

HIGH COURT OF AZAD JAMMU AND KASHMIR

Cr. Appeal No.15/2021.

Date of Institution 29.01.2021.

Date of Decision 03.09.2021.

Imdad Ali Malik S/o Islam Muhammad Malik,
Caste Malik, R/o Pallandri/Rawalakot.

Appellant.

VERSUS

1. Rehmatullah S/o Muhammad Zaman,
Caste Sudhan, R/o Sharqi Dhamni,
Tehsil Rawalakot.
2. Ataulah S/o Muhammad Zaman, Caste
Sudhan, R/o Sharqi Dhamni, Tehsil
Rawalakot.
3. Mst. Rehmat Jan Widow of Muhammad
Zaman Caste Sudhan, R/o Sharqi
Dhamni, Tehsil Rawalakot.
4. Mst. Tasleem Akhtar D/o Muhammad
Zaman, W/o Muhammad Bashir, Caste
Sudhan, R/o Barmang Khurd/Sharqi
Dhamni.
5. Mst. Naseem Akhtar D/o Muhammad
Zaman, W/o Muhammad Sadiq, Caste
Sudhan, R/o Koiyan Raqba
Dhaki/Sharqi Dhamni, Rawalakot.
6. Mst. Shamim Akhtar D/o Muhammad
Zaman, W/o Khadim Hussain, Caste
Sudhan, R/o Barmang Khurd/Sharqi
Dhamni, Rawalakot.
7. Mst. Zareen Akhtar D/o Muhammad
Zaman W/o Muhammad Shawal, Caste
Sudhan, R/o Chehar/Sharqi Dhamni,
Tehsil Rawalakot.

Respondents.

**APPEAL UNDER SECTION 203-J, CR.P.C AGAINST
IMPUGNED ORDER OF ADDITIONAL SESSIONS
JUDGE, RAWALAKOT, DATED 23.01.2021.**

BEFORE:- Justice Sadaqat Hussain Raja, C.J.

PRESENT :

Appellant Mr. Imdad Ali Malik, Advocate,
in person.

Sardar Rebaz Khan, Advocate for
Respondents.

JUDGMENT :-

The captioned appeal has been addressed against the impugned order of Additional District and Sessions Judge, Rawalakot, dated 23.01.2021, whereby a complaint filed by appellant-complainant under section 492-B, APC, was dismissed.

2. The precise facts forming background of the instant appeal are that complainant filed a complaint in the Court below stating therein that land comprising Survey No.1677 measuring 17 Kanal 18 Marlas, situated at village Sharqi-Dhamni, was in the ownership of appellant's father which after his death is in ownership of appellant. It is further averred that the aforesaid land is situated near the land of respondents and in year 1980, Muhammad Zaman, father of respondents, was tenant of the said

land, who filed a suit in the Court of Sub-Judge, Rawalakot, on 11.10.1986 to the effect that this land has been given to him on lease up to 1990 by the allottee. During the pendency of the aforesaid suit, Muhammad Zaman predecessor-in-interest of respondents, challenged the allotment and Proprietary Rights Certificate of the father of appellant in the Court of Custodian Evacuee Property by filing review petition. He also secured temporary injunction and during this period he illegally possessed the said land and also constructed a house over it in year 1989, however, the aforesaid review petition was dismissed vide order dated 30.03.1994 which was not challenged before any forum, hence, the same attained finality. Thereafter, in second round of litigation, predecessor-in-interest of respondents obtained power-of-attorney from one Jalal Din and filed

a second review petition before the Court of Custodian Evacuee Property on 27.04.1993, whereby allotment and Proprietary Rights Certificate issued in the name of appellant's father were cancelled vide order dated 16.11.1995. Feeling aggrieved, Islam Muhammad Malik, father of appellant, challenged the aforesaid order dated 16.11.1995 before this Court on 10.04.1996 whereby the order of learned Custodian Evacuee Property was quashed and Proprietary Rights granted in favour of the appellant's father were restored vide judgment dated 22.10.1997. The aforesaid judgment of this Court was not challenged before any forum by Jalal Din, however, Muhammad Zaman predecessor-in-interest of respondents, challenged the aforesaid judgment before the Apex Court through Civil PLA No.132 of 1997, which was dismissed by the Apex Court vide order dated 03.02.1998. It is further alleged

by appellant that Muhammad Zaman, predecessor-in-interest of respondents started third round of litigation and filed a writ petition before this Court on 29.06.2000 to claim improvements made upon the disputed land which was dismissed vide order dated 27.04.2002. Later on, appellant and others filed an application before Tehsildar ARC, Rawalakot, to take possession of the disputed land from respondents which was accepted and Girdawar Circle, Khaigala, was directed to obtain possession from respondents and submit report within fifteen days, who in compliance of the aforesaid direction, handed over possession of the aforesaid land to the appellant on 16.10.2019, however, respondents sought some time to remove material/rubble of the constructed house from the disputed land but they did not do so rather they are now illegally trespassing the aforesaid land by taking

advantage of the aforesaid illegal constructed house and are claiming their possession over it and taking control of the said land contrary to the decisions of the Court. It is averred that in view of the aforesaid position, appellant filed a complaint under section 492, APC before the Sessions Judge, Rawalakot, on 23.01.2021 which was entrusted to the Additional Sessions Judge, Rawalakot, who without necessary proceedings dismissed the same vide the impugned order dated 23.01.2021, hence, the instant appeal.

3. Appellant Imdad Ali Malik, Advocate, filed written arguments wherein more or less, reiterated the grounds of appeal and submitted that land comprising Survey No.1677 measuring 17 Kanal 18 Marlas situated at Village Sharqi Dhamni, was in the ownership of his father which after his death is in the ownership of appellant whereas the respondents have no nexus with the aforesaid land. He

agitated that the learned Court below without any lawful proceedings dismissed the complaint filed by appellant which is not warranted by law. He pleaded that the learned Court below while deciding the complaint did not rightly consider the Criminal Law (Fifth Amendment) Act, 2020, because actually the aforesaid amendment has been made applicable in Azad Jammu and Kashmir by following the Illegal Dispossession Act, 2005, enforced in Pakistan and the contents and purpose of section 3(1) of Illegal Dispossession, Act, 2005 (enforced in Pakistan) and section 492-B, APC, (Fifth Amendment enforced in AJ&K) are the same, however, only difference is that the Illegal Dispossession Act, 2005, was enforced in Pakistan about 15 years ago, whereas the aforesaid Fifth Amendment in Criminal Law was made/enforced in AJ&K in 2020. The appellant pointed out that the Apex Court of Pakistan has interpreted the law

regarding illegal dispossession in a number of cases and laid down guiding principles in 2010 SCMR 1254, PLD 2007 SC 423, 2009 SCMR 1066, PLD 2010 SC 725, PLD 2016 SC 769 and 2016 SCMR 1931 in connection with Illegal Dispossession Act, 2005, but the Court below did not pay any heed towards the aforesaid precedents of the Apex Court of Pakistan and passed the impugned order contrary to law. The appellant further contended in written arguments that he did not claim retrospective effect of Fifth Amendment rather he mentioned past facts and attached copies of previous judgments just to understand the matter and to highlight the trend of criminal intention of the respondents. He emphasized that keeping in view the wisdom of Fifth Amendment and precedents of the Apex Court of Pakistan, the application of Criminal Law (Fifth Amendment) Act, 2020 will be in the manner that a previous

illegal occupier with the enforcement of the aforesaid amended, Act, would be deemed an illegal occupier and against previous illegal occupier application of Section 492-B would be commenced from the enforcement of the aforesaid Act and moreover a previous legal occupier/possessor with the enforcement of the said Act, would be considered legal occupier/possessor and application of Section 492-C, after enforcement of the aforesaid Act, would be upon the person who forcibly dispossess any lawful owner/occupier, but the Court below did not understand the real object and wisdom of Section 492-B and 492-C, APC, hence, order of the Court below is liable to be set-aside. The appellant contended that the impugned order is masterpiece of misreading and non-reading because respondents have been declared a "peaceful occupier" from the time of their ancestor and the Court below did

not bother to take note of the decision regarding handing over possession dated 04.10.2019 and a "note" written with red ink on an attested copy of "Khasra Girdawari" regarding handing over possession to appellant on 16.10.2019 and wrongly declared the respondents as "peaceful Occupiers". According to the appellant, he clearly mentioned in paras No.7 & 8 of the complaint that revenue functionary handed over possession of the land measuring 17 Kanal 18 Marlas to the appellant on 16.10.2019 and in the aforesaid land only upon few marlas the respondents had constructed a house, which is under their illegal occupation and now taking advantage of the aforesaid illegal constructed house, they have started taking illegal control/possession on the land under possession of the appellant and the aforementioned factum could be clarified by holding local inquiry/investigation but the Court below

did not bother to study the aforesaid paragraphs and dismissed the complaint contrary to law. The appellant agitated that, according to the Court below the land in dispute is under litigation between the parties since long, whereas there is no litigation regarding possession of the aforesaid land before any Court or forum and if it is assumed that there is any litigation, even then the complaint of appellant would not suffer as per the Principle laid down in 2016 SCMR 1931, therefore, the impugned order is liable to be set at naught. According to the appellant, the Court below mentioned in the impugned order that appellant moved an application for obtaining possession before A.R.C. which is part of the file, however, the Court below failed to peruse the decision delivered upon the aforesaid application, which has also not been challenged before any forum, therefore, the impugned order

is contrary to the facts. It has been further submitted by the appellant that he is real owner and co-sharer of the aforesaid land and except few marlas, which are under the illegal constructed house, he is legal possessor/occupier of the remaining land since 16.10.2019, but now the respondents, from January, 2021, by taking advantage of the aforesaid illegal constructed house, have started taking control and possession of the remaining land contrary to the decisions of the Courts, hence, in such circumstances, dismissal of complaint is cruelty with appellant. The appellant finally craved that by accepting the instant appeal, the impugned order dated 23.01.2021 be set-aside and the complaint may be remanded to the trial Court for hearing and disposal under law. The appellant in support of his written arguments produced copies of Criminal Law Fifth

Amendment Act, 2020 as well as plethora of judgments.

4. Sardar Rebaz Khan, the learned Counsel for respondents also filed written arguments wherein he controverted the arguments of the learned Counsel for appellant and stated that the learned Court below appreciated the whole controversy in its true perspective and reached at right conclusion. The learned Counsel further stated that the appellant filed a frivolous and baseless complaint before the Court below which was rightly dismissed by the said Court because according to prosecution story too, Section 492-B does not attract. The learned Counsel further stated that disputed land was in possession of the father of respondents whereas the appellant has never got possession of the aforesaid land from the father of the respondents in this manner, they received possession of the aforesaid land in

heritage, hence, Section 492-B is not applicable at all, which is being twisted by appellant, whereas a plain reading of Section 492-B would show that it has no retrospective effect. The learned Counsel also submitted that Section 492-B was added in APC through amendment on 24.12.2020, which cannot be made applicable retrospectively, because after 24.12.2020 the respondents did not enter in any land and neither dispossessed anyone nor possessed any land. The learned Counsel contended that appellant admitted the impugned judgment as correct in ground "B" of the appeal. The learned Counsel agitated that the land old Survey No.1677, now 1036, measuring 17 Kanal and 18 Marlas, situated in village Sharqi-Dhamani, was allotted to Jalal Din S/o Lal Din, R/o Nakkur Abbaspur, refugee, in year 1955, whereas the aforesaid land remained under continuous possession of respondents' father, Muhammad Zaman,

since 1950 who obtained power-of-attorney from Jalal Din and filed a review petition before the Custodian Evacuee Property, which was decided on 16.11.1995, whereby allotment and Proprietary Rights Certificate issued in the name of father of appellant regarding the aforesaid land were cancelled, however, the appellant has suppressed the aforesaid factum. The learned Counsel stated that the father of appellant did not make contact with respondents from about 17 years from the decision of this Court till the year 2019. The learned Counsel pleaded that the appellant filed a complaint before SDM, Rawalakot, which was dismissed on 17.12.2020 and thereafter he filed suit before Additional District Court, Rawalakot, for recovery of Rs.50,00,000/- and six other suits for recovery of Rs.20,000/- before Civil Judge (Court No.2) and he also filed another suit for recovery of

Rs.1,03,60,000/- (one crore three lac and sixty thousand) before District Court, hence, all the aforesaid suits are subjudice. The learned Counsel finally prayed that Court below passed the impugned order in right direction which needs no interference by this Court, hence, the appeal may be dismissed. In support of his written arguments, the learned Counsel produced copies of the suits as well as judgment of the Custodian dated 16.11.1995.

5. I have perused the written arguments filed by both the parties and gone through the record of the case.

6. The appellant-complainant filed a complaint against respondents in offences under section 492-B, APC, alongwith sections 203-D, 203-E, 203-F, 203-H & 203-1 of the Criminal Procedure Code, before Sessions Judge, Rawalakot, on 23.01.2021 which was entrusted to the

Additional Sessions Judge, Rawalakot, whereby the same was dismissed vide impugned order dated 23.01.2021, which is reproduced as under:-

”23.01.2021- استغاثہ ہذا روبرو جناب سیشن جج صاحب راولاکوٹ پیش ہوا جو تفویض ہو کر بغرض سماعت عدالت ہذا کو تفویض ہوا۔

استغاثہ ہذا کونسل سائل نے پیش کیا۔ ہم نے ریکارڈ مشمولہ کا جائزہ لینے کے علاوہ ابتدائی موقف کونسل سائل کی بھی سماعت کی۔ ملاحظہ ریکارڈ سے پایا جاتا ہے کہ فریقین کے درمیان طویل عرصہ سے اراضی متدعوئیہ کی نسبت Litigation زیر کار ہے اراضی متدعوئیہ سائل کے والد کے نام پر الاٹ شدہ ہے جبکہ مسؤلان اراضی متدعوئیہ پر قابض اور متصرف ہیں اور مکانات تعمیر شدہ ہیں سائل کے حق میں حقوق ملکیت بھی جاری شدہ ہیں اور سائل کی طرف سے ایک درخواست حصول قبضہ روبرو A.R.C بھی دائر کی گئی جو صفحہ مسل کا حصہ ہے اس طرح مسؤلان اپنے آباؤ اجداد سے اراضی متدعوئیہ پر Peaceful قابض کے طور پر رہ رہے ہیں۔ دفعہ B-492 کا APC میں اضافہ بذریعہ ترمیمی کریٹل ایکٹ (VI) کے تحت مورخہ 24.12.2020 کو کیا گیا ہے اور تحت قانون مذکورہ تاریخ سے ہونے غیر قانونی قبضہ جات پر دفعہ B-492 کا APC کا اطلاق ہوگا تحت قانون Penal Provision کا اطلاق موثر بہ ماضی نہ ہو سکتا ہے نیز یہ کہ چونکہ مسؤلان بمطابق کہانی استغاثہ اراضی متدعوئیہ پر آباؤ اجداد سے پر امن قابض کے طور پر آباد ہیں۔ سائل مجاز فورم پر اپنا استحقاق ثابت کرنے کی صورت میں اراضی متدعوئیہ کا قبضہ حاصل کر سکتا ہے۔

لہذا استغاثہ ہذا مذکورہ بالا وجوہات کی بنا پر Maintainable نہ ہے جس کو خارج کیا جاتا ہے۔ مسل بعد از تکمیل کارروائی ضابطہ داخل دفتر ہو۔ حکم سنایا گیا۔“

7. It has been observed by the trial Court in the aforesaid order that the disputed land is allotted in the name of complainant's father and a Proprietary Rights Certificate has also been issued

in his name, however, regarding possession, the Court below observed that the aforesaid land is under possession of the respondents, who had also constructed houses over it. The trial Court further observed in the aforesaid order that an application, on the part of complainant, for obtaining possession, had been filed which is part of the file, hence, respondents are living as peaceful occupier/possessor upon the disputed land for the time of their ancestors and complainant may take possession of the disputed land by proving his claim/title before relevant forum, whereas grievance/version of the appellant/complainant is that he is real owner as well as legal possessor/occupier of the land old Khasra No.1677, new 1036, measuring 17 Kanal 18 Marlas situated in village Sharqi-Dhamni, Rawalakot, since 16.10.2019, and now, from January 2021, the respondents, instead of vacating the

illegal constructed house, have started taking control and possession of the aforesaid land of appellant. The aforesaid version of appellant /complainant regarding handing over possession seems to be genuine in light of record attached with the appeal, because a perusal of Annexure "N" (an attested copy of "Khasra Girdawri" of village Sharqi Dhamni, Rawalakot, dated 23.12.2019), reveals that a "note" with red ink has been written on it, according to which revenue functionary has handed over possession of the land Survey No.1036 measuring 17 Kanal 18 Marlas to appellant in compliance of the order of Tehsildar Rawalakot. The aforesaid "note" clearly indicates that possession has been handed over to appellant, in such state of affairs, observation made by the Court below in the impugned order, that complainant may take possession of the disputed land by proving his claim/title

before relevant forum, does not seem correct, hence, I agree with this contention of the appellant that the Court below did not bother to pay heed towards the decision dated 04.10.2019 regarding handing over possession to the appellant on 16.10.2019.

8. The second observation made in the impugned order by the Court below is that Section 492-B was added in APC through Criminal Law (Fifth Amendment) Act, 2020 on 24.12.2020, and according to law, Section 492-B, APC, will be applicable to the illegal possessions made from the aforesaid date, and as per law, penal provisions cannot be made applicable retrospectively. It is pertinent to mention here that the general principle is that when the law is changed/altered during the pendency of a proceeding, the substantive rights of the parties are to be decided according to the law as it existed at the time when

the action was initiated unless the legislature has made its intention clear that the amendment will apply retrospectively, and exception to this rule is that the beneficial law and the procedural law can be applied retrospectively. However, in the case in hand, the contention of the learned Counsel for respondents is that Section 492-B has been added in APC through amendment on 24.12.2020, which cannot be made applicable retrospectively because after 24.12.2020 his clients (respondents) did not enter in any land and neither dispossessed anyone nor possessed any land, whereas the contention of the appellant is that he did not claim retrospective effect of Fifth Amendment made in APC and Cr.P.C., because he is real owner as well as legal possessor/occupier of the land, old Khasra No.1677, new 1036, measuring 17 Kanal 18 Marlas, situated in Village

Sharqi-Dhamni, Rawalakot, in light of possession handed over to him by revenue functionary on 16.10.2019, however, the respondents did not vacate the illegal constructed house and now from January 2021, they have started taking control and possession of the aforesaid land. It would be pertinent to observe here that according to Annexure "N" i.e. an attested copy of "Khasra Girdawri" dated 23.12.2019, the aforesaid land seems to be in possession of the appellant since 16.10.2019, and as per assertion of appellant, the respondents now from January 2021, have started taking control and possession of the aforesaid land, whereas the version of respondents is that they did not enter or possess the land of appellant after the date of Fifth Amendment, i.e. 24.12.2020, thus, before dismissal of the complaint on the ground of retrospective effect of the aforesaid law, it was incumbent upon the trial

Court to determine whether whose version was correct, but the Court below failed to do so and dismissed the complaint on the ground that retrospective effect to the section 492-B, APC, cannot be given. Thus, the impugned order is not sustainable.

9. The Court below has narrated third reason in the impugned order for dismissal of the complaint that litigation between the parties with regard to the aforesaid land is subjudice since long. A perusal of record reveals that there is no litigation subjudice between the parties before any forum with regard to possession of the said land, however, copies of the cases produced by the learned Counsel for respondents reveal that appellant has filed some cases for recovery of damages caused to the aforesaid land by respondents during their possession. Even otherwise, a principle has been laid down in

(2016 SCMR 1931) that an Act which entails civil liability under civil law as well as criminal penalty under criminal law, then a person can be tried under both kinds of proceedings which are independent to each other. Therefore, the aforesaid ground of litigation between the parties, narrated by Court below in the impugned order, could not be made basis for dismissal of complaint, hence, the impugned order to this extent is also not maintainable.

10. It would be significant to observe here that Criminal Law (Fifth Amendment) Act, 2020, has been promulgated to discourage the land grabbers and to protect the right of owner and lawful occupant of the property as against the unauthorized and illegal occupants. Moreover, the purpose of the Act is to protect the right of possession of lawful owner or occupier and not to perpetuate the possession of illegal

occupants. For the purpose of elucidation, I would like here to reproduce Section 492-B, as under:-

492-B. Prohibition of Grabbing of Property, etc.-

(1) No one shall enter into or upon any property to dispossess, grab, control or occupy it without having any lawful authority to do so with the intention to dispossess, grab, control or occupy the property from Owner or Occupier of such property.

(2) Whoever holds a property under a lawful authority or occupies it lawfully in pursuance of provision of law, or a lawful order or a decree of a Court or an agreement, for a period of time specified or agreed upon as the case may be, on expiration of such period, as aforesaid, he shall be liable to surrender such property to such person who is entitled for the possession thereof.

(3) Whoever contravenes the provisions of the sub-section (1) or (2) shall, without prejudice to any punishment to which he may be liable under any other law for the time being in force, be punished with imprisonment which may extend to ten years and with fine and the victim of the offence shall also be compensated in accordance with the provision of Section 544-A of the Code."

It reveals that the provisions of the aforesaid sub-section (1) of section 492-B are in the form of preventive provisions. The Section begins with the words "No one shall", which is a prohibitory mandate and there is no restriction as to the class of persons. Moreover, the general term "whoever" for the offenders has been used and such general term clearly indicates that the widest possible meaning was attributed to the offenders.

11. A careful perusal of record, however, would reveal that the land Khasra No.1677 measuring 17 Kanal 18 Marlas was initially allotted to one Jalal Din on 12.11.1955, later on, his allotment was cancelled and the aforesaid land was allotted to Islam Muhammad Malik, father of appellant, who also got Proprietary Rights Certificate on 26.11.1983. However, Jalal Din filed a review petition against the aforesaid

Proprietary Rights Certificate before Custodian Evacuee Property, Camp, Rawalakot, on 27.04.1993, which was accepted and Jalal Din, was declared allottee of the said land vide order dated 16.11.1995. Thereafter, Islam Muhammad Malik, father of appellant, challenged the aforesaid order dated 16.11.1995 through writ petition titled **(Islam Muhammad Malik Vs. Custodian of Evacuee Property and 04 others)** before this Court on 10.04.1996, whereby Proprietary Rights Certificate was restored in favour of Islam Muhammad Malik, father of appellant, vide judgment dated 22.10.1997, wherein at para No.7 of the judgment the status of the aforesaid land and conduct of Muhammad Zaman, father of respondents (who was respondent No.3 in the aforesaid writ petition) was discussed as under:-

“The point necessary for the determination is whether the respondent had the knowledge of

allotment dated 31.1.1964 in favour of the petitioner. Copy of the plaint Annexure 'ج' shows that Muhammad Zaman instituted a suit in the Court of Sub Judge on 11.10.1996 against the petitioner for a perpetual injunction showing that the plaintiff had secured this land from defendant-allottee on tenancy in 1972 and had paid the amount in cash upto 1982. Again in consideration of Rs.2,000/ he secured the land in 1982 on the tenancy for which the payment had been made expired on 1990 but the defendant wanted to transfer the possession to somebody else, therefore, he should be restrained. Copy of temporary injunction issued by the Court is Annexure 'ج'. Entry, as to issuance of the temporary injunction was also made in Khasra Girdawari, copy of which is annexure 'د'. From the documents 'د' it is clear that the respondent No.3 had the knowledge of allotment of the petitioner even in 1986. The allotment of the allottee was in the knowledge of respondent No.3, is established as per paragraph (1) of plant. His review petition, later on, filed on 20.8.1990 was also dismissed on 30.3.1994 as is evident from Annexure 'ه'. He secured power of attorney from Jalal Din as per Annexure 'و'. He had made a number of other applications. The conduct of respondent No.3 shows that some time claims the land as tenant and some time becomes a dependent of Shaheed and some

time acts as attorney of Jalal Din, in spite of knowledge of allotment. He never challenged the allotment of petitioner within any reasonable time before an appropriate authority. He was not entitled to any relief. His claim could not be accepted on any score, whatsoever, by the Custodian."

The aforesaid judgment of this Court was assailed before the Hon'ble Supreme Court of AJ&K, by Muhammad Zaman, father of respondents, through Civil P.L.A. No.132 of 1997, titled **Muhammad Zaman Vs. Custodian of Evacuee Property etc.**, which was dismissed vide order dated 03.02.1998, wherein at page No.3 of the order it has been recorded by the Apex Court as under:-

"Jalal Din who filed the review petition before the Custodian of Evacuee Property has not challenged the order passed by the High Court. It is being challenged by Muhammad Zaman."

It has further been held by the Apex Court in the aforesaid order at page No.4 as under:-

"In the petition for leave to appeal as well as during the arguments before this Court Muhammad Zaman has not been able to spell out any legal grievance against the grant of provisional Rights Transfer Order to Islam Muhammad. His claim is that he was in possession of land in dispute for a long time and that he had made improvements on it. This cannot be treated as a legal ground and, in any case, cannot be raised directly before this Court."

Thereafter, Muhammad Zaman, father of respondents, applied to assess the improvements made upon the disputed land, before Custodian, whereby the matter was decided against him and then he filed a writ petition titled **Muhammad Zaman Vs. Custodian of Evacuee Property and 02 others** before this Court on 29.06.2000, which was dismissed with the following observations:-

"The other ground for improvements was also considered in the light of relevant law. The disputed piece of land is an evacuee property and under the relevant law no improvements could be made over it without the permission of the learned Custodian and that too by an

allottee. The petitioner is not an allottee and the evacuee land is under his possession some-how or the other. Therefore, the above stated grounds on the basis of which the petitioner sought quashment of the impugned judgment are not tenable in the eyes of law and no writ can be issued on such like grounds. Therefore, the writ petition stands dismissed."

Afterward, the revenue functionary, according to the "note" written with red ink upon an attested copy of "Khasra Girdawri" of village Sharqi-Dhamni, Rawalakot, dated 23.12.2019, have handed over possession of Survey No.1036 measuring 17 Kanal 18 Marlas to appellant in compliance of the order of Tehsildar Rawalakot. The relevant "note" written in the Annexure "N", i.e. an attested copy of "Khasra Girdawari" dated 23.12.2019, is reproduced as under:-

”قرار حکم جناب تحصیلدار راولاکوٹ زیر نمبری 103/19 مورخہ 04.10.2019 اراضی زیر نمبر خسره 1036 تعدادی سترہ کنال اٹھارہ مرلے سالم بموجودگی گواہان و ملاحظہ داران زیر نگرانی گرداور سرکل ازاں رحمت اللہ، عطا اللہ پسران محمد زمان بحق امداد علی ملک قبضہ سائل مالک اراضی دلایا گیا۔ رسید قبضہ شامل مسل ہے۔“

Thereafter, according to an attested copy of Annexure "Q" issued on 05.01.2021, the parties with their mutual consent entered into an arbitration agreement by appointing arbitrators namely Muhammad Arshad Khan Ghazi and Sardar Muhammad Khaliq Khan, on 12.10.2019. As per contents of the aforesaid agreement, the appellant-complainant was bound to pay Rs.12,00,000/- alongwith eight big trees to respondents Nos.1 & 2, whereas the respondents were bound to vacate the house etc. However, it reveals from the perusal of the attested copies of the "notes" Annexures "R & S" given by the aforesaid arbitrators on 16.10.2019 and 21.12.2019 respectively, that the aforementioned agreement could not be executed due to the denial of respondents.

12. It, therefore, emerges from perusal of the aforesaid record that before enactment of Criminal Law (Fifth

Amendment) Act, 2020, the appellant happens to be owner and occupier of the aforementioned land and the appellant-complainant filed complaint before Court below on 23.01.2021 by leveling allegation against respondents that instead of vacating the illegal constructed house, the respondents now, have started taking control and possession of the aforesaid land of appellant, in this manner, the act of trespassing in the aforesaid land has been alleged to be committed after promulgation of the aforesaid Criminal Law (Fifth Amendment) Act, 2020. In such state of affairs, dismissal of complaint by the Court below on the ground of retrospective effect, is not justified, thus, the complaint under section 492-B, APC, ought to be decided on merits. When the complaint is to be decided on merits, instead of the grounds mentioned in the impugned order, the trial Court, in order

to constitute an offence under section 492-B, APC, shall look into the following points that:-

- i. the complainant is the actual owner (or occupier i.e. in lawful possession) of the immovable property in question or the complainant is not the actual owner of the property;
- ii. the accused has entered into (or upon) the said property;
- iii. the entry of the accused into (or upon) the said property is without any lawful authority or the accused has the lawful authority to enter into the property;
- iv. the accused has done so with the intention to dispossess (to grab or to control or to occupy) the complainant or the entry of the accused into the property is not to dispossess the complainant;

In light of what has been discussed above, I accept the instant appeal, set-aside the impugned order dated 23.01.2021, recorded by the learned Additional District and Sessions Judge, Rawalakot, and remand the matter to the Court below for deciding the same on merits by adopting procedure given in

Chapter XVI-A of Criminal Law (Fifth Amendment) Act, 2020, within a specified time provided in sub-section (2) of Section 203-F, Cr.P.C. A copy of the instant judgment alongwith record shall be sent to the trial Court.

Muzaffarabad,
03.09.2021. (RAH) .

(Sd-)
CHIEF JUSTICE

Approved for reporting.

(Sd-)
CHIEF JUSTICE