

(2025) 03 KL CK 1321

In the High Court Of Kerala

Case No : Writ Petition (C) Nos. 2839, 3817 Of 2025

Kerala Waqf Samrakshana Vedhi (Registered) No:Ekm/
Tc/604/2012

APPELLANT

Vs

State Of Kerala

RESPONDENT

Date of Decision : 17-03-2025

Acts Referred:

Constitution of India, 1950 — Article 226
Wakf Act, 1954 — Section 36, 36A, 51(1A), 52, 54
Kerala Waqf Act, 1995 — Section 40, 85, 86
Kerala Waqf Rules, 1996 — Rule 95

Citation : (2025) 03 KL CK 1321

Hon'ble Judges : Bechu Kurian Thomas, J

Bench : Single Bench

Advocate : T.U.Ziyad, P.Chandrasekhar, Anoop Krishna, K.Gopalakrishna Kurup, Mayankutty Mather K.J., Anand Geo, S.Kannan, V.Manu, M.H.Hanil Kumar, Jamsheed Hafiz, George Poonthottam, Nisha George

Final Decision : Allowed

Judgement

Bechu Kurian Thomas, J.

1. Petitioners challenge a Government Order appointing a Commission of Inquiry under the Commissions of Inquiry Act, 1952 in relation to a property claimed to have been dedicated as waqf. Since the issues involved in these two writ petitions are almost identical, they are disposed of by this common judgment.

2. The Commissions of Inquiry Act, 1952, (for brevity 'the CoI Act') confers power upon the appropriate Government to appoint a Commission to inquire into 'definite matter of public importance'. In exercise of the said power, Justice C.N. Ramachandran Nair, a former Judge of this Court, has been appointed as per Ext.P1, to inquire into the issues referred to in the said Government Order.

3. Writ petitioners allege that the dispute now sought to be inquired into by the Commission relates to a waqf property, situated in Survey No.18/1 of

Vadakkekkara Village, which was the subject matter of O.S. No.53 of 1967 on the files of the Sub Court, North Paravur. In a judgment dated 12.07.1971, the trial court concluded that the document produced therein as Ext.P31 was not a gift deed but a waqf deed. The appeal against the said judgment was dismissed by a Division Bench of this Court in A.S. No.600/1971 on 30.09.1975. According to the petitioners, as a waqf property, the State Government is not the competent authority to appoint a Commission of Inquiry.

4. Petitioners also allege that in violation of the provisions of the waqf deed and the Waqf Act, 1995 (for short 'the Act') , the fourth respondent transferred portions of the waqf property to various persons, and the State, instead of protecting the said property, is now attempting to protect the trespassers by terming them as bonafide occupants. Petitioners also contend that Ext.P1 was issued without reference to the relevant factors, without any application of mind and in a perverse manner. Petitioners have alleged that the unauthorised occupants of the waqf property, who are rank trespassers and land grabbers, have been given the colour of bonafide occupants and in the absence of any jurisdictional fact to appoint a Commission of Inquiry, Ext.P1 has been issued. Petitioners have also pleaded that the Waqf Board had, in exercise of the powers under section 40 of the Act, declared the subject property to be a waqf property which is final and binding upon all. Petitioners also plead that, since the appeal filed by the fourth respondent is pending before the Waqf Tribunal, the Commission ought not to be permitted to render any opinion and the very appointment of the Commission itself, is a non est.

5. In W.P.(C) No.3817 of 2025, it is further pleaded that once a property has been declared to be a waqf property, the Government cannot issue any directions contrary to the waqf deed or its usage and practice and therefore, appointing a Commission of Inquiry contrary to the statutory provisions is without authority. Petitioners further allege that if at all any sale deed has been executed in favour of any person, the same can only be in contravention of the provisions of section 36A of the Wakf Act, 1954 and section 51(1-A) of the Act, and therefore, the Government is, by appointing the Commission of Inquiry, attempting to protect persons who are mere trespassers.

6. In the counter affidavit, the locus standi of the petitioners have been questioned and the appointment of the Commission is justified in their capacity as the appropriate Government as the subject is referable to entries in List-II and III of the Seventh Schedule. According to the first respondent, the inquiry is neither a judicial nor a quasi-judicial proceeding and that the Commission has no power of adjudication of the question of title, but is intended only as a mechanism to assimilate necessary information to apprise and enable the Government to decide the future course of action. It is further pleaded that the question of title has not been decided earlier by any Court and that the property was registered with the Kerala State Waqf Board in the name "Mohammed Siddique Sait Waqf" only with effect from 25.09.2019, after the Waqf Board

conducted the enquiry culminating in Ext.R1(a) which is now pending in appeal before the Waqf Tribunal. The first respondent further pleaded that around 175 persons are reported to be in possession of the subject property pursuant to registered documents executed prior to the registration of the waqf, and that their occupation cannot be termed as trespass.

7. It is further pleaded that, when the revenue authorities stopped the collection of land tax, persons in occupation raised public protests and agitations, thereby gaining public importance and it was in such circumstances that the Government convened a high level meeting under the chairmanship of the Chief Minister. A consensus was arrived at in the meeting and its recommendations were placed before the Council of Ministers on 27.11.2024, who, after considering various aspects of the matter, decided to appoint the Commission of Inquiry to find a permanent solution to the issues involved.

8. In the counter affidavit of the additional fifth respondent, apart from raising contentions similar to that of the first respondent, it is stated that the document titled as a waqf deed was essentially a gift deed and Sri. Mohammed Siddique Sait had transferred his title over the entire extent of land to the fourth respondent, who had the authority to alienate the property and in the absence of any of the components of a valid waqf, as evident from the document, the alienations cannot be said to be invalid.

9. A reply affidavit has also been filed by the petitioners reiterating their contentions.

10. Since the second respondent is the Commission of Inquiry, being a body appointed pursuant to Ext.P1, notice to the said Commission was dispensed with.

11. Sri.P.Chandrasekhar and Sri.P.K.Ibrahim, the learned counsel for the petitioners reiterated the contentions raised in the pleadings and asserted that since the property has already been declared as a waqf property, the Government could not have appointed a Commission of Inquiry to consider any claim of ownership over the said property or even treat the occupants as bonafide. According to the learned counsel, the Government had omitted to consider the basic facts necessary to appoint the Commission and without any application of mind, issued Ext.P1 order. It was also submitted that the basic jurisdictional facts were non-existent to order an inquiry and further that when the Waqf Tribunal is considering the question, any observation by a Commission will have far reaching implications.

12. Sri. K. Gopalakrishna Kurup, learned Advocate General instructed by Adv. S. Kannan, learned Senior Government Pleader, questioned the locus standi of the petitioners and also argued that the issue has been the subject matter of public protests and agitations over the attempt of the Waqf Board to evict the occupants and therefore it is a definite matter of public importance. According to the learned Advocate General, the Government is required to identify measures that can be adopted to diffuse the worrying situation and an inquiry by a former

Judge of this Court into the issues can suggest remedial measures. It was also argued that, faced with issues of public importance, which can even go out of control, the Government has the power to elicit a report from a competent authority to recommend measures. It was also submitted that the decision taken at a high level meeting, cannot be termed to be arbitrary or malafide.

13. Sri. Mayankutty Mather K.J., the learned Senior Counsel instructed by Sri.Anand Geo, the learned counsel for the fourth respondent, and Sri. George Poonthottam, the learned Senior Counsel instructed by Smt. Nisha George, the learned counsel for the fifth respondent, while supporting the contentions of the learned Advocate General, submitted that the deed in question cannot be regarded as a waqf deed as the recitals only indicate it to be a gift deed and therefore, the contentions built on that premise, are without any basis. It was also submitted that the civil court judgment is not conclusive as no issue on title was framed and hence the transfers effected till registration of the wakf, cannot even be vitiated. It was thus contended that the present occupants are all persons who had purchased the property under valid documents of title and are hence bonafide occupants.

14. Sri. Jamsheed Hafiz, the learned Standing Counsel for the Waqf Board after traversing the history of the Waqf Act, submitted that the first term of reference is essential as identification of property is required, while the second term of reference is unnecessary. It was submitted that the Waqf Board had already declared the property to be a waqf property and hence the Board is bound to recover all properties of the waqf including those that were alienated contrary to the waqf deed or the Waqf Act. It was also argued that the action of the Board cannot be the subject matter of the Commission of Inquiry.

15. On an appreciation of the rival contentions, the following issues are identified as arising for resolution:

- (i) Whether the petitioners have locus standi to file this writ petition?
- (ii) Whether the State Government is the appropriate authority for appointing the Commission of Inquiry as per Ext.P1? and
- (iii) Whether the appointment of the Inquiry Commission is valid in law?

16. Before addressing the three issues, it is relevant to mention the background of the dispute. Sri. Mohammed Siddique Sait who was incidentally, one of the members of the first Waqf Board constituted after the coming into force of the Wakf Act 1954, had, in the year 1950, transferred an extent of 404.76 Acres of property by a registered deed No.2115/1950 of Edappally Sub Registrar's Office, titled as a 'Waqf deed' in favour of the Farook College Managing Committee. Out of the total extent of the property, around 300 Acres are stated to be lost due to sea erosion and what remains is only about 135.11 Acres situated in Survey No.18/1 of Kuzhuppilly (erstwhile Vadakkekara) Village. In O.S. No.53/1967 instituted by the fourth respondent Farook College as plaintiff, the Sub Court,

Paravur had rendered a finding that the document executed by Sri. Mohammed Siddique Sait was a waqf deed and not a gift deed. The said finding was not challenged by the fourth respondent. It is also noticed from an affidavit filed in the said suit (produced as Ext.P10 in W.P.(C) No. 2839/2025) that the plaintiff therein had affirmed that the document is a waqf deed. However, the fact remains that there was no issue raised in the said suit regarding the nature of the deed.

17. Be that as it may, taking into consideration various complaints and irregularities relating to the Kerala State Waqf Board and its institutions, Government appointed Sri. M.A. Nissar, a retired District Judge, as the Chairman of a Commission of Inquiry under the CoI Act, to report on various aspects relating to waqfs. The Waqf Board had, in the meantime, initiated an enquiry as E.P No.685/2008 relating to the waqf property dedicated by Sri Mohammed Siddique Sait based on a complaint given by his legal heirs who had requested the Board to repossess the properties alienated contrary to the deed. The aforesaid complaint was also, inter-alia, considered by the said Commission and a report dated 26.6.2009, was submitted stating that:-

"7. Of course, for the limited purpose, this Commission has to ascertain whether this property covered by the registered document No.2115/1950 of Edappally Sub Registrar's Office (styled as a Waqf deed in the document) is a 'Waqf' or not. Since the Farook College Managing Committee is disputing its alleged Waqf Character, this Commission is to conduct an enquiry as to whether this property is a Waqf or not and the consequential matters. But we do not propose to conduct an enquiry on this matter as the Waqf Board is seized of the matter. The Waqf Board is the competent authority under the Waqf Act to decide the question whether a property is Waqf property or not. The Chief Executive Officer of the Waqf Board placed before this Commission the order he has pronounced on 24.06.2009 in this matter. The Chief Executive Officer ordered that it is a Waqf property and that this Waqf can be registered with the Waqf Board. The Chief Executive Officer ordered to place the matter before the Waqf Board for action under Rule 95 of the Kerala Waqf Rules.

8. In the result, we recommend to the Government to direct the Waqf Board under section 97 of the Waqf Act to expedite the proceedings pending before it under Rule 95 of the Kerala Waqf Rules, 1996 and to consider as to whether any action to be taken against the persons responsible for sale of the Waqf property, styling it as gifted property in the sale deed and that too without the sanction of the Waqf Board. The Waqf Board may also be directed to report to the Government the action taken in this matter."

18. The Government accepted the above report by Ext.P9 order dated 11.05.2010 (produced in W.P.(C) No.2839 of 2025), and directed further action to be initiated pursuant to the said report. Thereafter, the Waqf Board, by order dated 20.05.2019 in E.P No.685/2008, declared that the property covered by deed No.2115/1950, was a waqf property and directed its registration as a waqf

property under section 36 of the Act. Action was also directed to be initiated under section 52 or 54 of the Act to recover the waqf properties.

19. While so, by a communication dated 07.10.2022, the Tahsildar, Kochi, directed the Village Officer, Kuzhuppilly, to accept land tax from the occupants of the property which was declared as a waqf property. The second petitioner herein, along with the representative of the first petitioner, challenged the said direction of the Tahsildar in W.P.(C) No. 36063/2022, and a status quo was directed to be maintained initially which was later, by order dated 12.12.2022, clarified that the revenue officers can issue certificates, effect mutation and accept tax with regard to the properties that are claimed to be waqf properties. Aggrieved by the said order, the writ petitioners therein, filed W.A No. 2001/2022. In the appeal, the order of the learned Single Judge was stayed, which was, later, by judgement dated 19.01.2023 made absolute till the disposal of the writ petition. W.P.(C) No.36063/2022 is still pending. Thus, the direction not to issue any revenue certificates or effect mutation is still in force. After the aforesaid order, dispute exists between those occupying the land and the Waqf Board.

20. The Government has appointed the Commission of Inquiry against this backdrop. The issues mentioned earlier will have to be resolved in light of the above circumstances.

Issue No. (i). Whether the petitioners have locus standi to file this writ petition?

21. The writ petitioners in W.P.(C) No.2839/2025 have pleaded that the first petitioner is an organization formed to protect waqfs and waqf properties in Kerala. Second petitioner is its President while the signatory to the first petitioner is its Secretary. The second petitioner in the writ petition, along with the representative of the first petitioner, had already approached this Court in W.P. (C) No.26893/2012 and again in W.P.(C) No.36063/2022. Both of them had also filed W.A No.2001/2022. In the reply affidavit, it is also averred that as followers of Islam, they are beneficiaries of waqf and they seek to protect a waqf, which according to them is the subject matter of the litigation. The writ petitioners in W.P.(C) No.3817/2025 have also pleaded that they are beneficiaries of waqf property and that they are the Chairman and General Convenor of a forum for the beneficiaries of waqf. The said petitioners have also pleaded that they have a claim to enjoy a property dedicated as a waqf.

22. Normally, writ petitions under Article 226 of the Constitution of India can be filed only by a person aggrieved, unless it is a public interest litigation. However, the meaning of the term 'person aggrieved' has undergone sweeping changes in the last three decades. From a restricted and conservative interpretation of the said term, constitutional courts have adopted an expansive meaning to embrace within its fold not only factual grievances, but also legal grievances or sufficient interest in appropriate cases, to open the doors of justice. While exercising jurisdiction under Article 226 of the Constitution of India, it is a matter of

discretion also for the court to give a broader meaning to the term 'aggrieved' while considering the question of locus standi. The discretion can be exercised taking into account the nature of the petitioners, extent of its interest in the issue raised, remedy sought to be achieved and even the possibility of the petitioners being directly or indirectly affected by the subject matter.

23. When the nature of the writ petitioners and the cause pleaded in the writ petitions are viewed in the above perspective, it is explicit that petitioners have sufficient locus standi to maintain this writ petition as their legal rights can be affected. Further, the earlier two writ petitions as well the writ appeal filed by the petitioners, the nature of issues raised for consideration in the instant two cases and the absence of any malafides, also persuade this Court to lean in favour of finding sufficient interest on the petitioners to file these writ petitions. Taking into consideration the pleadings and circumstances arising in these two cases, this Court is of the view that petitioners have sufficient locus standi to maintain this writ petition under Article 226 of the Constitution of India.

Issue No. (ii). Whether the State Government is the appropriate authority for appointing the Commission of Inquiry as per Ext.P1?

24. As per section 3 of the CoI Act, a Commission of Inquiry can be appointed by the appropriate Government. Section 2(a)(i) of the CoI Act defines the term 'appropriate Government'. The said provision stipulates that the Central Government can be the appropriate Government in respect of any of the matters in the three lists of the Seventh Schedule to the Constitution of India. Under section 2(a)(ii) of the CoI Act, State Government can be the appropriate Government, if the inquiry relates to a matter relatable to any of the entries in List II or List III of the Seventh Schedule. Hence the question regarding the competence of the State Government can be answered by identifying whether the subject matter of inquiry falls within any of the entries in List II or List III, especially since none have a case that the Central Government has appointed any Commission for an inquiry into the same issue.

25. Entry 6 of List III of the Seventh Schedule deal with transfer of property other than agricultural lands; registration of deeds and documents and Entry 10 of the same list deals with Trust and Trustees. Entry 18 of List II on the other hand deals with land and rights over land. The heads of legislation in the various lists of the Seventh Schedule must be interpreted widely in a manner to take in all matters which are of a character incidental to the topics mentioned therein.

26. In the decision in *Express Hotels (P) Ltd v. State of Gujarat and Another* [(1989) 3 SCC 677], it was observed by the Supreme Court that the entries should not be read in a narrow or pedantic sense but must be given the fullest meaning and the widest amplitude and be held to extent to all ancillary and subsidiary matters which can fairly and reasonably be said to be included in them. Though the above interpretation is for identifying whether the source of a legislation can be traced to any of the entries, such a manner of interpretation

has to be adopted while identifying the appropriate Government as well. Viewed in the above perspective, it is evident that irrespective of the rival contentions, as the subject matter of the enquiry is the right in a land and can even be a transfer of property, it can fall either in entry 18 of List II or at least entry 6 of List III of the Seventh Schedule. In such circumstances, the State Government can be an appropriate Government. Thus the competence of the State Government to appoint a Commission of Inquiry in respect of the subject matter of Ext.P1 has to be upheld.

Issue No. (iii). Whether the appointment of the Inquiry Commission as per Exhibit P1 is valid in law?

27. For the purpose of easier comprehension, the relevant portion of the notification appointing the Commission as per Ext.P1, is extracted below:

" WHEREAS. the Government of Kerala is of the opinion that it is necessary to appoint a "Commission of Inquiry" for the purpose of making an inquiry into a definite matter of public importance, namely, to recommend measures to be taken by the Government to find a permanent solution with respect to the ownership in the matter of ongoing dispute for right of ownership between the citizens residing in Munambam at Ernakulam District and the Waqf Board:

.....(omitted as not relevant)

The terms of reference of the Commission of Inquiry shall be as follows;

1. To identify the present lie, nature and extent of property comprised in old survey number 18/1 of the then Vadakkekara Village of the erstwhile Travancore State.
2. To enquire and report as to how to protect the rights and interests of the bonafide occupants of the said land and to recommend the measures to be taken by the government in that regard.

Explanatory Note

In the Munambam area of Ernakulam District, there is a situation that the revenue authorities could not accept the land tax of those who have been holding land for many years, based on the letter issued by the Waqf Board and court direction. In a high level meeting chaired by the Chief Minister on 22nd November, 2024 regarding this matter, it was agreed to appoint a Judicial Commission to investigate and submit recommendation for finding a permanent solution to the issue of Waqf property. For this, the Government decided to appoint a commission of inquiry under the Commissions of Inquiry Act, 1952.

The notification is intended to achieve the above object."

28. On a reading of the above extracted portion from Ext.P1, it is evident that, what prompted the Government to appoint the Commission was the restriction on the revenue authorities to accept tax from the occupants of the property due

to orders of Court and that of the Waqf Board. It is also evident that the Commission has been called upon to inquire into a dispute and recommend measures to be taken by the Government to solve an ongoing dispute for right of ownership between the residents of an area and the Waqf Board. Thus the Commission has been appointed to give its recommendations regarding the ownership of certain persons over a property which is projected by the Waqf Board as its property.

29. In this context, it needs to be observed that the Court direction mentioned in Ext.P1 can only be the direction in W.A No. 2001/2022 (Ext.P7), while the letter referred to therein, can only be the communication issued by the Kerala State Waqf Board pursuant to its decision in E.P. No. 685 of 2008 (Ext.R1(a)). Concededly, the said order of the Waqf Board has been challenged by the fourth respondent before the Waqf Tribunal, Kozhikode, and is pending consideration as W.O.A No.38/2023. Thus, the question whether the property situated in old survey number 18/1 of Vadakkekara Village of the erstwhile Travancore State is a waqf property or not, is under consideration before the Waqf Tribunal. The question whether there are any occupants on the said land and whether they are bonafide occupants or not and even the requirement of identifying measures to protect a bona fide occupant on such a land are issues that may arise after a decision is arrived at by the Waqf Tribunal.

30. This Court cannot be oblivious of the scheme of the Waqf Act, 1995. As per the said statute, when a question on the waqf character of a property arises, only the Waqf Board and no other authority can decide the said question. As per Section 40(2) of the Act, the decision of the Waqf Board in that regard is final and can be revoked or modified only by the Tribunal. The statute further envisages in section 85 that no suit or other legal proceeding shall lie not only in any civil or revenue courts but also even before any other authority, in respect of any dispute, question or other matter relating to any waqf, waqf property or other matter which is required by or under the Act to be determined by the Tribunal. Therefore, since the Waqf Board has already declared by Ext.R1(a) that the deed No. 2115/1950 executed by Mohammed Siddique Sait is a waqf deed and the property is a waqf property, only the Tribunal can revoke or modify such a decision. A Commission of Inquiry appointed under the CoI Act, cannot consider the nature of the document or even whether it is a waqf property or not. Section 85 of the Act is an express prohibition for any authority to consider the question relating to a waqf or a waqf property. Further, if the deed under consideration is a waqf deed, even the Government is prohibited from issuing any directions contrary to such a deed as per the proviso to section 97 of the Act.

31. Since, the Waqf Tribunal is seized of the question relating to the nature of the property situated in Survey No. 18/1 of the erstwhile Vadakkekara Village, including the character of the deed relating to the said property, it is imperative that no other authority of any nature whatsoever, deal with issues that can have a direct or indirect impact on such a pending matter. A contrary view would

render sections 40 and 85 of the Act otiose.

32. Apart from the above, it needs to be mentioned that, if a property is a waqf, the Waqf Board is even empowered to initiate proceedings to set aside any transfer made without the sanction of the Board. The Mutawalli is also empowered to seek to set aside any transfer of a waqf property made by a previous Mutawalli without the sanction of the Board as per section 86 of the Act.

33. The above view is fortified by the decision in *Rashid Wali Beg v. Farid Pindari and Others* [(2022) 4 SCC 414]. In the said decision, it was clarified, after referring to various divergent views, that "the words "any dispute, question or other matter relating to any Waqf or Waqf property" are sufficient to cover any dispute, question or other matter relating to a waqf property. It was further observed in the said decision that "Section 83(1) provides for the determination of any dispute, question or any other matter, (i) relating to a waqf and (ii) relating to a waqf property."

34. Thus, the Waqf Act is a complete code in itself with respect to waqf properties. The decisions of the Waqf Board or the Tribunal, as the case may be, are final and they are the only authorities who can decide whether a property is a waqf or not. Interconnected with the aforesaid question would include that relating to the nature of the deed as well. No other authority can decide these questions.

35. In the light of the express restriction on any authority to consider any question relating to a waqf and as the Waqf Board had already found the property to be a waqf, the Commission of Inquiry is estopped from considering such a question. Needless to mention, when the law is specific and clear, its consequences must necessarily follow.

36. Notwithstanding the above, as admitted in the counter affidavit of the State, a Commission of Inquiry has no power of adjudication on any question of title and is neither a judicial nor a quasi-judicial inquiry. The terms of reference also do not enable the Commission to decide the question whether the property is a waqf or not. Even otherwise, the Commission has no power to enforce its recommendations and its report is not even binding upon the Government. Nevertheless, as the Commission is composed of a former Judge of this Court, any observation by the Commission in respect of a matter that is pending before the Waqf Tribunal, can have repercussions. The findings of the Commission may have a propensity to prejudice the rights of the contesting parties before the said Tribunal. Even an observation regarding the nature of occupation of the persons in possession, the character of their occupation including that of the property even indirectly, can have a tendency to impede the fair consideration of the questions before the Tribunal.

37. The Commission is, according to the Government as well as on principles of law, only a fact finding body intended to furnish the Government with material to act upon. Reference to the decision in *Mohammed Haneefa v. State of Kerala*

(1988 (2) KLT 919) is relevant in this context. However, it fails the comprehension of this Court as to what action can the Government initiate at this stage, when, by operation of the Waqf Act, it is precluded from initiating any action relating to the property covered by the terms of reference. Even the Commission will be restricted in its inquiry, as the question whether the subject property is a waqf property or not is pending adjudication before the Tribunal.

38. At this juncture it is relevant to mention that the power of the Government to appoint a Commission of Inquiry when 'a definite matter of public importance' arises, needs no elaboration. As observed in the decision in *Ram Krishna Dalmia v. Justice S.R. Tendolkar and Others* [AIR 1958 SC 538], 'a definite matter of public importance' can at times include, even the conduct of an individual or a group of individual persons, when it can have a prejudicial effect on the public well-being. Thus the decision to appoint a commission of enquiry is within the discretion of the Government and normally, such exercise of discretion ought not to be interfered with by courts of law.

39. Nevertheless, judicial interpretations are emphatic that there is no absolute or unfettered discretion, even in the matter of appointment of a Commission of Inquiry. Unrestrained discretion leads to arbitrariness which is the antithesis to the principles of equality under Article 14 of the Constitution of India. No action or decision of a public authority can be immune from judicial scrutiny. Hence, despite the discretion available with the Government to appoint a Commission of Inquiry, it is open for the court to judicially review the proceedings to identify whether there was proper application of mind or whether due care and caution were exercised by the Government while appointing the Commission. The power of judicial review allows the Court to assess whether relevant facts were considered before appointing the Commission or whether any irrelevant facts influenced the decision and also whether the order appointing the Commission was unreasonable or not. Reference to the observations in the decision in *Balakrishna Pillai v. State of Kerala* (1988 (2) KLT 1039), are relevant in this context.

40. While appreciating Ext.P1 order, in the light of the above legal principles, it is evident that, when the Commission of Inquiry was appointed, the Government had not considered the significance of the observations and findings of the Waqf Board or the provisions of the Waqf Act or the earlier report of Commission of Inquiry followed by its approval by the Government itself, the judgment of this Court in W.A No. 2001/2022 and above all, the pending proceeding before the Waqf Tribunal. The finality prescribed by section 40 of the Act, the bar of jurisdiction under section 85 of the Act and even the implication of section 51(1A) of the Act, were also not borne in mind by the Government. The Government acted mechanically and without proper application of mind in appointing the Commission of Inquiry. Thus, relevant factors which would have a bearing on the appointment of the Commission of Inquiry were not considered by the Government while issuing Ext.P1.

41. Apart from the above, neither the explanatory note nor the recitals in Ext.P1 order appointing the Commission of Inquiry, explain or narrate how a question relating to the right of ownership of certain properties assume the character of 'a definite matter of public importance'. No doubt, in the counter affidavit it is pleaded that, "because of the public protest and consequential agitation the issue has gained public importance". Curiously, there is no such reference in Ext.P1 about any agitation or protests. An order issued in exercise of a statutory power must withstand a challenge against its validity not on the basis of any explanation offered subsequently, but by the merit of the order alone. As observed by the Supreme Court in *Commissioner of Police Bombay v. Gordhandas Bhanji* [AIR 1952 SC 16] and in *Mohindhr Singh Gill and Another v. Chief Election Commissioner, New Delhi and Others* [(1978) 1 SCC 405], the validity of an order of a public functionary must be judged by the reasons mentioned in the order and not those supplemented by affidavits.

42. Notwithstanding the above, when an issue that can have an effect on public order arises, the Government is entitled to collect necessary materials to decide on what course of action should be adopted. However, as the issue is pending consideration before the Waqf Tribunal, even if the disputes create any issues of public order, still, recourse to the provisions of CoI Act could not have been resorted to, at this stage.

43. As the relevant facts which ought to have been borne in mind while appointing a Commission of Inquiry were not considered by the Government, Ext.P1 order appointing the Commission of Inquiry was issued without any application of mind and fails the test of law. Hence Ext.P1 order is quashed.

The writ petitions are allowed to the above extent.