

Chapter-IV: Analysis of Food and Prosecution

4.1 Introduction

Analysis of food samples for physical, chemical and microbiological contamination is important to ensure the safety and quality of food that is produced domestically or imported, and to enable appropriate action, whenever necessary, to be taken to protect consumers. In terms of section 38 of the Act, the Food Safety Officer is empowered (except in respect of imported food, where the FSSAI will authorise an officer) to take samples and send them to the food analyst of the local area within which such samples have been taken. In terms of sub-section 46(2) read with sub-section 43(1) of the Act, the food analyst shall cause such samples to be analysed by food laboratories and research institutions accredited¹ by National Accreditation Board for Testing and Calibration Laboratories (NABL)² or any other accreditation agency. Sub-sections 43(2) and (3) of the Act stipulate the notification of referral food laboratories and the framing of regulations for this purpose. Paragraph 2.2.1 of the Food Safety and Standards (Laboratory and Sample Analysis) Regulations, 2011 delineates the functions of referral laboratories. Section 47(1)(c) of the Act stipulates that the food safety officer shall send one part of the sample to the food analyst, two parts to the designated officer and one part to the accredited laboratory at the request of the FBO. In case of an appeal against the report of the food analyst, or if there is a difference in the test reports of the laboratory to which the food analyst has sent the sample and the laboratory to which the sample has been sent at the request of the FBO, sub-section 46(4) and proviso below section 47(c)(iii) respectively provide for referral by the designated officer to a referral food laboratory.

4.2 Laboratories under FSS Act

There are 209 laboratories recognised by FSSAI for testing of food samples as of December 2016. These include:

¹ Laboratory accreditation is a procedure by which an authoritative body gives formal recognition of technical competence for specific tests/measurements, based on international standard.

² NABL is an autonomous body under the Department of Science and Technology, Ministry of Science and Technology, Government of India.

- i) 72 laboratories³ functioning under the state/Union Territory governments (for primary analysis of samples by food analysts). Of these, only 62 are functioning⁴.
- ii) 121 NABL accredited laboratories⁵ notified by FSSAI.
- iii) 16 Referral Laboratories⁶ under various Central Government Ministries and Departments⁷.

4.3 Non-accreditation of state food laboratories and referral laboratories

Only seven⁸ out of 72⁹ state food laboratories and only eight¹⁰ out of 16¹¹ referral laboratories were NABL accredited as of September 2016. The Ministry of Health and Family Welfare informed (March 2017) that under the new scheme announced in October 2016, all state laboratories would be required to acquire NABL accreditation within two years. It was further stated by the Ministry that NABL accreditation is not a pre-condition for notification of referral laboratories under the Act. It is observed that FSSAI/Ministry had similarly informed the Rajya Sabha in July 2015, that, referral laboratories are not mandated to be accredited by the NABL, and are only to be notified by the Food Authority. However, para 2.2.1(5) of the FSS (laboratory and sample analysis) Regulations, 2011 state that referral laboratory shall maintain high standards of accuracy, reliability, credibility in the operations of laboratory and achieving and maintaining required level of accreditation and reliability. In view of such regulations, it became desirable that they are accredited by NABL to establish and prove their accuracy, reliability and credibility.

³ 72 state food testing laboratories functioning under the erstwhile Prevention of Food Adulteration Act (section 98 of the FSS Act permits such transition from earlier Acts).

⁴ Non-functional laboratories: Karnataka (1 out of 4 labs), Punjab (2 out of 3 labs), Rajasthan (3 out of 8 labs), Tamil Nadu (1 out of 7 labs), and West Bengal (3 out of 5 labs).

⁵ 109 notified laboratories are private laboratories and 12 are under Central/State Governments

⁶ Four referral laboratories were notified through the Food Safety and Standards (Laboratory and Sample Analysis) Regulations, 2011. Thereafter, 12 more referral laboratories were notified through gazette (as of December 2016).

⁷ Of these, the Central Food Laboratories at Kolkata and Ghaziabad function under FSSAI.

⁸ Four in Gujarat, one each in Maharashtra, Telangana and Uttar Pradesh

⁹ Daman & Diu and Uttarakhand have no state food laboratory; 15 states have one state food laboratory each; Maharashtra has the maximum number of state food laboratories (11).

¹⁰ Andhra Pradesh (1), Karnataka (2), Kerala (1), Maharashtra (1), Tamil Nadu (2), West Bengal (1)

¹¹ Andhra Pradesh (1), Gujarat (1), J&K (1), Karnataka (2), Kerala (2), Maharashtra (2), Tamil Nadu (2), Telangana (2), Uttar Pradesh (2), and West Bengal (1). Of these, one referral lab each in J&K, Kerala, Tamil Nadu and Telangana were set up in 2015-16.

The fact of non-accreditation of laboratories and testing by accredited laboratories for non-accredited parameters had been criticised by the Hon'ble Bombay High Court¹². Audit check of 183 and 374 tests performed between 2011-2016 in two accredited state laboratories (Ahmedabad and Vadodara) in Gujarat revealed that, on average, 68 per cent of the tests by the state laboratory in Ahmadabad, and 77 per cent of the tests performed by the state laboratory in Vadodara were for parameters where the state labs did not have NABL accreditation.

In view of the above, the quality of testing by 65 out of the 72 state food laboratories and 8 of the 16 referral laboratories cannot be assured.

Regarding the referral laboratories, the FSSAI stated (May 2017) that 14 are NABL accredited, and hence the quality and legality of food testing is being maintained. The replies cannot be accepted in view of the fact that the state food testing laboratories and referral laboratories necessarily have to maintain high standards of accuracy, reliability and creditability.

4.4 Notification of food testing laboratories

Sub-section 43(1) of the Act provides for the notification of food laboratories to carry out analysis of samples by food analysts, and notification of referral food laboratories. Sections 43(2) and 43(3) of the Act stipulate that the Food Authority shall notify referral laboratories, and frame Regulations specifying the functions of such laboratories and the local areas of their functioning.

4.4.1 Irregular recognition/notification of food testing laboratories

From September 2011 till March 2014, FSSAI empanelled 67 laboratories through office orders (without notification), in violation of Section 43(1) of the Act. The empanelment was also without the required approval of the Food Authority and the Ministry. To this audit observation, Ministry replied (March 2017) that FSSAI had notified 64 food laboratories till December, 2014. The reply is incorrect as FSSAI had recognised 67 laboratories between September 2011 and March 2014, by way of office orders and not notification. On 02 December 2014, FSSAI had, with the approval of the Ministry, notified, for the first time, 64 accredited laboratories, which included 56 laboratories empanelled earlier. Thus, the process for recognition through notification as stipulated in the Act was not followed by FSSAI.

¹² FSSAI vs Nestle India and Others Writ Petition 1688/2015.

4.4.2 Irregular notification of referral laboratories

Clause 2.2.2 of the Regulations¹³ identifies four referral laboratories, in Kolkata, Mysore, Pune and Ghaziabad and the distinct local areas of their functioning. In light of these provisions, any change in the number, scope and area of functioning of referral food laboratories can only be by way of amendment to the regulations by the Food Authority, through gazette notification.

Audit observed during May 2013 to March 2016, FSSAI had 14 referral laboratories notified without the approval of Food Authority. Further, the functional areas of laboratories were changed through office orders and notifications. Hence the process of amendment through office orders or simple notifications and not through amendment in regulation has resulted in violation of the Act.

The Ministry endorsed (June 2017) the view of the FSSAI (May 2017) that the Food Authority had full powers to notify referral food laboratories and the Chairperson approved such notification in advance subject to ratification by the Food Authority at its subsequent meeting. The replies cannot be accepted. The Ministry and the FSSAI have not covered the aspect that the Act stipulates notification of referral laboratories and the framing of Regulations specifying the functions of such laboratories and the local areas of their functioning. Any change in jurisdiction can only be done through amendment in the regulation and not through mere office orders or notification. Further, though the FSSAI issued administrative orders/ notifications relating to referral food laboratories, the same were ratified by the Food Authority only on 25 May 2017 (and not in December 2016 as wrongly stated by the FSSAI).

4.5 Food testing at NABL accredited laboratories

4.5.1 Failure of FSSAI to ensure sending of samples to appropriate laboratories

Audit observed that, while FSSAI has framed Regulations¹⁴ containing vertical

¹³ Food Safety and Standards (Laboratory and Sample Analysis) Regulations, 2011 notified on 01 August 2011.

¹⁴ FSS (Food Products Standards and Food Additives) Regulations, FSS (Prohibition and Restrictions on Sales) regulations, and FSS (Contaminants, Toxins and Residues) Regulations.

and horizontal product standards¹⁵, these standards have not been integrated, to permit users and stakeholders to straightaway identify the contaminant, toxin and residue standards that are applicable to specific food categories. FSSAI also does not have any mechanism to link its individual standards with the specific type of accreditation of the NABL laboratories applying for empanelment. Such juxtaposition is important because, NABL accredits laboratories for specific disciplines (e.g., chemical testing, biological testing etc.), with further levels below them¹⁶. There are multiple specific tests within the testing parameters (for instance, the parameter for metal residue has many specific tests, e.g. cadmium, mercury, arsenic, lead, methyl mercury etc.) and NABL accredited laboratories may have accreditation for only some of the specific tests. Such juxtaposition would provide a transparent linking of standards to the specific tests for which the empanelled laboratories have accreditation, enabling FSSAI to better evaluate the eligibility of laboratories for empanelment, and making the selection of relevant laboratories to which the enforcement arms (designated officers of FSSAI and states, and authorised officers¹⁷ in respect of imports) send samples for testing, more effective.

FSSAI had not framed any Standard Operating Procedures (SOP) for examination and approval of applications for empanelment. FSSAI also does not have any mechanism to promptly update the status of NABL accreditation (such updated status may include withdrawal of NABL accreditation or addition/deletion of specific tests for which accreditation is given) of the empanelled laboratories.

Though NABL accreditation is accorded not only for the specific discipline but also for the multiple tiers or levels below (as explained in footnote 16), FSSAI notifies empanelled laboratories only for two of the broad disciplines (chemical and biological) without providing tier/level details to the enforcement arms of the FSSAI and the states.

¹⁵ Vertical standards apply to a particular food product, whereas horizontal standards apply across the board for the entire food sector or categories thereof. For instance, the FSS (Food Products Standards and Food Additives) Regulations contain vertical standards covering nature, composition and properties of specific categories of food products; and also contain horizontal standards covering limits of permitted additives/ contaminants etc., which may be different for different food categories (for instance, the permissible limits for lead are 0.5 ppm parts per million- for edible oils, 10 ppm for baking powder etc.).

¹⁶ For instance, the first level, say, Level I is the product category (e.g., Food and Agricultural Products); Level II is the sub-product category (e.g., Fish and Fishery Products); Level III is the test parameter in respect of Level II (e.g., Metal Residue in Fish and Fishery Products); and Level IV is the specific test in respect of Level III (e.g., tests for mercury in fish).

¹⁷ Appointed by CEO, FSSAI, in terms of section 47 (5) of the Act read with section 25 of the Act dealing with imports.

Hence, the enforcement arms sent samples to the empanelled laboratories, without knowing the current status of NABL accreditation of the laboratory, or the specific tests that are required to be conducted on the food product that is proposed to be sampled and analysed, or whether the concerned laboratory has NABL accreditation for the specific food category, parameter or tests that are required to be conducted.

In their replies (May 2017 and June 2017 respectively), the FSSAI and the Ministry stated that they are putting a system in place to address the issue.

4.5.2 Testing of samples by laboratories with no accreditation or empanelment

Audit noted that NABL accreditation of four notified laboratories had expired/ were not in the notified list of laboratories for varying periods between January 2014 and March 2016. Despite this, FSSAI regional offices in Chennai, Delhi and Mumbai had sent 6,845 import samples to these laboratories for testing during these periods when they were not accredited/notified.

In their replies (May 2017 and June 2017 respectively), FSSAI and the Ministry accepted the Audit observations.

4.5.3 Testing of samples by laboratories without accreditation for specific parameters

Audit test check of 1,803 import samples sent to empanelled food laboratories by the four regional offices (Chennai, Delhi, Kolkata and Mumbai) between August 2011 and March 2016 revealed that in 264 cases (14.64 *per cent*), the private laboratories did not have accreditation for the parameters (e.g. ethyl alcohol, reducing sugar, esters as ethyl acetate, higher alcohol as amyl alcohol, aldehyde, sulphur dioxide etc.) on which it conducted tests.

In reply, the Ministry stated (March 2017) that it may not be practically feasible for a laboratory to have accreditation for all the test parameters across all food products and that all the notified laboratories have been advised to upgrade their facilities for complete testing and NABL accreditation as per the requirement of FSS Regulations. The reply is not acceptable, since, under section 43(1) of the Act, the Food Authority is mandated to ensure that private laboratories test and report on only such parameters for which they have accreditation, so that, criticisms of the type contained in the Bombay High Court judgement referred to in paragraph 4.3 above are avoided.

In their replies (May 2017 and June 2017 respectively), the FSSAI and the Ministry stated that they are putting a system in place to address the issue.

4.5.4 Non-testing of samples on all prescribed parameters

The Regulations¹⁸ specify the standards (in terms of constituents, nutrients, properties etc.) and permissible limits of contaminants, toxins, additives and residues. Laboratories are required to test on such parameters as applicable to specific foods. Audit test check of 1,309 import cases, however, revealed that in 303 cases (23.15 per cent) the laboratories to whom the regional offices of FSSAI in Chennai, Kolkata and Mumbai had sent samples did not perform the checks on all the prescribed parameters applicable to the specified food item, despite which the concerned regional offices issued No Objection Certificates (NOC) for the import of these items.

In reply, Ministry stated (March 2017) that for the purpose of quick clearance of imported food items, tests are conducted on most common and essential safety parameters without compromising with the risk factors. The reply is not acceptable. FSSAI has not defined which of its parameters are essential and which are non-essential.

4.5.5 Ineffective monitoring of functioning of empanelled laboratories

Apart from NABL accreditation, FSSAI is required to ensure that the performance of empanelled laboratories is satisfactory. FSSAI, however, did not enter into any agreement with the empanelled laboratories prior to December 2014. Resultantly, FSSAI had no mechanism to ensure that the empanelled laboratories adhered to the conditions of empanelment. Though, clause 2.3 of the now extant agreement with the laboratories requires FSSAI to monitor the continuing conformity with the requirements prescribed at the time of recognition, and gives FSSAI the right to carry out additional or unscheduled assessments or investigation over and above the NABL assessment, FSSAI is yet to formulate any procedure¹⁹ till date for surveillance audits, periodicity of special/supervisory visits and suspension/revocation of suspension, renewal, de-recognition, etc., of the laboratories. Consequently, there is no effective monitoring of the empanelled laboratories by FSSAI.

¹⁸ Food Safety and Standards (Food Products Standards and Food Additives) Regulations, 2011 and the Food Safety and Standards (Contaminants, Toxins and Residues) Regulations, 2011.

¹⁹ Unlike the Bureau of Indian Standards (BIS), for instance, who have framed detailed guidelines in this regard.

The FSSAI and Ministry accepted (May 2017 and June 2017 respectively), the Audit observations.

4.6 Food Analysts

Food analysts are required, in terms of section 46 of the Act to, *inter-alia*, undertake analysis of food samples sent by the authorised officer (in respect of imports) or the food safety officer (in all other cases). Section 45 of the Act prescribes the appointment of food analysts through notification, and further stipulates that such persons should have the qualifications prescribed by the Central Government. Such qualifications have been prescribed in paragraphs 2.1.4(1)(i) and (ii) of FSS Rules, and are mandatory for food analysts functioning under the Act (except for those persons declared qualified for appointment as public analysts under the erstwhile Prevention of Food Adulteration Act and who had been functioning as public analysts on the date of commencement of FSS Rules). Paragraph 2.1.4(1)(ii) of the Rules stipulates that food analysts should have been declared qualified for appointment by a board appointed and notified by FSSAI. After the framing of FSS Rules, FSSAI has conducted, commencing from February 2012, examinations for the purpose of qualifying food analysts under the Act²⁰. Consequently, 57 candidates were declared by a board constituted by the FSSAI to be eligible²¹. Further, the agreements entered into by FSSAI when empanelling laboratories from December 2014²², stipulated that the food laboratory should have a qualified food analyst for testing food samples under the Act.

4.6.1 Food analysts functioning in notified food laboratories without qualification by board

Audit noted that FSSAI has no data on eligible persons who were functioning as public analysts under the erstwhile Prevention of Food Adulteration Act, and who continued to function in the posts of public analysts/food analysts after the framing of FSS Rules. Further, in response to an audit query on the availability of qualified analysts in the empanelled notified food laboratories, FSSAI admitted (December 2016) that no such record was available. Test check in Audit, however, revealed that out of the 16 notified food laboratories to which the

²⁰ In February 2012, January and July 2014 (covered in the present report), and February 2017.

²¹ For the period covered in audit. A further 127 candidates were declared qualified by the board based on the examination conducted in February 2017.

²² As mentioned in paragraph 4.5.5 of this report, there was no formal agreement between FSSAI and the empanelled private laboratories prior to December 2014.

authorised officers in Delhi and Mumbai sent 49193 cases of imported food samples for testing during 2015-16, 15 food laboratories did not have a food analyst qualified by FSSAI board. It is not clear how many of these samples had been sent for testing by food analysts who are qualified either in terms of the Prevention of Food Adulteration Act or by orders of FSSAI board. Hence tests conducted by state food laboratories and empanelled private laboratories that do not have food analysts with the stipulated qualification were in violation of the Rules.

In their replies (May 2017 and June 2017 respectively), FSSAI and the Ministry accepted the Audit observation and stated that now it will insist on the notified laboratories to appoint Food Analyst as per the Act.

4.6.2 Non-notification of FSSAI board for qualifying food analysts

Audit observed that, contrary to the stipulation in paragraph 2.1.4(1)(ii) of FSS Rules, FSSAI had not notified the board for qualifying food analysts for the period covered in audit²³. Hence, during the period checked by audit, tests on food were performed in laboratories by food analysts approved by a board which had not been notified in accordance with the Rules.

In their replies (May 2017 and June 2017 respectively), FSSAI and the Ministry stated that the board has since been notified and is in place now. The reply however, does not address the issue of Food Analysts already declared qualified by the board which had not been notified.

4.7 State Food and Referral Laboratories

A baseline survey conducted (between September 2013 and January 2014) by FSSAI found that of 72 state food laboratories, only 62 laboratories were functional, with most of the functioning laboratories not having testing facilities for pesticide residues, heavy metals, naturally occurring toxic substances and microbiological parameters.

Audit test check of 20 state food laboratories and one referral laboratory, Central Food Laboratory, Kolkata (CFLK), revealed that they were lacking in technical manpower and important food testing equipment were either not available or were non-functional. This resulted in failure to fully/partially analyse food samples received in these laboratories during 2011-16 with regard to metal contaminants,

²³ The board that conducted the February 2017 examinations was, however, notified.

crop contaminants, insecticides/pesticides, microbiological, as stipulated in the regulations²⁴. Details are discussed in the following paragraphs:

4.7.1 Shortage of technical staff

In test checked laboratories, shortfall of technical staff ranged from 18 to 30 *per cent* in 5 laboratories, 30 to 40 *per cent* in 3 laboratories and more than 40 *per cent* in 10 laboratories. In CFLK there were only 29 technical staff against the sanctioned strength of 53. This affected the performance of the laboratories as illustrated in the case study below:

Case Study

Public Health Laboratory, Surat Municipal Corporation (SMC)

The laboratory was non-functional since August 2014 due to vacant post of Food Analyst though all other facilities like equipment and staff were available. Consequently, the Food Safety Officers (FSO) in the municipality did not lift any food samples between August 2014 and March 2015. Lifting of food samples commenced after April 2015, but were sent for analysis to food laboratories at Rajkot and Bhuj.

4.7.2 Absence of functional food testing equipment

In five state laboratories and Central Food Laboratory Kolkata (CFLK), 18 vital food testing equipment valued at ₹ 8.83 crore²⁵ purchased between February 2003 and July 2015 were non-functional due to repairs or non-installation of equipment. Audit test check of the state laboratories in the selected states²⁶ revealed that they lacked facilities to test many essential parameters like microbiological, pesticide and heavy metal contamination.

Audit verification of 4,895²⁷ food analysis reports of state food laboratories revealed that these laboratories had not tested for mandatory pesticides and microbiology tests in 4,866 cases (99 *per cent*) and 4,698 cases (96 *per cent*) respectively. Some interesting findings are discussed below:

²⁴ FSS (Contaminants, Toxins and Residues) Regulations, 2011 and FSS (Food Product Standards and Food Additives) Regulations, 2011.

²⁵ Three equipment valued at ₹1.26 crore were procured by CFLK between 2005 and 2007.

²⁶ Assam (1), Delhi (1), Gujarat (3 out of 6 state laboratories were checked), Haryana (2), Himachal Pradesh (1), Maharashtra (4 out of 11), Orissa (1), Tamil Nadu (2 out of 7), Uttar Pradesh (3) and West Bengal (2 out of 5).

²⁷ Milk and milk products (1,190 cases), edible oils (641 cases), packaged drinking water (114 cases), sweets and confectionery (686 cases), spices (274 cases) and other foods (1,990 cases).

Case study 1

Testing of vegetables and fruits for pesticides residue in Delhi by non-accredited and ill-equipped laboratory

The State Grading Laboratory of the state Directorate of Agricultural Marketing to whom the food safety department, Delhi had sent food samples for analysis during 2014-15, had declared 2,676 samples as conforming to standards. Audit observed, however, that the laboratory was neither accredited by NABL nor notified by FSSAI. Further, against 113 types of pesticides for fruits and vegetables (including 53 banned pesticides), which are required to be tested in terms of the FSS Regulations, the laboratory was equipped to test only 28 type of pesticides (including 18 banned pesticides). Consequently, food products with possibly harmful pesticide presence (including banned pesticides) impacting food safety were declared safe for human consumption.

Case Study 2

Inadequate testing of milk by ill equipped state laboratory

Out of 324 samples of milk analysed in Delhi from 5 August 2011 to 31 March 2016, 274 samples were found 'genuine' by the Delhi State Laboratory though the laboratory did not have required equipment and manpower to test for microbiological safety, metal contaminants, pesticides. Further, the laboratory did not test for the presence of caustic soda, refined white paint, refined oil, and nitrate arising from addition of pond water to milk. Consequently, food products with possibly harmful contaminants impacting food safety were declared safe for human consumption. The Department admitted (September 2016) the facts.

Case Study 3

Inadequate testing of food samples by ill equipped referral laboratory

Audit test check of 293 food samples of various products analysed by CFLK during the audit period revealed the following:

- (i) CFLK declared 178 samples (60.75 *per cent*) of the above food samples to be conforming to standards, even though these were not analysed for various parameters like pesticides, heavy metal, metal contamination, microbiology etc.
- (ii) Against 149 types of pesticide residues required to be tested in these food products, CFLK was equipped to analyse only 12 types of pesticide residues.
- (iii) No 'Pesticides/Insecticides' residue analysis could be carried out after February 2015 due to breakdown and obsolete conditions of equipment.

Consequently, food products with possibly harmful pesticide presence impacting food safety were declared safe for human consumption. CFLK admitted the facts (June 2016).

In their replies (May 2017 and June 2017 respectively), FSSAI and the Ministry accepted the Audit observation and stated that necessary steps are being taken.

4.7.3 Delays in sending reports by food analysts

Rule 2.4.2 of FSS Rules, 2011 provides that the report of the food analyst shall be sent within 14 days of the receipt of the article of food for analysis. However, no such time limit has been prescribed in respect of referral laboratories. Audit noted that there were considerable delays in sending the analysis report by the food analysts, as discussed below:

- In four states²⁸, out of test checked 2,637 cases, delays²⁹ were noticed in 1,638 cases (62 per cent). The worst delays (in 95 per cent of the cases), were observed in Uttar Pradesh, with 558 cases (47 per cent) not reported even after two months; of these, in 42 cases, the reports had not been received even after nine months (September 2016).
- In 124 randomly selected referral sample cases (out of 3,217 cases tested by CFLK during the audit period), in 100 cases (81 per cent), CFLK had taken between 14 to 210 days in sending reports. CFLK admitted the facts (August 2016), attributing the delays to shortage of infrastructure and manpower.

In their replies (May 2017 and June 2017 respectively), FSSAI and the Ministry accepted the Audit observation and stated that this bottleneck would be suitably addressed.

4.8 Prosecution

Section 42 of the Act stipulates that the Designated Officer (DO), shall, after scrutiny of the report of Food Analyst, decide whether the contravention is punishable with imprisonment or fine only, and in case of the former, send his recommendations within fourteen days to the Commissioner of Food Safety for sanctioning prosecution. In terms of FSS Rules, DOs authorise the FSOs to file an application with the Adjudicating Officer(s) (AOs), who, in terms of section 68 of the Act, is empowered to impose penalty on the FBO(s). Section 96 of the Act

²⁸ Gujarat, Himachal Pradesh, Uttar Pradesh and West Bengal.

²⁹ Delay of 1 to 10 days in 337 cases, 11 to 30 days in 407 cases, 31 to 60 days in 301 cases and above 60 days in 593 cases.

further provides that if penalty imposed is not paid, it shall be recovered as an arrear of land revenue and the defaulter's license shall be suspended till the penalty is paid.

As mentioned in paragraph 3.5, the enforcement of central licensing cases has been delegated to the state food safety authorities, who do not have any mechanism to monitor these cases separately. Therefore, audit has not segregated central licensing and state licensing prosecution cases. Nevertheless, the findings relating to prosecution by state food safety authorities are given below.

Section 42(4) of the Act permits the Commissioner of Food Safety to decide whether, depending on the gravity of the offense, the matter is to be referred to a Special Court (for offenses punishable with imprisonment for more than three years) or to a court of ordinary jurisdiction (for offenses punishable with imprisonment for lesser terms). Audit noted that Special Courts have been set up in only three States (Assam, Delhi and Uttar Pradesh) out of ten test checked states. Audit further observed that though section 42(4)(b) of the Act permits trial by courts of ordinary jurisdiction where no Special Courts exist, the state food safety authorities in Tamil Nadu have failed to launch prosecution on offenses punishable with imprisonment of more than three years on the ground that the state government is yet to create the Special Court. This has given rise to an anomalous situation, where, FBOs charged with less grave offenses are fined/prosecuted, while those accused of far more serious offenses escape unpunished.

In their replies (May 2017 and June 2017 respectively), FSSAI and the Ministry stated that these observations would be shared with the state and UT governments for corrective action.

4.9 Adjudication

4.9.1 Delays in adjudication

Rule 3.1.1(4) and (9) of FSS Rules state that the Adjudicating Officer (AO) shall pass the final order within 90 days from the date of first hearing. In test checked districts of the ten selected states, Audit observed that out of 8,294 cases registered during the audit period (2011-16) 2,126 (26 *per cent*) cases were pending (March 2016) with the AOs for more than 90 days from the date of first hearing. Maximum pendency was in Maharashtra (694 cases or 20 *per cent*) and Uttar Pradesh (1,107 cases or 44 *per cent*), as on March 2016.

In their replies (May 2017 and June 2017 respectively), FSSAI and the Ministry accepted the Audit observations, and stated that these observations would be shared with the state and UT governments for corrective action.

4.9.2 Non-recovery of penalty from Food Business Operators

Audit noted that a penalty of ₹ 12.92 crore was imposed on FBOs by concerned Adjudicating Officers in 10 test checked States/UTs during 2011-2016, whereas penalty amounting to ₹ 6.83 crore was deposited by the FBOs and balance amount of ₹ 6.09 crore (47 per cent) was yet to be recovered from FBOs. No further action was taken by the Department to recover the penalty or to suspend the license as per provisions of the Act.

In their replies (May 2017 and June 2017 respectively), FSSAI and the Ministry stated that necessary corrective actions would be introduced in the licensing system.

4.10 Appellate Tribunal

Under Section 70 of the Act, the Central/State Governments, as the case may be, may, by notification, establish one or more tribunals to be known as the Food Safety Appellate Tribunal to hear appeals on the decisions of the Adjudicating Officer. Audit observed that Food Safety Appellate Tribunals have not been established in two of the ten test checked states (Odisha and Tamil Nadu), leading to appeal cases lying unattended in these states. In Maharashtra, Presidents of District Consumer Forums have been declared as Presiding Officers of Food Safety Appellate Tribunals as an interim measure in April 2013.

FSSAI and the Ministry accepted (May 2017 and June 2017 respectively) the Audit observation.

Conclusions:

Many state food laboratories and referral laboratories to which FSSAI and state food safety authorities sent food samples for testing do not possess NABL accreditation. Though the Act stipulated gazette notification of empanelled food laboratories, FSSAI empanelled food laboratories through office orders. Contrary to the provisions of the FSS Act, FSSAI (and not the Food Authority), either through office orders or notification (and not through regulation), amended the number, scope and local areas of functioning of referral laboratories. FSSAI has not integrated its vertical and horizontal food product standards and linked them to the specific tests contained in the NABL accreditation. FSSAI failed to monitor

the current status of NABL accreditation of empanelled laboratories. FSSAI has no data on public analysts declared eligible under the erstwhile Prevention of Food Adulteration Act who continue to function under the FSS Act. FSSAI also has no data on whether all the notified empanelled food laboratories have qualified food analysts. Contrary to FSS Rules, FSSAI did not notify, till June 2016, the board for qualifying food analysts. Shortage of qualified manpower and functional food testing equipment in state food laboratories and referral laboratories resulted in deficient testing of food samples. Special Courts for offenses punishable with imprisonment for more than three years have not been set up in seven States. There were significant delays in finalisation of cases by Adjudicating Officers and a significant portion of penalties imposed remained uncollected.

Recommendations:

- *Ministry is required to ensure accreditation of all state food laboratories, and ensure that state food laboratories and referral laboratories are fully equipped and functional.*
- *Ministry should ensure that the due process delineated in the Act stipulating empanelment of food laboratories through notification, and amendments relating to referral laboratories through regulations are followed, and the process of securing the Food Authority prior approval is not bypassed.*
- *FSSAI should (i) frame transparent standard operating procedures (SOP) for the empanelment of laboratories; (ii) integrate the vertical and horizontal food product standards with the specific tests contained in NABL accreditation; (iii) ensure prompt communication on change in accreditation status of empanelled laboratories, to its enforcement arms; (iv) more effectively monitor the performance of empanelled laboratories; (v) maintain database of public analysts declared eligible under the erstwhile Prevention of Food Adulteration Act who continue to function under the FSS Act; (vi) ensure that all empanelled laboratories have qualified food analysts; and (vii) ensure that the board that qualifies food analysts is invariably notified.*
- *FSSAI may ensure that all states establish Special Courts and Food Safety Appellate Tribunals and persuade the states to effectively monitor the functioning of Adjudicating Officers, food safety courts and appellate tribunals.*