under Section 50 of the 1973 Act. In support of this submission, reliance is placed on the dictum of Constitution Bench of this Court in *Life Insurance Corporation of India v. Escorts Ltd. & Ors.*⁵. Reliance has also been placed on the observations made by three-Judge Bench of this Court in *Renusagar Power Co. Ltd. v. General Electric Co.*⁶ and *Vijay Karia & Ors. v. Prysmian Cavi E Sistemi SRL & Ors.*⁷. According to the appellant, the reasons weighed with the Punjab & Haryana High Court in *Piara Singh* (supra) are manifestly wrong. That decision has not analysed the true scope and purport of Section 31 of the 1973 Act in correct perspective. Similar view taken by the Madras High Court in *R. Sambasivam v. Thangavelu Dhanabagyam*⁸, following the decision in *Piara Singh* (supra), suffers from the same error. On the same lines different High Courts have construed Section 31 to mean that the transaction in contravention thereof is not void. (see *Ajit Prashad Jain v. N.K. Widhani & Ors.*⁹, *Tufanu Chouhan & Ors. v. Md. Abdur Rahman & Ors.*¹⁰, *Geeta Reinboth v. Mrs. J. Clairs Brohier through LRs. Mrs. Cheryl Brohier Gosens & Ors.*¹¹, *Sivaprakasam v. Ilangovan & Ors.*¹² and *Mathu Sree Akkabai Ammani Charitable Trust & Ors. v. Samikanu*¹³). None of the decisions of the different High Courts dealing with the purport of Section 31 of the 1973 Act have invoked principle that would stand the test of judicial scrutiny. It is urged that any transaction, which is in violation of Section 31 of the 1973 Act, would be unenforceable in law until such permission is accorded by the RBI and for that reason, the gift deeds in question cannot be given effect to or will be of any avail to respondent No.1. Instead, the entire property No.12 (old No.10A), Magrath Road, admeasuring 35,470 square feet stood validly transferred in favour of Mr. R.P. David (predecessor of the appellant and respondent No.4 herein). It is then urged that despite

⁵(1986)1 SCC 264

⁶1994 Supp (1) SCC 644

⁷(2020) 11 SCC 1

⁸2001 – 1 – L.W. 161

⁹AIR 1990 Del 42 (para 26)

¹⁰(1993) 1 Gau LR 306 (paras 5 and 6)

¹¹(2005) 1 MP LJ 122 (paras 12 to 16)

¹²(2010) 3 MWN (Civil) 525 (paras 15 and 16) : 2010 SCC OnLine Mad 4245

¹³(2013) 1 LW 136 (para 16) : 2012 SCC OnLine Mad 2769

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- A the above, respondent no.1 sought to transfer the stated property to one Dr. Thomas Chandy under sale deed dated 15.09.2005 (which has not seen the light of day) by wilfully disobeying the High Court's interim order dated 07.04.2005. Hence, this transaction in any case is nullity.
8. Per contra, respondent No.1 would urge that Section 31 is a directory provision; and not obtaining previous permission of the RBI would not render the gift deeds in question invalid. It is urged that since no consequence is provided in Section 31 or any other provision in the 1973 Act to treat the transaction in violation of Section 31 as void, the transfer in favour of respondent No.1 cannot be regarded as ineffective or invalid. Such a transfer would at best be voidable that too only at the instance of the RBI and none else. The stipulation under Section 31 is only a regulatory measure and not one of prohibiting transfer by way of gift as such. The consequence of such violation is provided for as penalty under Section 50, for which the concerned parties can be proceeded against. However, no action has been taken in that regard including by
- B the RBI. The decision of the RBI to grant or refuse permission for transfer is made final. The RBI is exclusively entrusted with the task of determining the permissibility of the transaction, being repository of management of foreign exchange of the country.

9. Our attention was invited to the provisions of the Indian Contract Act, 1872¹⁴ and the Transfer of Property Act, 1882, to contend that there is marked distinction between void and voidable transaction. At best, the transfer in favour of respondent No.1 may come within the latter category. It is further urged that different High Courts have consistently opined that transaction in contravention of Section 31 cannot be regarded as void and that view needs no interference. Relying on
- F *Waman Rao & Ors. v. Union of India & Ors.*¹⁵, the argument is that following the principle of *stare decisis*, this Court ought not to countermand the consistent view of the High Courts prevailing since 1987. It is further urged that the 1973 Act has since been repealed and therefore, it would be in the fitness of things not to disturb the consistent
- G view taken by different High Courts in that regard.

10. We have heard Mr. Navkesh Batra, learned counsel for the appellant and Mr. C.A. Sundram, learned senior counsel for the respondent No.1.

¹⁴ For short, "the Contract Act"

H ¹⁵(1981) 2 SCC 362 (paras 36 to 40)

11. It is not in dispute that Mrs. F.L. Raith was not a citizen of India. She transferred right, title and interest in the larger property (35,470 square feet) by way of sale to Mr. R.P. David (predecessor of the appellant and respondent No.4). Around the same time, however, portion of the larger property (12,306 square feet) was given by her by way of gift deeds to respondent No.1. As regards sale deed in favour of Mr. R.P. David, that was executed only after previous permission was given by the RBI for such transfer. However, gift deeds in favour of respondent No.1 in respect of portion of the larger property are not backed by such previous permission of the RBI either general or special. Admittedly, no permission has been taken from the RBI in that regard thus far.

12. It is in this backdrop, the appellant is questioning the validity of the transaction or stated transfer in favour of respondent No.1 of property admeasuring 12,306 square feet, being in contravention of Section 31 of the 1973 Act. And if that contention succeeds, it must follow that the gift deeds, though executed in favour of respondent No.1, would be unenforceable in law. Resultantly, Mr. R.P. David (predecessor of the appellant and respondent No.4), had acquired clear title of the larger property admeasuring 35,470 square feet transferred to him vide registered sale deed dated 09.04.1983 being backed by previous permission by the RBI in that regard.

13. Before we analyse Section 31 of the 1973 Act, it is essential to understand the object and purpose for which the 1973 Act was brought into force. It was to consolidate and amend the law relating to certain payments, dealings in foreign exchange and securities, transactions indirectly affecting foreign exchange and the import and export of currency, for the conservation of the foreign exchange resources of the country and the proper utilisation thereof in the interests of the economic development of the country. While introducing the Bill in the Lok Sabha and explaining the object of Section 31 of the 1973 Act, Mr. Y.B. Chavan, the then Minister of Finance rose to state as follows:

“As a matter of general policy it has been felt that we should not allow foreign investment in landed property/buildings constructed by foreigners and foreign controlled companies as such investments offer scope for considerable amount of capital liability by way of capital repatriation. While we may still require foreign investments in certain

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- A **sophisticated branches of industry, there is no reason why we should allow foreigners and foreign companies to enter real estate business.”**
- (emphasis supplied)
- B 14. The avowed object of Section 31 of the 1973 Act was thus to minimise the drainage of foreign exchange by way of repatriation of income from immovable property and sale proceeds in case of disposal of property by a person, who is not a citizen of India. As is noticed from the title of Section 31, it is to put restriction on acquisition, holding and disposal of immovable property in India by foreigners – non citizens. We
- C deem it apposite to reproduce Section 31 of the 1973 Act as applicable at the relevant time, the same reads thus:
- “31. Restriction on acquisition, holding, etc., of immovable property in India.— (1) No person who is not a citizen of India and no company (other than a banking company) which is not incorporated under any law in force in India or in which the non-resident interest is more than forty per cent shall, except with the previous general or special permission of the Reserve Bank, acquire or hold or transfer or dispose of by sale, mortgage, lease, gift, settlement or otherwise any immovable property situate in India:
- E Provided that nothing in this sub-section shall apply to the acquisition or transfer of any such immovable property by way of lease for a period not exceeding five years.
- (2) Any person or company referred to in sub-section (1) and requiring a special permission under that sub-section for acquiring, or holding, or transferring, or disposing of, by sale, mortgage, lease, gift, settlement or otherwise any immovable property situate in India may make an application to the Reserve Bank in such form and containing such particulars as may be specified by the Reserve Bank.
- G (3) On receipt of an application under sub-section (2), the Reserve Bank may, after making such inquiry as it deems fit, either grant or refuse to grant the permission applied for:
- Provided that no permission shall be refused unless the applicant has been given a reasonable opportunity for making a representation in the matter:
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Provided further that if before the expiry of a period of ninety days from the date on which the application was received by the Reserve Bank, the Reserve Bank does not communicate to the applicant that the permission applied for has been refused, it shall be presumed that the Reserve Bank has granted such permission.

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Explanation.— In computing the period of ninety days for the purposes of the second proviso, the period, if any, taken by the Reserve Bank for giving an opportunity to the applicant for making a representation under the first proviso shall be excluded.

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(4) Every person and company referred to in sub-section (1) holding at the commencement of this Act any immovable property situate in India shall, before the expiry of a period of ninety days from such commencement or such further period as the Reserve Bank may allow in this behalf, make a declaration in such form as may be specified by the Reserve Bank regarding the immovable property or properties held by such person or company.”

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On a bare reading of sub-Section (1), it is crystal clear that a person, who is not a citizen of India, is not competent to dispose of by sale or gift, as in this case, any immovable property situated in India without previous general or special permission of the RBI. The only exception provided in the proviso is that of acquisition or transfer of immovable property by way of lease for a period not exceeding five years. This provision applies to foreign citizens and foreign and FERA companies only. A non-resident Indian citizen is not covered thereunder. Sub-Section (2) mandated such person, who is not a citizen of India, to make an application to the RBI in the prescribed form making necessary disclosures. Sub-Section (3) postulates that on receipt of such an application, the RBI after due inquiry as it deems fit, either may grant or refuse to grant the permission applied for. The second proviso to sub-Section (3) provides for a default permission, if no response is received to the application within the specified period. What is significant to notice is that as per sub-Section (4), every person, who is not a citizen of India, holding immovable property situated in India at the time of commencement of the 1973 Act, is obliged to make declaration within ninety days from the commencement of the 1973 Act or such further period as may be allowed by the RBI.

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15. In other words, a person, who is not a citizen of India, holding immovable property situated in India was obliged to make disclosure

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- A and declaration in that behalf to the RBI; and in any case, if he/she intended to dispose of such property by sale, mortgage, lease, gift, settlement or otherwise, was expected to obtain previous general or special permission from the RBI. Only then, transfer so intended could be given effect to. It is true that the consequences of failure to seek such previous permission has not been explicitly specified in the same provision or elsewhere in the Act, but then the purport of Section 31 must be understood in the context of intent with which it has been enacted, the general policy not to allow foreign investment in landed property/buildings constructed by foreigners or to allow them to enter into real estate business to eschew capital repatriation, including the purport of other provisions of the Act, such as Sections 47, 50 and 63. Here, we deem it apposite to reproduce Sections 47, 50 and 63 as applicable at the relevant time, the same read thus:
 - D “47. Contracts in evasion of the Act.— (1) No person shall enter into any contract or agreement which would directly or indirectly evade or avoid in any way the operation of any provision of this Act or of any rule, direction or order made thereunder.
 - (2) Any provision of, or having effect under, this Act that a thing shall not be done without the permission of the Central Government or the Reserve Bank, shall not render invalid any agreement by any person to do that thing, if it is a term of the agreement that that thing shall not be done unless permission is granted by the Central Government or the Reserve Bank, as the case may be; and it shall be an implied term of every contract governed by the law of any part of India that anything agreed to be done by any term of that contract which is prohibited to be done by or under any of the provisions of this Act except with the permission of the Central Government or the Reserve Bank, shall not be done unless such permission is granted.
 - (3) Neither the provisions of this Act nor any term (whether express or implied) contained in any contract that anything for which the permission of the Central Government or the Reserve Bank is required by the said provisions shall not be done without that permission, shall prevent legal proceedings being brought in India to recover any sum which, apart from the said provisions and any such term, would be due, whether as debt, damages or otherwise, but—

(a) the said provisions shall apply to sums required to be paid by any judgment or order of any court as they apply in relation to other sums; A

(b) no steps shall be taken for the purpose of enforcing any judgment or order for the payment of any sum to which the said provisions apply except as respects so much thereof as the Central Government or the Reserve Bank, as the case may be, may permit to be paid; and B

(c) for the purpose of considering whether or not to grant such permission, the Central Government or the Reserve Bank, as the case may be, may require the person entitled to the benefit of the judgment or order and the debtor under the judgment or order, to produce such documents and to give such information as may be specified in the requisition. C

(4) Notwithstanding anything contained in the Negotiable Instruments Act, 1881, neither the provisions of this Act or of any rule, direction or order made thereunder, nor any condition, whether expressed or to be implied having regard to those provisions, that any payment shall not be made without permission under this Act, shall be deemed to prevent any instrument being a bill of exchange or promissory note. D

50. Penalty.— If any person contravenes any of the provisions of this Act [other than section 13, cl. (a) of sub-section (1) of section 18 and cl. (a) of sub-section (1) of section 19] or of any rule, direction or order made thereunder, he shall be liable to such penalty not exceeding five times the amount or value involved in any such contravention or five thousand rupees, whichever is more, as may be adjudged by the Director of Enforcement or any other officer of Enforcement not below the rank of an Assistant Director of Enforcement specially empowered in this behalf by order of the Central Government (in either case hereinafter referred to as the adjudicating officer). F G

63. Confiscation of currency, security, etc.— Any court trying a contravention under section 56 and the adjudicating officer H

- A adjudging any contravention under section 51 may, if it or he thinks fit and in addition to any sentence or penalty which it or he may impose for such contravention, direct that any currency, security or any other money or property in respect of which the contravention has taken place shall be confiscated to the Central Government and further direct that the foreign exchange holdings, if any, of the person committing the contravention or any part thereof, shall be brought back into India or shall be retained outside India in accordance with the directions made in this behalf.
- B Explanation.— For the purposes of this section, property in respect of which contravention has taken place shall include—
 - C (a) deposits in a bank, where the said property is converted into such deposits;
 - (b) Indian currency, where the said property is converted into that currency;
 - D (c) any other property which has resulted out of the conversion of that property.”
- E 16. Reverting to Section 47, sub-Section (1) clearly envisages that no person shall enter into any contract or agreement which would directly or indirectly evade or avoid in any way the operation of any provision of the 1973 Act or of any rule, direction or order made thereunder. What is significant to notice is that sub-Section (2) declares that the agreement shall not be invalid if it provides that thing shall not be done without the permission of the Central Government or the RBI. That would be the implied requirement of the agreement in terms of this provision. In other words, though ostensibly the agreement would be a conditional one made subject to permission of the Central Government or the RBI, as the case may be and if such term is not expressly mentioned in the agreement, it shall be an implied term of every contract governed by the law—of obtaining permission of the Central Government or the RBI before doing the thing provided for in the agreement. In that sense, such a term partakes the colour of a statutory contract. Notably, Section 47 of the 1973 Act applies to all the contracts or agreements covered under the 1973 Act, which require previous permission of the RBI.
- H 17. Section 50 reinforces the position that transfer of land situated in India by a person, who is not a citizen of India, would visit with penalty.

Indeed, inserting such a provision does not mean that the 1973 Act is a A
penal statute, but is to provide for penal consequence for contravention
of provisions, such as Section 31 of the 1973 Act.

18. Section 63 of the 1973 Act empowers the court trying a B
contravention under Section 56 which includes one under Section 51 of C
the 1973 Act, to confiscate the currency, security or any other money or
property in respect of which the contravention has taken place. The
expression “property” in Section 63, takes within its sweep immovable
property referred to in Section 31 of the 1973 Act. To put it differently,
the requirement specified in Section 31 is mandatory and, therefore,
contract or agreement including the gift pertaining to transfer of immovable
property of a foreign national without previous general or special
permission of the RBI, would be unenforceable in law.

19. At this stage, it may be useful to keep in mind the purport of D
expression “void” and “voidable”. For that, we may advert to the
exposition in the case of *Dhurandhar Prasad Singh v. Jai Prakash
University & Ors.*¹⁶, which had noted the dictum of Lord Denning in *R.
v. Paddington Valuation Officer, ex p Peachey Property Corp. Ltd.*¹⁷
and also in *Judicial Review of Administrative Action* by de Smith,
Woolf and Jowell and in *Judicial Remedies in Public Law* by Clive
Lewis, the same read thus:

“**19.** This question was examined by the Court of Appeal in the E
case of *R. v. Paddington Valuation Officer, ex p Peachey
Property Corp. Ltd.* [(1965) 2 All ER 836 : (1966) 1 QB 380 : F
(1965) 3 WLR 426 (CA)] where the valuation list was challenged
on the ground that the same was void altogether. On these facts,
Lord Denning, M.R. laid down the law, observing at p. 841 thus:

“It is necessary to distinguish between two kinds of invalidity. G
The one kind is where the invalidity is so grave that the list is a
nullity altogether. In which case there is no need for an order
to quash it. It is automatically null and void without more ado.
The other kind is when the invalidity does not make the list
void altogether, but only voidable. In that case it stands unless
and until it is set aside. In the present case the valuation list is
not, and never has been, a nullity. At most the first respondent

¹⁶(2001) 6 SCC 534

¹⁷(1965) 2 All ER 836

- A — acting within his jurisdiction — exercised that jurisdiction erroneously. That makes the list voidable and not void. It remains good until it is set aside.”
- B **20.** de Smith, Woolf and Jowell in their treatise *Judicial Review of Administrative Action*, 5th Edn., para 5-044, have summarised the concept of void and voidable as follows:
- “Behind the simple dichotomy of void and voidable acts (invalid and valid until declared to be invalid) lurk terminological and conceptual problems of excruciating complexity. The problems arose from the premise that if an act, order or decision is ultra vires in the sense of outside jurisdiction, it was said to be invalid, or null and void. If it is intra vires it was, of course, valid. If it is flawed by an error perpetrated within the area of authority or jurisdiction, it was usually said to be voidable; that is, valid till set aside on appeal or in the past quashed by certiorari for error of law on the face of the record.”
- C **21.** Clive Lewis in his work *Judicial Remedies in Public Law* at p. 131 has explained the expressions “void and voidable” as follows:
- “A challenge to the validity of an act may be by direct action or by way of collateral or indirect challenge. A direct action is one where the principal purpose of the action is to establish the invalidity. This will usually be by way of an application for judicial review or by use of any statutory mechanism for appeal or review. Collateral challenges arise when the invalidity is raised in the course of some other proceedings, the purpose of which is not to establish invalidity but where questions of validity become relevant.”
- D **22.** Thus the expressions “void and voidable” have been the subject-matter of consideration on innumerable occasions by courts. The expression “void” has several facets. One type of void acts, transactions, decrees are those which are wholly without jurisdiction, ab initio void and for avoiding the same no declaration is necessary, law does not take any notice of the same and it can be disregarded in collateral proceeding or otherwise. The other type of void act, e.g., may be transaction against a minor without being represented by a next friend. Such a transaction is a good

transaction against the whole world. So far as the minor is concerned, if he decides to avoid the same and succeeds in avoiding it by taking recourse to appropriate proceeding the transaction becomes void from the very beginning. Another type of void act may be which is not a nullity but for avoiding the same a declaration has to be made. Voidable act is that which is a good act unless avoided, e.g., if a suit is filed for a declaration that a document is fraudulent and/or forged and fabricated, it is voidable as the apparent state of affairs is the real state of affairs and a party who alleges otherwise is obliged to prove it. If it is proved that the document is forged and fabricated and a declaration to that effect is given, a transaction becomes void from the very beginning. There may be a voidable transaction which is required to be set aside and the same is avoided from the day it is so set aside and not any day prior to it. In cases where legal effect of a document cannot be taken away without setting aside the same, it cannot be treated to be void but would be obviously voidable.”

20. It is well established that a contract is void if prohibited by a statute under a penalty, even without express declaration that the contract is void, because such a penalty implies a prohibition. Further, it is settled that prohibition and negative words can rarely be directory. In the present dispensation provided under Section 31 of the 1973 Act read with Sections 47, 50 and 63 of the same Act, although it may be a case of seeking previous permission it is in the nature of prohibition as observed by a three-Judge Bench of this Court in *Mannalal Khetan & Ors. v. Kedar Nath Khetan & Ors.*¹⁸. In every case where a statute imposes a penalty for doing an act, though, the act not prohibited, yet the thing is unlawful because it is not intended that a statute would impose a penalty for a lawful act. When penalty is imposed by statute for the purpose of preventing something from being done on some ground of public policy, the thing prohibited, if done, will be treated as void, even though the penalty if imposed is not enforceable. We may usefully reproduce paragraphs 18 to 22 of the said reported decision, which

read thus:

“**18.** The High Court said that the provisions contained in Section 108 of the Act are directory because non-compliance with Section 108 of the Act is not declared an offence. **The reason given by**

¹⁸(1977) 2 SCC 424

- A **the High Court is that when the law does not prescribe the consequences or does not lay down penalty for non-compliance with the provision contained in Section 108 of the Act the provision is to be considered as directory.** The High Court failed to consider the provision contained in Section 629(a) of the Act. Section 629(a) of the Act prescribes the penalty where no specific penalty is provided elsewhere in the Act. **It is a question of construction in each case whether the legislature intended to prohibit the doing of the act altogether, or merely to make the person who did it liable to pay the penalty.**
- C **19. Where a contract, express or implied, is expressly or by implication forbidden by statute, no court will lend its assistance to give it effect.** (See *Mellis v. Shirley L.B.* [(1885) 16 QBD 446 : 55 LJQB 143 : 2 TLR 360]) **A contract is void if prohibited by a statute under a penalty, even without express declaration that the contract is void, because such a penalty implies a prohibition.** The penalty may be imposed with intent merely to deter persons from entering into the contract or for the purposes of revenue or that the contract shall not be entered into so as to be valid at law. A **distinction is sometimes made between contracts entered into with the object of committing an illegal act and contracts expressly or impliedly prohibited by statute.** The distinction is that in the former class one has only to look and see what acts the statute prohibits; it does not matter whether or not it prohibits a contract: **if a contract is made to do a prohibited act, that contract will be unenforceable.** In the latter class, one has to consider not what act the statute prohibits, but what contracts it prohibits. One is not concerned at all with the intent of the parties, if the parties enter into a prohibited contract, that contract is unenforceable. (See *St. John Shipping Corporation v. Joseph Rank* [(1957) 1 QB 267].) (See also *Halsbury's Laws of England*, 3rd Edn., Vol. 8, p. 141.)
- G **20. It is well established that a contract which involves in its fulfilment the doing of an act prohibited by statute is void.** The legal maxim *A pactis privatorum publico juri non derogatur* means that private agreements cannot alter the general
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law. Where a contract, express or implied, is expressly or by implication forbidden by statute, no court can lend its assistance to give it effect. (See *Mellis v. Shirley L.B.*) **What is done in contravention of the provisions of an Act of the legislature cannot be made the subject of an action.**

21. If anything is against law though it is not prohibited in the statute but only a penalty is annexed the agreement is void. In every case where a statute inflicts a penalty for doing an act, though the act be not prohibited, yet the thing is unlawful, because it is not intended that a statute would inflict a penalty for a lawful act.

22. Penalties are imposed by statute for two distinct purposes:
(1) for the protection of the public against fraud, or for some other object of public policy; (2) for the purpose of securing certain sources of revenue either to the State or to certain public bodies.
If it is clear that a penalty is imposed by statute for the purpose of preventing something from being done on some ground of public policy, the thing prohibited, if done, will be treated as void, even though the penalty if imposed is not enforceable.”

(emphasis supplied)

The principle underlying in this decision must apply on all fours while analysing the purport of Section 31 of the 1973 Act.

21. The appellant has invited our attention to the dictum in *Union of India & Ors. v. A.K. Pandey*¹⁹, that where a contract, express or implied, is expressly or by implication forbidden by statute, no court will lend its assistance to give it effect. Further, a contract is void if prohibited by a statute under a penalty, even without express declaration that the contract is void, because such a penalty implies a prohibition. Similarly, in the case of *Union of India v. Colonel L.S.N. Murthy & Anr.*²⁰, the Court opined that the contract would be lawful, unless the consideration and object thereof is of such a nature that, if permitted, it would defeat the provisions of law and in such a case the consideration or object is unlawful and would become void and that unless the effect of an agreement results in performance of an unlawful act, an agreement which

¹⁹ (2009) 10 SCC 552 (paras 14 and 15)

²⁰ (2012) 1 SCC 718 (paras 16 to 19 and 21)

- A is otherwise legal cannot be held to be void and if the effect of an agreement did not result in performance of an unlawful act, as a matter of public policy, the court should refuse to declare the contract void with a view to save the bargain entered into by the parties and the solemn promises made thereunder. The Court adverted to the exposition in the earlier decision in *Shri Lachoo Mal v. Shri Radhey Shyam*²¹ as to what makes an agreement, which is otherwise legal, void is that its performance is impossible except by disobedience of law.

22. Notably, the Constitution Bench of this Court in *Life Insurance Corporation of India* (supra) had an occasion to examine the objects and reasons for enacting the 1973 Act. The Court was called upon to consider the purport of Section 29 of the 1973 Act, which does not qualify the words “general or special permission of the Reserve Bank of India” with word “previous” or “prior” unlike in the case of Section 31 of the same Act. In paragraph 63, this distinction has been noticed and reference has been specifically made to Section 31 of the 1973 Act. That makes it amply clear that the dispensations provided in Sections 29 and 31, must be regarded as distinct and violation whereof would visit with different consequences. As regards Section 29, this Court opined that the permission can be sought from the RBI at some stage for the purchase of shares by non-resident companies and not necessarily prior permission. The Court, therefore, opined that even *ex post facto* permission can be accorded by the RBI in reference to transaction covered by Section 29 of the Act.

23. Significantly, the consequence of contravention of Section 31 of the Act as being rendering the transfer void, is also taken notice of in the recent decision of a three-Judge Bench of this Court in *Vijay Karia* (supra). It has been so noted in paragraph 88 while distinguishing the dispensation provided in the Foreign Exchange Management Act, 1999 (FEMA). The Court has noted that FEMA unlike FERA — refers to the nation’s policy of managing foreign exchange instead of policing foreign exchange, the policeman being RBI under FERA. Indeed, it is not a decision dealing directly with the question involved in the present appeal. Nevertheless, it does take notice of the strict dispensation under Section 31, as it obtained under the 1973 Act, particularly requiring “previous” general or special permission of the RBI.

24. Another three-Judge Bench in the case ***Renusagar Power Co. Ltd.*** (supra) while dealing with the question of enforceability of an arbitral award, adverted to violation of FERA in reference to Section 47 of the 1973 Act as can be discerned from paragraphs 68 to 84. We need not dilate on this judgment except to notice the dictum in ***Herbert Wagg & Co. Ltd., Re***²² reproduced in paragraph 68, which reads thus:

“**68.** ... In *Herbert Wagg & Co. Ltd., Re* [(1956) 1 Ch 323], Upjohn J., has said:

“It cannot be doubted that legislation intended to protect the economy of the nation and the general welfare of its inhabitants regardless of their nationality by various measures of foreign exchange control or by altering the value of its currency, is recognised by foreign courts although its effect is usually partially confiscatory. Probably there is no civilized country in the world which has not at some stage in its history altered its currency or restricted the rights of its inhabitants to purchase the currency of another country. (p. 349)

In my judgment these courts must recognize the right of every foreign State to protect its economy by measures of foreign exchange control and by altering the value of its currency. Effect must be given to those measures where the law of the foreign State is the proper law of the contract or where the movable is situate within the territorial jurisdiction of the State.” (p. 351)”

It may be useful to also reproduce paragraph 69 of the judgment, which reads thus:

“**69.** The following principle of Private International Law is applicable in relation to such legislation:

“212. (1) A contractual obligation may be invalidated or discharged by exchange control legislation if—

- (a) such legislation is part of the proper law of the contract; or
- (b) it is part of the law of the place of performance; or
- (c) it is part of English law and the relevant statute or statutory instrument is applicable to the contract:

²²(1956) 1 Ch 323

- A Provided that foreign exchange legislation will not be applied if it is used not with the object of protecting the economy of the foreign State, but as an instrument of oppression or discrimination." (See : Dicey & Morris, *The Conflict of Laws*, 11th Edn., Vol. II, 1466.)"
25. From the analysis of Section 31 of the 1973 Act and upon conjoint reading with Sections 47, 50 and 63 of the same Act, we must hold that the requirement of taking "previous" permission of the RBI before executing the sale deed or gift deed is the quintessence; and failure to do so must render the transfer unenforceable in law. The dispensation under Section 31 mandates "previous" or "prior" permission of the RBI before the transfer takes effect. For, the RBI is competent to refuse to grant permission in a given case. The sale or gift could be given effect and taken forward only after such permission is accorded by the RBI. There is no possibility of *ex post facto* permission being granted by the RBI under Section 31 of the 1973 Act, unlike in the case of Section 29 as noted in *Life Insurance Corporation of India* (supra).
- B Before grant of such permission, if the sale deed or gift deed is challenged by a person affected by the same directly or indirectly and the court declares it to be invalid, despite the document being registered, no clear title would pass on to the recipient or beneficiary under such deed. The clear title would pass on and the deed can be given effect to only if permission is accorded by the RBI under Section 31 of the 1973 Act to such transaction.
26. In light of the general policy that foreigners should not be permitted/allowed to deal with real estate in India; the peremptory condition of seeking previous permission of the RBI before engaging in transactions specified in Section 31 of the 1973 Act and the consequences of penalty in case of contravention, the transfer of immovable property situated in India by a person, who is not a citizen of India, without previous permission of the RBI must be regarded as unenforceable and by implication a prohibited act. That can be avoided by the RBI and also by anyone who is affected directly or indirectly by such a transaction. There is no reason to deny remedy to a person, who is directly or indirectly affected by such a transaction. He can set up challenge thereto by direct action or even by way of collateral or indirect challenge.
27. In other words, until permission is accorded by the RBI, it would not be a lawful contract or agreement within the meaning of Section 10 read with Section 23 of the Contract Act. For, it remains a forbidden

transaction unless permission is obtained from the RBI. The fact that the transaction can be taken forward after grant of permission by the RBI does not make the transaction any less forbidden at the time it is entered into. It would nevertheless be a case of transaction opposed to public policy and, thus, unlawful. In this view of the matter, the appellant must succeed and would be entitled for the reliefs claimed in O.S. No. 10079 of 1984 for declaration that the gift deed dated 11.03.1977 and supplementary deed dated 19.04.1980 in favour of respondent No.1 are invalid, unenforceable and not binding on the plaintiff. A *fortiori*, the plaintiff is entitled for possession of the suit property from respondent no.1 and persons claiming through him, admeasuring 12,306 square feet and also mesne profits for the relevant period for which a separate inquiry needs to be initiated under Order 20 Rule 12 of the Code of Civil Procedure, 1908.

28. Reverting to the judgment of Punjab & Haryana High Court in **Piara Singh** (supra) relied upon in the impugned judgment, it was held as follows:

“**11.** It is true that the section provides that without the previous permission of the Reserve Bank, a person who is not a citizen of India, cannot acquire property, but it does not provide that if someone purchases any property the title therein does not pass to him. What the Act provides is that if a person contravenes S.31 and some other sections, he can be penalized under S.50 and can also be prosecuted under S.56. However, there is no provision in the Act which makes transaction void or says that no title in the property passes to the purchaser in case there is contravention of the provisions of sub-sec.(1) of S.31. Section 63 contains a provision regarding confiscation of certain properties but it does not contain any provision for confiscation if there is breach of the provisions of sub-sec.(1) of S.31. Therefore, the property purchased in contravention of sub-sec.(1) of S.31 is also not liable to confiscation. In the circumstances, it cannot be held that the plaintiffs are not entitled to obtain possession of the property or recover damages for its use and occupation.”

29. In the first place, provision for penalty under Section 50 for contravention referred to in Section 31, does not mean that the requirement of previous permission of RBI is directory or a mere formality. It is open to the legislature to provide two different consequences for the violation.

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- A As already noted hitherto, despite the absence of express provision declaring the transfer void, the intent behind enacting Section 31 and its purport renders the transfer in contravention thereof unenforceable until permission for such transaction is granted by the RBI.

30. Suffice it to observe that merely because no provision in the Act makes the transaction void or says that no title in the property passes to the purchaser in case there is contravention of the provisions of Section 31, will be of no avail. That does not validate the transfer referred to in Section 31, which is not backed by “previous” permission of the RBI. Further, the Punjab & Haryana High Court erroneously assumed that there was no provision regarding confiscation of the immovable property referred to in Section 31. Section 63 of the 1973 Act clearly refers to property in respect of which contravention has taken place for being confiscated to the Central Government. The expression “property” therein would certainly take within its sweep an immovable property referred to in Section 31 of the Act. The expression “property” in Section 63 is an inclusive term and, therefore, there is no reason to assume that consequence of confiscation may not apply to immovable property in respect of which contravention of the provisions of sub-Section (1) of Section 31 had taken place. The basis of that judgment is tenuous and is palpably wrong. For the same reason, the decision in *R. Sambasivam* (supra) of the Madras High Court is erroneous as it has merely followed the dictum of the Punjab & Haryana High Court. Suffice it to observe that the transaction of gift deed without previous permission of the RBI may not be nullity, but certainly not enforceable in law until such permission is granted.

31. In the case of *Ajit Prashad Jain* (supra) discussion regarding consequences of contravention of Section 31 of the 1973 Act is found in paragraph 26 of the reported decision. Although, this decision is independent of the view expressed in *Piara Singh* (supra) by the Punjab & Haryana High Court, there is no clear analysis of the aspects which are germane for giving correct interpretation to Section 31 of the 1973 Act and the effect of consequences for its contravention. For the view taken by us hitherto, it is unnecessary to dilate on this judgment any further. Similarly, the Gauhati High Court in the case of *Tufanu Chouhan* (supra) essentially relied upon the decision in *Piara Singh* (supra) of the Punjab & Haryana High Court. For the reasons already stated while dealing with *Piara Singh* (supra), even this judgment will be of no avail

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to the respondent. Even the Madhya Pradesh High Court in *Geeta Reinboth* (supra) relied upon *Piara Singh* (supra) as well as on the dictum in the book titled Principles of Statutory Interpretation, 8th Edition by Justice G.P. Singh and upon the decision of the same High Court in *Janki Bai v. Ratan Melu*²³, *Ajit Prashad Jain* (supra) and notification No. GSR 456 (E) dated 26.05.1993 of the RBI (Exchange Control Department) published in 1993 MPLT 242 (109). As regards the dictum in the book Principles of Statutory Interpretation, that is a general observation, not specifically dealing with the purport and interpretation of Section 31 of the 1973 Act. As aforesaid, Section 31 needs to be interpreted in light of the intent with which the same has been enacted keeping in mind the general policy not to allow foreigners to transact in or hold real estate in India. The case of *Janki Bai* (supra) had dealt with the provisions of C.P. & Berar Money Lenders Act, 1934. The observations made therein are, therefore, in the context of provisions of that Act. We have already analysed the dictum in *Ajit Prashad Jain* (supra) and noted that the same is of no avail to the respondent. Reverting to the stated notification dated 26.05.1993 issued by the RBI, that indeed is to clarify the scope of Section 31 of the 1973 Act. However, it is limited to transaction entered into by a foreign citizen of "Indian origin", to deal with real estate in India on certain conditions. This notification has no application to foreigners or so to say the person who is not a citizen of India, namely, foreign citizens. In the present case, the land was owned by a foreign citizen. For which reason, the rigours of Section 31 must apply with full force. Additionally, it must be kept in mind that the stated notification was issued in 1993, around which time a change in policy regarding the investment opportunities for non-resident Indians and foreigners had been crystallised, by opening up of economy in India. In the present case, we are dealing with the transaction effected close to the coming into force of the 1973 Act i.e., in the year 1977 when considerations were different and governed by different policy manifested in the form of enactment of Section 31 of the 1973 Act, spoken to by the then Finance Minister in the Lok Sabha, forbidding foreigners from dealing with real estate in India.

32. The two other decisions of the Madras High Court, namely, *Sivaprakasam* (supra) and *Mathu Sree Akkabai Ammani Charitable Trust* (supra), were pressed into service. These came to be decided on similar reasoning adopted in the earlier decision of the same High Court

²³ 1962 MPLJ 78 : AIR 1962 MP 117

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- A in ***R. Sambasivam*** (supra) and ***Piara Singh*** (supra) of the Punjab & Haryana High Court. Those decisions will be of no avail to the respondent in light of the view taken by us on the interpretation of Section 31 of the 1973 Act.

33. We may now usefully advert to the decision of the Bombay High Court (Goa Bench) in ***Joaquim Mascarenhas Fiuba v. Jaime Rebello & Anr.***²⁴, which has taken a different view to interpret Section 31 of the 1973 Act. That dealt with the case of transfer of property which according to the respondent therein could not be held by the plaintiff/petitioner, who was a foreign national and not a citizen of India, in absence of permission given by the RBI in that regard. The Bombay High Court took the view that the requirement of seeking previous permission of the RBI in Section 31 of the 1973 Act is mandatory and a foreign national could hold the property in India, only if so permitted by the RBI. The view so taken commends to us. Notably, the Single Judge of the Madras High Court had followed this dictum in ***Sahruvan Nachair & Anr. v. V.S. Mohammed Hussain Maracair***²⁵.

34. It has been brought to our notice that the Kerala High Court in ***William Babu & Anr. v. Helma Roy Alias Emily Carmel***²⁶, opined that contract in contravention of Section 31 is void, as previous general or special permission of the RBI had not been obtained, which in its view was mandatory. This decision had become final consequent to dismissal of SLP(Civil) No.11591 of 2018 on 23.04.2018. Even a Division Bench of the Madras High Court in ***Mrs. Shoba Viswanatha v. D.P. Kingsley***²⁷, while considering the purport of Section 31 of the 1973 Act, vide its erudite judgment considered the scope of Section 23 of the Contract Act and the principles delineated in that regard in Pollock and Mulla Indian Contract Act, VII Edition, page 158 including the decisions in ***Joaquim Mascarenhas Fiuba*** (supra), ***Beharilal Maudgi v. The Secretary to Govt. of A.P. Home Department, Hyderabad & Ors.***²⁸ and the considerations governing public policy as delineated in ***Gherulal Parakh v. Mahadeodas Maiya & Ors.***²⁹, ***Rattan Chand Hira Chand v. Askar Nawaz (Dead) by L.Rs. & Ors.***³⁰ and other treaties, to

G ²⁴ 1986 SCC OnLine Bom 234 : 1986 Mah LJ 1031

²⁵ (2001) 1 Mad LJ 188 : 2000 SCC OnLine Mad 737

²⁶ (2018) 1 KLJ 525 : 2017 SCC OnLine Ker 25269

²⁷ 1996 (I) CTC 620 : 1996 SCC Online Mad 319

²⁸ 1986 (2) ALT 241

²⁹ AIR 1959 SC 781

H ³⁰ 1991 (3) SCC 67

eventually conclude that the position of law is clear that when the enforcement of the contract is against any provision of law, that will amount to enforcement of an illegal contract. The contract per se may not be illegal. But its enforcement requires compliance of statutory conditions, failure of which will amount to statutory violation. A court which is expected to enforce the law, cannot be a party to such a decree. The view so taken in this judgment commends to us. As a matter of fact, this judgment has become final in view of dismissal of SLP (Civil) No.15024 of 1996 by this Court vide order dated 14.08.1996.

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35. For the view that we have taken, it is not possible to countenance the argument not to disturb the consistent view of different High Courts on the principle of *stare decisis* by invoking the dictum in *Waman Rao* (supra), in reference to Section 31 of the 1973 Act. For, there is conflict of opinion and is not a case of consistent view of all High Courts, having occasion to deal with interpretation of Section 31 of the 1973 Act. Resultantly, we had to undertake the exercise of analysing all the decisions so as to give proper meaning to Section 31 of the 1973 Act. In our opinion, the requirement of seeking previous general or special permission of the RBI in respect of transaction covered by Section 31 of the 1973 Act is mandatory. Resultantly, any sale or gift of property situated in India by a foreigner in contravention thereof would be unenforceable in law.

36. As the stated gift deeds dated 11.03.1977 and 19.04.1980 in favour of respondent no.1 being unenforceable in law, respondent no.1 had no clear title to transfer the same to Dr. Thomas Chandy vide purported sale deed dated 15.09.2005. It is not necessary for us to dilate on the argument of the appellant that such a sale deed in any case could not have been executed by respondent No.1 in favour of Dr. Thomas Chandy in contravention of interim order passed by the High Court on 07.04.2005 and the effect thereof.

37. As noticed above, the contrary decisions of High Courts have completely missed the legislative intent and the spirit of enactment of Section 31, as is manifest from the statement of the then Finance Minister while tabling the Bill in the Lok Sabha that as a general policy foreign national cannot be allowed to deal with real estate in India. Besides that clear indication, the legislative scheme impels us to take a view which is reinforced from conjoint reading of Section 31 along with Sections 47, 50 and 63. There is little doubt that the requirement of "previous" permission of the RBI, to be taken by a foreign national before transacting in real estate, is mandatory. In other words, without previous permission

- A of the RBI, such a transaction is forbidden and if entered into, would be unenforceable in law.

38. We hold that the condition predicated in Section 31 of the 1973 Act of obtaining “previous” general or special permission of the RBI for transfer or disposal of immovable property situated in India by sale or mortgage by a person, who is not a citizen of India, is mandatory.

- B Until such permission is accorded, in law, the transfer cannot be given effect to; and for contravening with that requirement, the concerned person may be visited with penalty under Section 50 and other consequences provided for in the 1973 Act. Hence, the Trial Court as well as the High Court committed manifest error in dismissing the suit C filed by the plaintiff for a declaration in respect of suit property admeasuring 12,306 square feet and for consequential reliefs referred to therein.

39. *A priori*, we conclude that the decisions of concerned High Courts taking the view that Section 31 of the 1973 Act is not mandatory and the transaction in contravention thereof is not void or unenforceable,

- D is not a good law. However, transactions which have already become final including by virtue of the decision of the court of competent jurisdiction, need not be reopened or disturbed in any manner because of this pronouncement. This declaration/direction is being issued in exercise of our plenary power under Article 142 of the Constitution of India. For, E there has been a paradigm shift in the general policy of investment by foreigners in India and more particularly, the 1973 Act itself stands repealed. Accordingly, we deem it appropriate to overrule the decisions of the High Courts, taking contrary view, albeit, prospectively.

40. In view of the above, the appeal is allowed. The impugned judgment and decree of the Trial Court, as confirmed by the High Court,

- F is set aside. Instead, O.S. No.10079 of 1984 filed by Mr. R.P. David (predecessor of the appellant and respondent no.4) stands decreed in toto in favour of the plaintiff. The appellant (being the legal representative of the plaintiff) is entitled for possession of the suit property being the owner thereof and also for mesne profits for the relevant period for which a separate inquiry be conducted under Order 20 Rule 12 of the G Code of Civil Procedure, 1908. Ordered accordingly. No order as to costs.

All pending applications stand disposed of.