

(2025) 05 KL CK 1149

In the High Court Of Kerala

Case No : Criminal Miscellaneous Petition No. 9199 Of 2024

Sreehari R

APPELLANT

Vs

State Of Kerala

RESPONDENT

Date of Decision : 20-05-2025

Acts Referred:

Food Safety and Standards Act, 2006 — Section 3(1)(zz)(v), 3(1)(zz)(vii), 37(1), 42, 42(3), 46(4),? 59

Citation : (2025) 05 KL CK 1149

Hon'ble Judges : V.G.Arun, J

Bench : Single Bench

Advocate : P.Mohamed Sabah, Libin Stanley, Saipooja, Sadik Ismayil, R.Gayathri, M.Mahin Hamza, Benson Ambrose, Alwin Joseph, Grashious Kuriakose

Final Decision : Dismissed

Judgement

V.G.Arun, J

1. The petitioners are accused Nos.1 and 2 in S.T.No.4937 of 2023 pending on the files of the Judicial First Class Magistrate -I, Kottayam. The case originated from a complaint filed by the 2nd respondent, initiating prosecution under Section 37(1) of the Food Safety and Standards Act, 2006 (the Act for short). The allegations in the complaint are to the following effect;

On 11.01.2023, the Food Safety Officer inspected the shop premises, wherein the petitioners are functioning a food outlet named 'M/s.Al-Keyaan', and collected the sample of chicken shawarma for analysis. On analysis, the sample was found to contain added synthetic food colour, Sunset Yellow FCF (CI-15985), the use of which is not permitted for the heat treated processes for meat and poultry products as per Table 8 of Appendix A Food Category System 8.2.2 of Food Safety and Standards (Food Products Standards and Food Additives) Regulations 2011. Being thus unsafe as per Section 3(1)(zz)(v) and 3(1)(zz)(vii) of Food Safety and Standards Act, 2006, its use amounts to a contravention punishable with imprisonment under Section 59 of the Act. The petitioners are

seeking to get the prosecution against them quashed on the premise that the mandatory requirement under Section 42(3) stands violated, the Designated Officer having sent the recommendation for prosecution to the Commissioner for Food Safety after fourteen days of receipt of the report from the Food Analyst.

2. Learned counsel for the petitioners submitted that Annexure-3 report of the Food Analyst is dated 19.01.2023, but the Designated Officer had forwarded his recommendation to the Commissioner only on 15.07.2023. According to the counsel the expression used in Section 42(3) being 'shall', the time limit has to be followed mandatorily and violation would render the prosecution illegal.

3. Learned Additional Director General of Prosecution submitted that no prejudice is caused to the petitioners by reason of the delay in submitting the recommendation under Section 42(3). It is pointed out that, although Section 46(4) provides for appeal against the report of the Food Analyst and the Designated Officer had sent a notice under Section 46(4) to the petitioners, enquiring whether they intended to file an appeal and the second sample analysed, the petitioners did not avail the opportunity. It is contended that the expression 'shall' in Section 42(3) has to be understood as 'may', since the consequence of non-compliance is not provided in the Act. In support of this contention reliance is placed on the decision in *Subramanian v. State of Kerala* [2024 (6) KHC 375].

4. Being contextually relevant, Section 42 of the Act, prescribing the procedure for launching prosecution, is extracted below;

"42. Procedure for launching prosecution.-(1) The Food Safety Officer shall be responsible for inspection of food business, drawing samples and sending them to Food Analyst for analysis.

(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.

(3) The Designated Officer after scrutiny of the report of Food Analyst shall decide as to whether the contravention is punishable with imprisonment or fine only and in the case of contravention punishable with imprisonment, he shall send his recommendations within fourteen days to the Commissioner of Food Safety for sanctioning prosecution.

(4) The Commissioner of Food Safety shall, if he so deems fit, decide, within the period prescribed by the Central Government, as per the gravity of offence, whether the matter be referred to, -

(a) a court of ordinary jurisdiction in case of offences punishable with imprisonment for a term up to three years; or

(b) a Special Court in case of offences punishable with imprisonment for a term

exceeding three years where such Special Court is established and in case no Special Court is established, such cases shall be tried by a court of ordinary jurisdiction.

(5) The Commissioner of Food Safety shall communicate his decision to the Designated Officer and the concerned Food Safety Officer who shall launch prosecution before courts of ordinary jurisdiction or Special Court, as the case may be; and such communication shall also be sent to the purchaser if the sample was taken under section 40.” (underline supplied)

5. In the case at hand, the analysis report was sent to the Designated Officer within the fourteen days stipulated in Section 42(2). As per Section 42(3), after scrutiny of the analysis report, the Designated Officer should decide whether the contravention is punishable with imprisonment or fine only. In case the contravention is punishable with imprisonment, the Designated Officer must, within fourteen days, send his recommendations to the Commissioner for sanctioning prosecution. Here, it is essential to note that as per Rule 2.4.2:6 of the Food Safety and Standards Rules, 2011 ('the Rules' for short), upon receipt of the analysis report, the Designated Officer is bound to send one copy to the Food Safety Officer for record and one copy to the Food Business Operator from whom the sample was taken. Section 46(4) of the Act provides the Food Business Operator with the opportunity of preferring appeal against the report of the Food Analyst. As per Rule 2.4.6, the Food Business Operator can file the appeal within 30 days of receipt of a copy of the Analysis Report. Once such appeal is filed, Rule 2.4.6:1 provides thirty days' time to the Designated Officer for forwarding one part of the sample to the referral lab. Rule 2.4.6:3 stipulates that the Certificate of Analysis, duly signed by the Director of the Referral Laboratory, shall be forwarded within fourteen days of receipt of the sample. Therefore, if the Food Business Operator files appeal under Section 46(4), the Designated Officer will have to await the outcome of the second analysis, for deciding whether recommendation should be sent to sanction prosecution of the Food Business Operator. In view of the procedure prescribed by the Rules, it will be irrational to hold the time limit for making the recommendation under Section 42(3) to be mandatory. As held by this Court in Subramanian (*supra*), while determining the question whether a provision is directory or mandatory, not only the language, but the context, subject matter and object of the provision should be taken into account. In the case at hand, absence of consequence for non-compliance as well as the provision for filing appeal and the procedure to be followed upon filing appeal also clearly indicate that the provision is only directory, although the expression used is 'shall'.

For the aforementioned reasons, the CrI.M.C. is dismissed.