

**(1976) 04 J&K CK 0001**  
**In the Jammu And Kashmir High Court**  
**Case No : Writ Petition No. 18 of 1974**

Begum Hamida Malik

APPELLANT

Vs

State of Jammu and Kashmir and Another

RESPONDENT

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**Date of Decision :** 28-04-1976

**Acts Referred:**

Constitution of India, 1950 — Article 226

Constitution of Jammu and Kashmir, 1956 — Section 26(2)

Jammu and Kashmir Evacuees (Administration of Property) Act, 2006 — Section 30(5)

**Citation :** (1976) JKLR 240 : (1976) KashLJ 347

**Hon'ble Judges :** M.R.A.Ansari, C.J and Mian Jalal-Ud-Din, J

**Bench :** Division Bench

**Advocate :** I.K.Kotwal, Amar Chand, Advocates appearing for the Parties

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## Judgement

(1) This petition seeks to quash the Government order No. GR. 127M/67 dated 19763 as also the order of Custodian General dated 29174

reviewing the order of the Custodian Evacuee Property, Jammu dated 2821963.

(2) The petitioner has averred that she applied to the Custodian Evacuee Property Jammu for restoration of the evacuee house owned by her

father and uncle (both deceased) in the year 1963 to the then Custodian Shri Altaf Hussain. After regular enquiry under section 14 of the Jammu

and Kashmir State Evacuees (Administration of Property) Act (hereinafter to be referred as 'the Act') the Custodian passed an order of restoration

on 2821963 in favour of the petitioner (vide annexure ""A""). One Nutwal Singh and other challenged this order in appeal before the Custodian

General KH. Mohd Amin but were unsuccessful and their appeal was dismissed vide the appellate order annexure ""B""). Some time thereafter

proceedings under the Jammu and Kashmir Government Servants Prevention of

Corruption (Commission) Act were initiated against Shri Altaf

Hussin the then Custodian Evacuee Property Jammu. He was found guilty by the commission. One of the Charges established was that he had

restored the property in favour of the petitioner for ulterior motive. The Government by its order No. GR127M/67 dated 19768 while imposing

the punishment of censure on Shri Altaf Hussain ordered as follows :

Now, therefore, the Governor after considerhis explanation has recorded that.

(1.) Aga Syed Altaf Hussian formely Custodian Evacuee property, Jammu be censured :

(2) The restorations being null and void, confer no rights upon the persons to whom the properties have been restored and the Custodian General,

in exercise of his statutory powers, may take appropriate Action for restoring the legal position in the cases.

(3) Occasional review may be made by the Custodian General of the proceedings of the custodian in order to satisfy whether other orders of

restoration passed from time to time have been done legally under the Act.

(3) In pursuance of this order the Custodian General respondent No. 2 sought to review the order of the Custodian dated 2821963 and issued

notice to the petitioner calling upon her to show cause as to why the legality and property of the order of restoration be not reexamined. He

accordingly ordered the parties to produce their evidence in support of their respective claims. This order as well as the order of the Government

directing the Custodian General to take appropriate action in the matter have been challenged on the following grounds :

(1) That the order of the Custodian having been already upheld by the Custodian General on appeal, the same could net be reopened, reviewed or

revised by the Custodian General after it became final. The order of the Custodian General reopening the whole case is without jurisdiction ;

(ii) that the Anticorruption Commission did not have jurisdiction to quesh order of restoration passed by the Custodian. At any rate the

Government, also could not do that. The order of the Government, therefore, seeking reversal of the order of the Custodian is without jurisdiction ;

(iii) that the custodian General has no power to review or revise the order passed by his predecessor inoffice after lapse of a number of years.

(3) Respondents in their objections have averred that the impugned order is only

an interim order. It does not finally decide the rights of the parties

and also that adequate remedy would be available to the petitioner when final order would be passed against him. Therefore, on these twin

grounds the writ petition is not maintainable.

(4) On merits it is admitted that the Government did pass the impugned order. Respondent No. 2 is, in exercise of his powers in revision or review,

competent to pass the second impugned order. Both the Government and the respondent No. 2 have jurisdiction to pass the above mentioned

orders. The orders so passed do not contravene any of the provisions of the Act.

(5) We heard the learned counsel for the parties on 28576 and after the arguments were concluded we announced the following order in the court

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The writ petition is accepted. Para (2) of the operative part of Government Order No. GR127H/67 dated 19768 and the order of Custodian

General dated 29174 in the case of Begum Hamida Malik Vs. Custodian are hereby quashed. Reasons for the judgment will be given to her.

(6) We now proceed to give reasons in support of the Judgment.

(7) We agree with the contention of the learned counsel for the petitioner that the second part of the Government Order No. GR127M/67 dated

19768 is without jurisdiction. It has been observed in this part of the order that the restorations being null and void conferred no rights upon the

persons in whose favour the properties have been restored and the Custodian General has been asked to exercise his statutory powers and take

appropriate action for restoring the legal position in the case. In other words the impugned order makes a declaration that the restoration order is

null and void and is destitute of legal effect in as much as it cannot do the any person with any right in the property. The learned counsel for the

respondents has not been able to convince us as to under what provision of law was this order made. Surely, none of the provisions of the Jammu

and Kashmir Government Servants Prevention of Corruption (Commission) Act authorised the Commission itself or for the matter of that any

officer of the Government or the Government to declare quasi judicial order of the Custodian null and void. It is the Act which gives jurisdiction to

an appropriate authority to declare a certain transaction or an order as void, Section 17 of the Prevention of Corruption (Commission) Act no

where says that the Commission has got power to make any such recommendation to the Governor, nor can the Governor in exercise of his constitutional powers make such an order. Section 26(2) of the Jammu and Kashmir Constitution deals with the powers of the Governor. This section nowhere says that as executive head of the State his executive power extends to declaring an order of a judicial or quasi judicial authority as null and void. From this Section it is clear that the Constitutional obligations of the Governor are restricted to passing of orders which are consistent with the statute that enables him to pass an order. It is also noticed that the aforesaid part of the impugned order also offends the principle of natural justice, for no declaration could be made either by the Commission or by the Government in respect of the legal character of claim of the petitioner as also the invalidity of the order of restoration without hearing the person affected in the matter. The order, it seems, was passed behind the back of the petitioner and without notice, therefore also it suffers from serious legal infirmity.

(8) Now in so far as the second impugned order of the Custodian General is concerned that too is without jurisdiction. No doubt section 30(5) of the Act gives power to the Custodian General to review his own order. It would also enable the Custodian General to review the order of his predecessor. But the crux of the matter is ; does the impugned order of the Custodian General seek to review the order of his predecessor respondent No. 2 (KH. Mohd Amin) ? The order as it reads, it has been passed with a view to examine the propriety and legality of the order of the Custodian. In other words, respondent No. 2 has invoked his revisional powers vested in him by virtue of Section 30A of the Act to examine the legality of the order of the Custodian. It is true that the Custodian General can examine the propriety and legality of the order of the Custodian but that will be only in exercise of his revisional jurisdiction. But for doing that he has to first of all recall the appellate order of his predecessor and then he can reexamine the legality of the order of the Custodian. There is no gainsaying the fact that the order of the Custodian has merged in the order of the Custodian General, therefore the respondent No. 2, could not embark upon the examination of the legality of the order of the Custodian while overlooking the order of his predecessor. In that view of the matter the impugned order of respondent No 2 is illegal and without

jurisdiction.

(9) Mr. Amar Chand has tried to explain that the order though not happily worded nevertheless conveys the sense that it is one made under section

30(5) and not under section 30A. But in our view, language of the impugned order does not warrant such construction as is sought to be placed

upon by the learned counsel for the respondent.

(10) Another question raised at the bar is that the exercise of power of review is beyond time. According to the learned Counsel for the petitioner

the Custodian General respondent No. 2 could not suo moto review the order as section 30(5) puts fetters on his power and discretion. In our

view this contention is not correct inasmuch as section 30(5) does confer this power on him. The words "review his own order" occurring in section

30(5) are of wide amplitude and enable the Custodian General to review the order suo moto. In that view of matter the question of limitation is of

no import.

(11) Before we conclude we should also like to dispose of the preliminary objection of the respondents that the writ petition is not maintainable

because no final order has been passed by the Custodian General in the case. Only notice has been issued and proceedings have been initiated. In

our judgment this objection is devoid of merit inasmuch as it is well settled that if the notice is issued in contravention of any rule and the inferior

Tribunal or forum issuing the notice initiating proceedings lacks jurisdiction then a writ of prohibition can be issued. In A. I. R. 1962 S. C. 1894,

their lordships observed that where proceedings were initiated by the Collector of Customs and a notice was issued in contravention of a rule that

entitled the petitioner therein to seek writ of prohibition.

(12) For the foregoing reasons the writ petition is allowed. Para (2) of the operative part of Government order No. Cr127M/67 dated 19768 and

the order of the Custodian General dated 2811974 in the case of Begum Hamida Malik Vs Custodian are hereby quashed. There will be, however,

no order as to costs.