

(2025) 03 KL CK 1322

In the High Court Of Kerala

Case No : Criminal Miscellaneous Petition No. 6348 Of 2019

Jemini Anil

APPELLANT

Vs

Food Safety Officer

RESPONDENT

Date of Decision : 17-03-2025

Acts Referred:

Code of Criminal Procedure, 1973 — Section 482

Food Safety and Standards Act, 2006 — Section 3(1)(zz)(iii), 26, 27(3)(e), 42, 42(2), 42(3), 42(5), 46, 46(3), 46(3)(ii), 59(i)

Citation : (2025) 03 KL CK 1322

Hon'ble Judges : G. Girish, J

Bench : Single Bench

Advocate : E.K.Nandakumar, M.Gopikrishnan Nambiar, K.John Mathai, Joson Manavalan, Kuryan Thomas, Paulose C. Abraham, Raja Kannan, Jai Mohan, Grashious Kuriakose

Final Decision : Dismissed

Judgement

G. Girish, J

1. Accused Nos.1 to 5 in C.C.No.498/2019 on the files of the Judicial First Class Magistrate Court, Pala, have filed this petition under Section 482 of the Code of Criminal Procedure, 1973 (in short, 'Cr.PC'), to quash the proceedings against them in the said case. The aforesaid case arose out of a complaint filed by the Food Safety Officer, Pala Circle, under Section 42(5) of the Food Safety and Standards Act, 2006 (in short, 'Act').

2. The prosecution case relates to the sale of two kilograms of chilli hybrid which contained the insecticide residue 'Triazophos' exceeding tolerance limit to the Food Safety Officer on 14.06.2018 at the shop by name 'Reliance Retail Limited' at Pala. The first accused is stated to be the Food Business Operator of the firm 'M/s.Reliance Retail Limited', and the second accused is said to be the person in-charge of the above said firm, which sold the food article to the Food Safety Officer. The third accused is mentioned as the establishment from which the

aforesaid food item was sold to the Food Safety Officer. The fourth accused is the nominee of the warrantor, and the fifth accused is the warrantee firm which supplied the unsafe food article to the third accused.

3. The proprietary food 'chilli hybrid' was purchased by the Food Safety Officer on 14.06.2018. The samples were sent for analysis to the Food Analyst on the same day, but it was received by the Food Analyst on 16.06.2018. The analysis started on 09.07.2018 and completed on 24.07.2018. In the meanwhile, on 27.06.2018, the Food Analyst submitted a statement under the proviso to Section 46(3)(ii) of the Act to the Designated Officer and the Commissioner of Food Safety, that the analysis report of 25 samples mentioned in the schedule given thereunder, which included the food sample in the present case, cannot be sent within 14 days due to the incompleteness of analysis within the stipulated time. It was further stated in the aforesaid statement that the analysis report of those samples will be sent within 50 days from the date of receipt of the samples. Accordingly, the Food Analyst sent the report of the analysis on 24.07.2018 indicating that the sample contained the insecticide residue 'Triazophos', which exceeded the tolerance limit prescribed for chillies under Regulation 2.3.1(2) of Food Safety and Standards (Contaminants, Toxins and Residues) Regulations, 2011, and hence it was unsafe under Sections 3(1)(zz) (iii) and (xii) of the Act. It is based on the aforesaid report of the Food Analyst that the present prosecution has been launched by the first respondent.

4. In the present petition, the petitioners would contend that the prosecution initiated against them are not maintainable due to multiple reasons including the infraction of procedural formalities, which are mandatory in nature.

5. Heard the learned counsel for the petitioners and the learned Additional Director General of Prosecution representing the respondents.

6. The learned counsel for the petitioners raised the preliminary challenge against the maintainability of the prosecution against the petitioners on the ground that it is in violation of the provisions contained in Section 42(2) and the proviso to Section 46(3) of the Act. Adverting to Sub-Section (3) of Section 42 of the Act, the learned counsel for the petitioners argued that it is mandatory on the part of the Food Analyst to complete the analysis and send his recommendations within 14 days from the date of receipt of the food sample. It is further pointed out that as per the proviso to Section 46(3) of the Act, if the sample cannot be analysed within 14 days of its receipt, the Food Analyst shall inform the Designated Officer and the Commissioner of Food Safety, giving reasons and specifying the time to be taken for analysis. According to the learned counsel for the petitioners, the statement which the Food Analyst claims to have given to the Designated Officer and the Commissioner of Food Safety on 27.06.2018, does not contain the reasons for the failure to complete the analysis within 14 days. Thus, it is pointed out that the mandatory requirements of Section 42(2) and the proviso to Section 46(3) of the said Act, are not fulfilled in the instant case. Stressing upon the term 'shall' used in the above provisions of

law, the learned counsel for the petitioners submitted that the non-compliance of the requirements in letter and spirit would vitiate the prosecution initiated against the petitioners.

7. Per contra, it is submitted by the learned Additional Director General of Prosecution that there is substantial compliance of the provisions mentioned above, and hence the challenge raised by the petitioners in the above regard is devoid of merit. According to the learned Additional Director General of Prosecution, the Food Analyst has stated in the statement submitted under Section 46(3)(ii) to the Designated Officer and the Commissioner of Food Safety that the analysis report of the sample cannot be sent within 14 days due to incompleteness of analysis. It is further submitted that the Food Analyst has mentioned in the same statement that the analysis report will be sent within 50 days from the date of receipt of the samples. Thus, it is argued that the above indication in the statement submitted by the Food Analyst is in substantial compliance with the proviso to Section 46(3)(ii) of the Act.

8. Section 42(2) of the Food Safety and Standards Act, 2006 reads as follows:

"42. Procedure for launching prosecution.–

(1) xxxxxxx

(2) The Food Analyst after receiving the sample from the Food Safety Officer shall analyse the sample and send the analysis report mentioning method of sampling and analysis within fourteen days to Designated Officer with a copy to Commissioner of Food Safety."

9. As per the aforesaid Section, it is incumbent upon the Food Analyst to analyse the sample, and send the analysis report mentioning the method of sampling to the Designated Officer with a copy to the Commissioner of Food Safety, within 14 days from the date of receipt of the sample.

10. Section 46(3) of the Food Safety and Standards Act, 2006 reads as follows:

"46. Functions of Food Analyst.–

(1) xxxxxxx

(2) xxxxxxx

(3) The Food Analyst shall, within a period of fourteen days from the date of receipt of any sample for analysis, send—

(i) where such sample is received under section 38 or section 47, to the Designated Officer, four copies of the report indicating the method of sampling and analysis; and

(ii) where such sample is received under section 40, a copy of the report indicating the method of sampling and analysis to the person who had purchased such article of food with a copy to the Designated Officer.

Provided that in case the sample cannot be analysed within fourteen days of its receipt, the Food Analyst shall inform the Designated Officer and the Commissioner of Food Safety giving reasons and specifying the time to be taken for analysis.”

11. It appears from the provisions contained in the aforesaid two Sections of the Act that it is mandatory for the Food Analyst to complete the analysis within 14 days from the date of receipt of the food samples, and to send the analysis report mentioning the method of sampling and analysis within 14 days to the Designated Officer, with a copy to the Commissioner of Food Safety. In any case, if the Food Analyst is not in a position to comply with the above requirement of analysis and report within 14 days, the proviso to Section 46(3) of the Act requires the Food Analyst to inform the Designated Officer and the Commissioner of Food Safety, giving reasons, and specifying the time to be taken for analysis. As far as the present case is concerned, the Food Analyst is seen to have submitted a statement to the Designated Officer and the Commissioner of Food Safety on 27.06.2018, indicating that the analysis report of the 25 samples shown in the table thereunder, which include the food sample in the present case, could not be sent within 14 days due to incompleteness of analysis, including pesticide residue of sample within the stipulated time. It is further made clear by the Food Analyst in the aforesaid statement that the analysis report of the above samples will be sent within 50 days from the date of receipt of the samples.

12. According to the learned counsel for the petitioners, the aforesaid statement given by the Food Analyst cannot be taken as the information as required under the proviso to Section 46(3) of the Act, since it does not contain the reasons why the sample could not be analysed within 14 days of its receipt. The learned counsel for the petitioners would further contend that the term ‘shall’ incorporated in the aforesaid proviso would make it clear that the requirements of the said proviso are mandatory, and that the failure of the Food Analyst to mention the reasons why the analysis could not be completed within 14 days, can only show that there has been violation of the procedural mandate contained under Sections 42 & 46 of the Act. According to the learned counsel for the petitioners, the above infraction of law would vitiate the prosecution proceedings initiated in this case.

13. As regards the aspect relating to the mandatory nature of a provision, there are no ready reckoner tests or straight jacket formula to determine whether a provision is mandatory or directory. The cardinal principle to be followed is to ascertain the broad purpose of legislation and the object sought to be achieved by that particular provision. Where the design of the statute is the avoidance or prevention of damage to public health, and the enforcement of a particular provision literally to its letter will tend to defeat that design, then that provision must be taken as directory so that proof of prejudice is necessary to invalidate the act complained of. The failure of those Departmental Officials to follow a procedural requirement in letter and spirit cannot, by statutory interpretation, be

allowed to be to the detriment of the health safety of the public, and defeat the main object of the statute. The Hon'ble Apex Court while dealing with the failure to supply a copy of the report of the Public Analyst within a period of 10 days, as stipulated by Rule 9(j) of the erstwhile Prevention of Food Adulteration Rules, as it was in force at the relevant time, observed in *Dalchand v. Municipal Corpn.* [(1984) 2 SCC 486], as follows:

"One of the questions raised in this petition for special leave to appeal to this Court is whether the failure to supply a copy of the report of the Public Analyst within the period of 10 days stipulated by Rule 9(j) of the Prevention of Food Adulteration Act, as it was in force at the relevant time — it may be noticed here that Rule 9(j) which was in force at the relevant time has since been omitted with effect from January 4, 1977 — was fatal to a prosecution under the Prevention of Food Adulteration Act. Was Rule 9(j) mandatory or directory? There are no ready tests or invariable formulae to determine whether a provision is mandatory or directory. The broad purpose of the statute is important. The object of the particular provision must be considered. The link between the two is most important. The weighing of the consequence of holding a provision to be mandatory or directory is vital and, more often than not, determinative of the very question whether the provision is mandatory or directory. Where the design of the statute is the avoidance or prevention of public mischief, but the enforcement of a particular provision literally to its letter will tend to defeat that design, the provision must be held to be directory, so that proof of prejudice in addition to non-compliance of the provision is necessary to invalidate the act complained of. It is well to remember that quite often many rules, though couched in language which appears to be imperative, are no more than mere instructions to those entrusted with the task of discharging statutory duties for public benefit. The negligence of those to whom public duties are entrusted cannot by statutory interpretation be allowed to promote public mischief and cause public inconvenience and defeat the main object of the statute. It is as well to realise that every prescription of a period within which an act must be done, is not the prescription of a period of limitation with painful consequences if the act is not done within that period. Rule 9(j) of the Prevention of Food Adulteration Act, as it then stood, merely instructed the Food Inspector to send by registered post copy of the Public Analyst's report to the person from whom the sample was taken within 10 days of the receipt of the report. Quite obviously the period of 10 days was not a period of limitation within which an action was to be initiated or on the expiry of which a vested right accrued. The period of 10 days was prescribed with a view to expedition and with the object of giving sufficient time to the person from whom the sample was taken to make such arrangements as he might like to challenge the report of the Public Analyst, for example, by making a request to the Magistrate to send the other sample to the Director of the Central Food Laboratory for analysis. Where the effect of non-compliance with the rule was such as to wholly deprive the right of the person to challenge the Public Analyst's report by obtaining the report of the Director of the Central

Food Laboratory, there might be just cause for complaint, as prejudice would then be writ large. Where no prejudice was caused there could be no cause for complaint. I am clearly of the view that Rule 9(j) of the Prevention of Food Adulteration Rules was directory and not mandatory. The decisions in *Public Prosecutor v. Murlidhar* [1977 Cr LJ 1634 (AP) : 1977 Andh LT 34 : 1977 MLJ (Cri) 205] and *Bhola Nath v. State* [1977 Cr LJ 154 (Cal) : (1977) 1 FAC 38] to the extent that they hold that Rule 9(j) was mandatory are not good law. The petition is dismissed.”

14. As regards the legal implications in the use of the word ‘shall’ in a statute, the Hon’ble Supreme Court held in *State of Haryana v. Raghubir Dayal* [(1995) 1 SCC 133], as follows:

“The use of the word ‘shall’ is ordinarily mandatory but it is sometimes not so interpreted if the scope of the enactment, on consequences to flow from such construction would not so demand. Normally, the word ‘shall’ prima facie ought to be considered mandatory but it is the function of the court to ascertain the real intention of the legislature by a careful examination of the whole scope of the statute, the purpose it seeks to serve and the consequences that would flow from the construction to be placed thereon. The word ‘shall’, therefore, ought to be construed not according to the language with which it is clothed but in the context in which it is used and the purpose it seeks to serve. The meaning has to be ascribed to the word ‘shall’ as mandatory or as directory, accordingly. Equally, it is settled law that when a statute is passed for the purpose of enabling the doing of something and prescribes the formalities which are to be attended for the purpose, those prescribed formalities which are essential to the validity of such thing, would be mandatory. However, if by holding them to be mandatory, serious general inconvenience is caused to innocent persons or general public, without very much furthering the object of the Act, the same would be construed as directory.”

15. On the same point, in *State of Kerala v. Allasserry Mohd.* [(1978) 2 SCC 386], the Hon’ble Supreme Court held as follows:

“It is not necessary to refer to the numerous decided cases on this point. Applying the salutary principles extracted above, it would be noticed that the use of the word “shall” in sub-section (3) of Section 11 and in Rule 22 would, on its face, indicate that an imperative duty has been cast upon the Food Inspector to send a sample in accordance with the prescribed Rules. But it is well known that the mere use of the word “shall” does not invariably lead to this result. The whole purpose and the context of the provision has to be kept in view for deciding the issue. The object of the Act is to obtain the conviction of a person dealing in adulterated food. It was brought to our notice by counsel on either side that the quantities of various samples of food to be sent to the Public Analyst as fixed from time to time have varied. As observed by this Court in the case of *State of U.P. v. Kartar Singh* [AIR 1964 SC 1135 : (1964) 5 SCR 679 : (1964) 2 Cri LJ 229] the standards of food are fixed after consultation with the

Committee constituted under Section 3 of the Act. The quantities of samples are also fixed from time to time by the Government presumably in consultation with the Committee and on the basis of the experts' opinions. By and large, it appears, as was stated before us by the learned Attorney General with reference to the various tests and the quantities required therefore from the Manual of Methods of Tests and Analysis for food, that generally the quantities fixed are more than double the quantity required for analysis by the Public Analyst. As, for example, the total quantity required for the various tests of Ghee is approximately 55 gms. But the quantity prescribed in Rule 22 is 150 gms. The purpose of prescribing more than double the quantity required for analysis is that a Food Inspector while taking a sample of food for analysis in accordance with Section 11 is not aware at the threshold whether the person from whom the sample has been taken would decline to accept one of the three parts. It is to guard against such an eventuality that the quantity prescribed is more than double because if the person declines to accept one part of the sample, then, as mentioned in sub-section (2), the Food Inspector has to send an intimation to the Public Analyst of such refusal and thereupon the latter has to divide the 1/3rd part sent to him into two parts. The half of the one third is retained for further tests, if necessary, or for production in case legal proceedings are taken. It would thus be seen that the whole object of Section 11 and Rule 22 is to find out by a correct analysis, subject to further verifications and tests by the Director of the Central Laboratory or otherwise, as to whether the sample of food is adulterated or not. If the quantity sent to the Public Analyst, even though it is less than that prescribed, is sufficient and enables the Public Analyst to make a correct analysis, then merely because the quantity sent was not in strict compliance with the Rule will not result in the nullification of the report and obliterate its evidentiary value. If the quantity sent is less, it is for the Public Analyst to see whether it is sufficient for analysis or not. If he finds it insufficient, there is an end of the matter. If however he finds it sufficient, but due to one reason or the other, either because of further tests or otherwise, it is shown that the report of the Public Analyst based upon the short quantity sent to him is not trustworthy or beyond doubt, the case may fail. In other words, if the object is frustrated by the sending of the short quantity by the Food Inspector to the Public Analyst, it is obvious, that the case may end in acquittal. But if the object is not frustrated and is squarely and justifiably achieved without any shadow of doubt, then it will endanger public health to acquit offenders on technical grounds which have no substance. To quote the words of Sir George Rankin, C.J. from the decision of the Calcutta High Court in Chandra Nath Bagchi v. Nabadwip Chandra Dutt [AIR 1931 Cal 476 : 53 CLJ 329 : 35 CWN 9] at p. 478, it would "be merely piling unreason upon technicality...". In our considered judgment the Rule is directory and not mandatory. But we must hasten to reiterate what we have said above that, even so, Food Inspectors should take care to see that they comply with the Rule as far as possible."

(emphasis supplied)

16. Again, in *T.V. Usman v. Food Inspector, Tellicherry Municipality* [(1994) 1 SCC 754], the Apex Court, in the context of the mandatory requirement of Rule 7(3) of the erstwhile Prevention of Food Adulteration Rules, held as follows:

"In Rule 7(3) no doubt the expression "shall" is used but it must be borne in mind that the rule deals with stages prior to launching the prosecution and it is also clear that by the date of receipt of the report of the Public Analyst the case is not yet instituted in the court and it is only on the basis of this report of the Public Analyst that the authority concerned has to take a decision whether to institute a prosecution or not. There is no time-limit prescribed within which the prosecution has to be instituted and when there is no such limit prescribed then there is no valid reason for holding the period of 45 days as mandatory. Of course that does not mean that the Public Analyst can ignore the time-limit prescribed under the rules. He must in all cases try to comply with the time-limit. But if there is some delay, in a given case, there is no reason to hold that the very report is void and on that basis to hold that even prosecution cannot be launched. May be, in a given case, if there is inordinate delay, the court may not attach any value to the report but merely because the time-limit is prescribed, it cannot be said that even a slight delay would render the report void or inadmissible in law. In this context it must be noted that Rule 7(3) is only a procedural provision meant to speed up the process of investigation on the basis of which the prosecution has to be launched. No doubt, sub-section (2) of Section 13 of the Act confers valuable right on the accused under which provision the accused can make an application to the court within a period of 10 days from the receipt of copy of the report of Public Analyst to get the samples of food analysed in the Central Food Laboratory and in case the sample is found by the said Central Food Laboratory unfit for analysis due to decomposition by passage of time or for any other reason attributable to the lapses on the side of prosecution, that valuable right would stand denied. This would constitute prejudice to the accused entitling him to acquittal but mere delay as such will not per se be fatal to the prosecution case even in cases where the sample continues to remain fit for analysis in spite of the delay because the accused is in no way prejudiced on the merits of the case in respect of such delay. Therefore it must be shown that the delay has led to the denial of right conferred under Section 13(2) and that depends on the facts of each case and violation of the time-limit given in sub-rule (3) of Rule 7 by itself cannot be a ground for the prosecution case being thrown out."

17. It is pertinent to note that all the above decisions are rendered in the context of the law relating to prevention of food adulteration during the relevant time. The consistent legal view laid down in all the aforesaid dictums is that the mere use of the term 'shall' in a statute by itself does not mean that it is of such mandatory nature that the non-compliance of the provision in letter and spirit would vitiate the whole procedures initiated thereunder. On the other hand, what has been laid down is that the word 'shall' ought to be construed not according to the language with which it is clothed, but in the context in which it is used and

the purpose it seeks to serve.

18. As far as the present case is concerned, it could be seen that the Food Analyst had informed the Designated Officer as well as the Commissioner of Food Safety within 10 days of the date of receipt of the sample that the analysis report of the sample cannot be sent within 14 days due to incompleteness of analysis, including pesticide residue of the sample. The reason for not sending the analysis report is thus stated as the inability to complete the analysis including pesticide residue within the stipulated time. True that the reason for the inability to complete the analysis has not been mentioned in the aforesaid report. The omission in the above regard cannot be taken as a fatal defect which would vitiate the whole procedures, in view of the settled principles of law enunciated in the case laws discussed above. It is not possible to say that the delay in completing the analysis within 14 days from the date of receipt of the sample, had caused prejudice of any sort to the petitioners. This is especially so in view of the fact that the food item was found to be unsafe for the reason that the insecticide 'Triazophos' residue exceeded the prescribed tolerance limit, and not due to any other reason for which the delay in analysis would have an adverse impact on the findings on its quality. The extent of the above insecticide content in the food sample analysed in this case cannot be expected to increase due to a few days' delay in conducting the analysis. If at all there is the possibility of any variation, it can only be a reduction in the insecticide content due to the disintegration caused by the efflux of time. Triazophos is an organophosphate pesticide that can degrade over time. Its stability can be affected by factors such as temperature, pH and moisture levels. Triazophos can break down into less harmful metabolites, reducing its concentration in vegetables. The delay in the analysis of the food sample cannot, thus, be said to have caused any prejudice to the petitioners. Therefore, the mere reason that the Food Analyst did not indicate in the report sent to the Designated Officer and the Commissioner of Food Safety, about the reason why the analysis could not be completed within 14 days, cannot be taken as a ground to annul the prosecution proceedings initiated in this case. The above requirement to indicate in the report to Designated Officer, the reason why analysis could not be done in 14 days, is intended to enable the Designated Officer and Food Safety Commissioner to oversee the promptness and diligence on the part of the Food Analysts in completing their work in a time bound manner; and not to provide a shot in the arm for the errant food business operators to stifle the prosecution.

19. On merits, it has been argued by the learned counsel for the petitioners that the accused Nos.1 to 3, who are the sellers, cannot be mulcted with the liability, since the complaint does not disclose that they have received the food item from the manufacturer with the knowledge that it was unsafe. Adverting to Section 27(3)(e) of the Act, the learned counsel for the petitioners submitted that the liability of the seller in connection with the violation alleged in this case would arise if only it is shown that the 'chilly hybrid' involved in this case was received by the accused Nos.1 to 3 with the knowledge that the said item was unsafe due

to excess content of pesticides.

20. It is true that Section 27(3)(e) of the Act fixes the liability upon the seller for any article of food not conforming to the prescribed standards if it is shown that the said food item was received by the seller with the knowledge of it being unsafe. At the same time, it is pertinent to note that, as per Section 26 of the Act, it is the responsibility of every food business operator to ensure that the articles of food satisfied the requirements of the Act, and the Rules and Regulations made thereunder at all stages of production, processing, import, distribution and sale within the business, under his control. As per Section 59(i) of the Act, any person who, whether by himself or by any other person on his behalf, manufactures for sale or stores or sells or distributes or imports any article of food for human consumption, which is unsafe, is punishable even if such failure or contravention does not result in injury. Therefore, for establishing the penal liability in the above regard, the prosecution need only show that accused Nos.1 to 3 had sold an article food for human consumption, which was unsafe. The question whether the accused Nos.1 to 3, had received the above food item, without the knowledge of it being unsafe is, in fact, a matter of defence to be dealt with at the time of trial. Therefore, the argument of the learned counsel for the petitioners that the petitioners 1 to 3 (accused Nos.1 to 3) are not liable to be proceeded against for the violation alleged in this case, due to the absence of any indication in the complaint about their act of receiving the food item with the knowledge of it being unsafe, cannot be countenanced.

21. Another challenge raised by the petitioners against the maintainability of the prosecution against them is that there is no specific overt act alleged against the accused, and that the complaint makes no mention of the role played by each of the accused in the commission of offence. There is absolutely no basis for the above contention of the petitioners since the complaint lodged by the Food Safety Officer contains the requisite particulars fixing the criminal liability upon each of the accused. The other challenge raised by the petitioners that there is no reason to frame the other accused, except the second accused, who has been nominated by the third accused, is also bereft of merit, in view of the collective liability of all the accused as envisaged under Section 26 of the Act.

22. The petitioners are not able to substantiate any other procedural violations which would vitiate the prosecution proceedings initiated against them. Therefore, the prayer in this petition to quash the proceedings against the petitioners, cannot be allowed.

In the result, the petition is hereby dismissed.