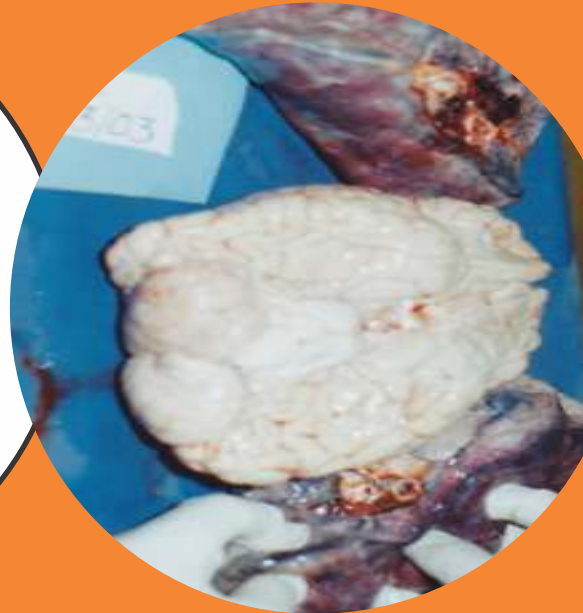


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Original Article

Issue of Unethical Advertisement: Medico-legal Issues in India-A Case Study

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ABSTRACT

The Division Bench of Bombay High Court observed that a true professional who goes by the rules is competent and mature enough to understand that if any action has to be taken against his peers, he should not hesitate and while dealing with them, he should act fairly and in a just manner. This hope and trust are believed by the Council. It was submitted that the MMC lacked jurisdiction to entertain and try the complaint. It is a complaint alleging breach of medical ethics and such allegations pertaining to non-observance of Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002. If any breach or non-observance of such regulations is alleged and if that is required to be inquired into, then, it is only the Medical Council of India which can initiate the necessary action. The MMC, in terms of its powers under the MMC Act, cannot initiate and conduct any inquiry. [Para 38]. The said order on the face of it is perverse and bad in law. The purported order of the Council has been passed as an afterthought and in great haste only to adopt arm twisting methods against the petitioners. Inviting Division Bench attention to the notice of charges at page 67 of the paper book, it is submitted that there is no reference therein to clause 6.4 of the Regulations. There is only reference to clause 6.1 (advertisement) and clause 6.1.2. The order, therefore, does not restrict itself only to the charges/memo of the same but travels much beyond it. Apart from the complaint from the Advertising Council, the Notice of charges refers to some other material but which was never disclosed to the Petitioners and not made available otherwise. It is stated that there is a gross violation of the principles of natural justice and procedural rules under the MMC Act, as the notice only gives seven days to put in a written statement of defence by the petitioners. This time was wholly inadequate and insufficient. In these circumstances, the impugned orders deserve to be set aside. Division Bench of Bombay High Court by a brief order dated 29.04.2016, directed as under: "For the reasons separately recorded, we reduce the period of suspension from 13th April, 2016 till 30th April, 2016, both days inclusive. The petitioners can commence their practice from 1st May, 2016."

Keywords: Medical register, High court, Maharashtra medical Council, Registrar, Penalty

INTRODUCTION

Background of the Case

By this petition under Article 226 of the Constitution of India, the petitioners challenge an order of the Maharashtra Medical Council dated 13.04.2016. By this

order, the said council has directed removal of the names of the petitioners for a period of three months from the date of the order. Thus, their names stand removed from the Medical Register, which the Council maintains in terms of section 20 of the Maharashtra Medical Council Act, 1965 ("the MMC Act").

FACTS OF THE CASE

Profile of the Petitioners (P-1, P-2)

The petitioners (P-1, P-2) have studied medicine at Seth G. S. Medical College and KEM Hospital, Mumbai. They got their certificate of MBBS and MD, a postgraduate degree in Obstetrics and Gynaecology from Mumbai University. They are registered with Respondent No.2 and have received licence to practice medicine. They have been running one of India's leading In Vitro Fertilization (IVF) clinics called the Malpani Infertility Clinic in Mumbai. With the help of modern technology, they have assisted numerous infertile couples to become parents. Because of their hard work and dedication, they have garnered enormous reputation and success in the field of medicine. [Para 6]

Issue of Unethical Advertisement

On 20th May, 1996, a letter was addressed by an anonymous person to Respondent No. 2. The letter sought to lodge a complaint against the petitioners that they were advertising their services in contravention of medical ethics, because articles in newspapers were being written about them. Pursuant to the said complaint, an inquiry was conducted by R.No.2 against the petitioners. Thereafter, on 27.06.2012, pursuant to an inquiry held by R.No.2 against the petitioners on the same date, R.No.2 passed a resolution that a warning be issued to the petitioners. On 03.11.2012, a letter of warning was issued by Registrar of R.No.2 to the petitioners (P-1, P-2).

On 29.10.2012, the petitioners (P-1, P-2) filed an appeal against the said letter with R.No.4. The said appeal is still pending. The said appeal was filed without the aid of a lawyer and under the bonafide belief that R.No.4 has jurisdiction to hear the said appeal.

Complaint before ASCI-Issue of Electronic Advertisement

On 07.11.2014, the Advertising Standards Council of India (ASCI) addressed a letter to the petitioners' clinic. The said letter informed the petitioners that a complaint has

been received by the said council against their clinic regarding some website/internet advertisement. On 08.11.2014, the petitioners responded to ASCI. The petitioners removed the alleged objectionable page from their clinic's website on 04.12.2014 as requested by ASCI.

On 30.01.2015, the ASCI addressed a letter to R.No.2 to take action against the petitioners for allegedly advertising their services in contravention of medical ethics. On 11.02.2015, R.No.2 addressed a letter to the petitioners' clinic to submit a reply to complaint.

Issue of No False Claim and Guarantee: Removal of Page

On 16.02.2015, the petitioner (P-1) submitted a reply to R.No.2. In the said reply, it was stated that no false claim had been made because the guarantee was essentially a refund if the patient failed to get pregnant. It was also stated that the concerned page had also been removed by the petitioners (P-1, P-2) from the website. On 10.12.2015, the Registrar of R.No.2 issued a letter to the petitioners bearing the subject "**Notice of Charges**". In the said letter, the petitioners were informed that they were being charged not with making false claims on their website (as the ASCI had alleged) but with advertising. The petitioners were called upon to file their written statements within a period of 7 days.

R.No.2 addressed via letter to the petitioners that an inquiry under section 22 of the MMC Act was going to be held against them on 19.03.2016 relating to **press cuttings**. Importantly, no copy of any such complaint or press cuttings was annexed by R.No.2 to the said letter. In their reply, petitioners stated that they did not intend to violate any guidelines.

Publication of Penalty in News Paper: Press Conference by MMC

On 27.03.2016, an article was published in the Mumbai Mirror newspaper bearing the title "**Colaba doctor couple guarantees IVF success, loses license**". In the said article, it was stated that the petitioners had been suspended from practicing for a period of three months.

No copy of the order of R.No.2 has been given to petitioners and the same could never have been given because R.No.2 has not yet provided any personal hearing to the petitioners nor have the rules and procedure prescribed under the MMC Act been followed.

Immediately, after reading the said article, the petitioners through their advocate addressed letters to R.No.2, Editors of Mumbai Mirror and Free Press Journal respectively to furnish a copy of the alleged impugned resolution/order to the petitioners.

On 11.04.2016, the petitioners' advocates received a reply from the advocate for R.No.2 denying all the allegations made against them by the petitioners. Apart from mere denials, the R.No.2's advocates have made certain statements in the said letter, which prima facie show the R.Nos. 4 to 14 complete disregard of the rules and regulations of the MMC, with principles of natural justice being given a go by and a blatantly false denial of a statement made by R.No.5 to the Press.

Writ Petition before Bombay High Court:

The petitioners (P-1, P2) state that after filing of the above mentioned writ petition and after receiving notice in the said matter, R.No.2 has received a copy of an alleged order dated 13.04.2016, purportedly passed by R.No.2 against the petitioners (P-1, P2). The said order on the face of it is perverse and bad in law. The purported order of the Council has been passed as an afterthought and in great haste only to adopt arm twisting methods against the petitioners. [Para 33]

The petitioners (P-1, P2) state that a perusal of the said order dated 13.04.2016 would exhibit the personal vendetta and bias that R.No.2 has against the petitioners. The said order is completely mischievous and contradictory to R.No. 2's advocates letter dated 5.04.2016. R.No.2's advocate states that the hearing on 19.03.2016 was before R.No.4 and that R.No. 4 passed an oral order of suspension against the petitioner (P-1, P2). The said letter further records that the official communication in this respect will be communicated to the petitioner(P-1, P2). Whilst on the other hand, the

purported order dated 13.04.2016 states that the hearing on 19.03.2016 was before R.No.2. The impact of this contradictory statement is evident when read in juxtaposition of the MMC Act and Rules. These allegations are made in both the petitions and are common to the petitioners (P-1, P2). That is how both petitions were heard together.

Hearing before Division Bench

Initially, when the petitions were placed before a Division Bench on 15.04.2016, the Bench adjourned the hearing to 29.04.2016, but directed production of original record in relation to the disciplinary inquiry against the petitioners by the MMC.

In assailing the impugned order, Dr. Saraf divided his oral contentions broadly on jurisdiction, procedural impropriety, malafides and eventually taking everything against the petitioners the harshness of the penalty.

Issue of Jurisdiction of MMC v/s MCI

It was submitted that it is a complaint alleging breach of medical ethics and such allegations pertain to non-observance of Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002. It can be inquired only by the Medical Council of India which can initiate the necessary action. The MMC, in terms of its powers under the MMC Act, cannot initiate and conduct any inquiry.

Issue of Procedural Impropriety/ Principles of Natural Justice

Petitioners submitted that the inquiry in the present case is vitiated by procedural impropriety and there was gross violation of the fundamental principles of rule of law and natural justice.

Issue of Advertisement/ Alleged Professional Misconduct/Unethical Acts

It is common ground that the complaint against them was for placing an advertisement. The complaint was that contrary to the professional ethics, etiquette and conduct regulations, the petitioners advertised their

professional activities. This was not a case where the petitioners were alleged to be negligent in discharging their duties and obligations towards patients. Dr. Saraf submitted that it was erroneous to assume that there was any guarantee and what the petitioners placed before the MMC was a fact that the alleged objectionable advertisement was nothing but a mode of informing the patients. Thus, there was neither any guarantee of pregnancy nor was the alleged act unethical.

Notice of Charges: Reference to regulations

It is submitted that there is no reference therein to clause 6.4 of the Regulations. There is only reference to clause 6.1 (advertisement) and clause 6.1.2. The order, therefore, does not restrict itself only to the charges/memo of the same but travels much beyond it. Apart from the complaint from the Advertising Council, the Notice of charges refers to some other material but which was never disclosed to the Petitioners and not made available otherwise. Division Bench attention is then invited to the fact that no materials were supplied which would enable the petitioners to defend themselves effectively and properly in the proceedings. Once there is no reference in the memo of the charges to the material leading to the inquiry, then, it is apparent that the Council has reopened a closed case.

Previous Disciplinary Inquiry

In that regard, HC attention is invited by Mr. Saraf to Suo Moto Complaint No. DC/11/1996, which was a disciplinary inquiry ending with a warning to the petitioners by the Council. Once that very allegation and complaint which is covered by the earlier proceedings is the basis on which the fresh round is commenced, then, it is apparent that the Council has failed to apply its mind. Its order is, therefore, vitiated on both counts, namely, non-application of mind and by errors of law apparent on the face of the record.

Criticism of Approach of MMC

Mr. Saraf has then criticized the approach of the Council during the inquiry. It was submitted that the petitioners' letter dated 21st March, 2016 addressed to the President

of MMC at page 72 of the paper book is by no stretch of imagination an admission of guilt or of any wrongful and unethical act. That communication only sets out the facts. That is too general a statement and has no reference to any act, as alleged in the notice of charges. Hence, this letter cannot be construed as an admission of any guilt on the part of the petitioners.

It was further submitted that merely on the strength of this letter, it cannot be said that the petitioners deserve a penalty of removal of their names for three months from the Medical Register. That also was never known to the petitioners. It is shocking and surprising that a statutory body exercising quasi-judicial powers, while taking disciplinary action against its members should rush to the newspapers and media & announce its order to them.

A Quasi-Judicial order can be said to be validly and legally passed only when it is duly signed and communicated to the affected party before making it public. Before all this is done, the Council rushes to the newspaper and media and publishes its act. It was, therefore, unbecoming of a professional Council and its Executive Body has not acted responsibly and reasonably.

Who is a True Professional?

A true professional goes by the rules, is competent and mature enough to understand that if any action has to be taken against his peers, he should not hesitate and while dealing with them, he should act fairly and in a just manner. This hope and trust is belied by the Council.

Harshness of Penalty: Disproportionate Punishment

It was submitted that the imposed penalty (removal of the petitioners' names from the register for three months) was too harsh and excessive and a warning was issued earlier on the same allegations. There were also violations of the fundamental rights. Therefore the order deserves to be set aside.

Case Law Cited

It was, therefore, submitted that the petitions be allowed. Mr. Saraf has relied upon an order passed by a Division

Bench of this court in the case of Dr. (Ms. Anuja D/o. Awadh Pandey vs. the Maharashtra Medical Council and Anr. in Writ Petition No.4905 of 2014 and a connected matter, decided on 21st July, 2015

On the other hand, the Council has filed an affidavit in reply denying each and every allegation. In the affidavit, the Council has, through Registrar, pointed out that there is no substance in the writ petitions at all.

Power of MMC to hold Inquiry

In that regard, what HC find from a reading of the Act is that by Chapter VI vide section 62, the Council is **empowered to hold inquiry either suo moto or on any complaint** made to it as regards **the misconduct of any registered practitioner**. That is for taking an action in terms of section 22. section 22 of the MMC Act states that after due inquiry held by the Council or by the Executive Committee if the registered practitioner is found guilty by the Council, it may inflict any of the penalties, including removal of the name from the Register for such period as may be specified in the direction or permanently.

Thus, the power to hold the inquiry into alleged misconduct is admitted. That includes the power to impose penalties. The code of ethics is violated by the Petitioners, which in the given facts and circumstances are treated as a misconduct serious enough to be inquired into. In the present case, we do not deem it necessary to deal with any larger question or controversy. It is not necessary to enumerate the powers vesting in the Council and what could be the limits or restrictions placed upon it regarding a delegation of any power under the MMC Act.

Issue of Powers of MMC: What the Executive Committee can do?

HC do not find that the petitioners can raise any grievance with regard to lack of power and authority in the Council to direct any inquiry by its executive committee into the complaint against the petitioners. The petitioners have voluntarily and without any demur or protest appeared before the various authorities at all stages. They have

subjected themselves to the power and authority of the Executive Committee as also the Council. They were aware of the complaint against them which is of breach of professional ethics. They were aware of the proceedings initiated pursuant to the complaint of the Advertising Standards Council of India.

Thus, the inquiry could not be said to be vitiated by lack of jurisdiction or power in the Council or the Executive Committee.

Issue of Action of MMC as Arbitrary or improperly or in breach of principles of natural justice: HC do not find that the Council acted arbitrarily or improperly or in breach of principles of natural justice. The committee invited the attention of the petitioners to the complaint against them and the contents thereof. None of this has been ever disputed. Each of the letters addressed by the Council have been promptly replied. The petitioners were aware of the breach attributed to them and by a specific letter, which they duly signed and on their own volition, they wrote to the Council on 21st March, 2016.

Issue of Unethical Advertisement and Prejudice/ Malafides

Once such is the response of the petitioners, then, HC do not see any prejudice to them at all. Even if the Council has not made reference to the regulations in its notice of charges but set out the same and relied on them in the impugned order, yet, the essential controversy or issue was known to the petitioners. They were aware of what the advertisement inserted on the website contains and what is the objectionable act on their part. That the petitioners and others are not supposed to advertise their profession or their achievements and invite patients to their clinics them.

The petitioners indulged in such an act. The petitioners' advertisement or insertion may contain several details including an assurance to return the money if the programme does not succeed, but they were throughout aware that the very factum of advertisement goes against them.

They could not have and to steal a march over others inserted such an advertisement. They admit their mistake. They did not contest the charge, but apologized and removed the objectionable page from the website. The petitioners are not disputing that they indulged in an unethical act not once but twice.

Issue of Malafides against Petitioners

If in this admitted factual scenario by alleging a breach of professional ethics and misconduct the MMC proceeds against them, then, there are no legal or personal malafides or a predetermined action vitiated by vengeance or vendetta against the petitioners. It is the MMC which passed the impugned order. It is the MMC which inflicted the penalty. The inquiry may be held by the delegate but the application of mind to the act of the delegate is by the principal body or the entire council. In these circumstances, HC do not think that the allegations of malafides hold any water. It is the Council's act of hastily rushing to the press and media for informing the public about how it proceeds against unethical acts of the member doctors.

Duty of MMC / MCI/NMC: Burdened Duty, Statutory Duty, Public Duty

If the MMC Act and the Indian Medical Council Act, 1956, equally the Rules and Regulations, including the Code of Ethics and Etiquettes were carefully perused by members of the Executive Committee and Council, they would have realized that it is their bounden duty to proceed and take disciplinary action against erring peers or professional colleagues.

Issue of Publicity of Disciplinary Action

They have to perform a statutory and public duty. They should not shirk or avoid it at any cost. They are not obliging anybody by taking cognizance of complaints against doctors and fellow members and therefore, there is no need to be over enthusiastic and publicise the disciplinary action.

The MMC should not advertise its orders and passed in exercise of quasi-judicial powers. The power to inflict

penalty in terms of section 22 carries with it a public duty and responsibility to the society at large. Such actions are very serious and have enormous legal consequences.

Quasi-Judicial Powers of MMC/MCI/NMC

The rights and equities have to be balanced by an impartial and unbiased adjudication. The quasi-judicial powers are conferred in order to subserve the larger public interest of maintaining the standards, dignity, status and reputation of the medical profession. The public must not lose faith and trust in doctors and medical professionals for that is the foundation on which the doctors and medical professionals earn name and fame.

They would be true professionals only if they are ethical. Therefore, when other doctors / practitioners preside over disciplinary committees, they have to act in a judicious and judicial manner. No statutory authorities or public bodies, while discharging public functions and performing such duties, rush to the press and praise themselves for having punished their peers.

Rather they are humbled and ought to put their heads down, if not in anything, but in shame and disgust on noticing increasing indiscipline and gross violation of professional ethics, etiquettes and conduct. Something other than punishing the guilty also needs to be done by the seniors and experienced professionals. Equally, Judges and presiding officers of courts and tribunals and those on quasi-judicial bodies do not announce to the world their orders and how they pass them. All proceedings of this nature have to be conducted in a smooth, fair and transparent manner.

Issue of Press Conference

HC therefore, impressed upon Mr. Nerlekar the urgent need to inform the MMC, particularly its President, Secretary and other Executive Committee Members not to be ecstatic and in a mood of celebration so as to advertise their own orders and furnish details to the Council's office of disciplinary proceedings by holding press conferences. It is only when the orders are signed, duly communicated and received by the parties that their

contents should be divulged, but not in the manner in which it has been done in the present case.

Issue of injudicious and irresponsible act on the part of the Council

HC does not think that the sanctity and purity of disciplinary proceedings is preserved by such injudicious and irresponsible acts on the part of the Council. The conduct of the members of the disciplinary committees and the Council as a whole in such proceedings should reflect sobriety, restraint and reserve so very necessary for maintaining the dignity of the Medical Profession. They should emphasize the need for introspection to control the falling standards of the medical profession. The undisputed newspaper reports reflect everything but the above. We strongly disapprove and deprecate the same. [Para 55]

Issue of Adherence to the Procedural Requirements

Equally, we do not find that the inquiry in this case was held by complete adherence to the procedural requirements. We find that the hearing was held on 19th March, 2016. Thereafter, the Council passed the impugned order. In the impugned order as well, we find that there are several typographical errors and factual inaccuracies. None has bothered to correct them. We have also found that the Council misunderstood the real issue and its order falls much short of the required standards.

The reasoning in para 8 of the order and which are the only reasons assigned do not disclose proper application of mind to the issue at hand. However, when the charge was clear, there was no prejudice to the petitioners nor were they handicapped in any manner for the allegations were simple and uncomplicated, the response thereto was also not of total denial, in these circumstances we do not think that at the instance of the petitioners the impugned order or the inquiry as well needs to be interfered with. [Para 56]

Issue of Writ Jurisdiction

The writ jurisdiction under Article 226 of the Constitution

of India is extraordinary, equitable and discretionary. It has to be exercised to promote and uphold honesty, truth and justice. Once we (Division Bench) find that there is no prejudice caused and the petitioners are themselves to blame for, they have repeated an unethical act and committed a second breach of the professional code of ethics and regulations, our writ jurisdiction should not enable them to overcome their lapses and deficiencies.

Once their conduct is wrongful and unethical, then, we say nothing more, but clarify that we refuse to interfere with the disciplinary inquiry and the proceedings before the MMC at their instance. Division Bench [We] clarified that we do not condone any defects in the inquiry and the approach of the MMC either.

Observation on the Point of Penalty Imposed

Division Bench [We] have heard the counsel on the point of penalty. We (Division Bench) find that initially, the Council suspended the petitioners' registration and their licence to practice on 19th March, 2016, but no copy of the resolution/order in that behalf has been furnished to the petitioners. Thereafter, the impugned order has been passed and that directs removal of the petitioners' name for three months from the date of the order, namely, 13th April, 2016.

SUMMARY AND CONCLUSIONS

Division Bench of Bombay High Court summarised that thus, we have found that the petitioners rushed to this court (Bombay High Court) **firstly to question the alleged suspension and secondly because of this penalty of removal.**

In the facts peculiar to this case and bearing in mind that the petitioners apologized for their act in the first instance and removed the objectionable advertisement from the website that we (Division Bench) are of the opinion that interest of justice would be served if the penalty of removal of the petitioners' names from the Register for three months is reduced to 18 days from 13th April, 2016 to 30th April, 2016 (both days inclusive). To that extent alone, the impugned order stands set aside and substituted

with the above. The writ petition fails and is dismissed but without any order as to costs.

Reduction of Period of Removal of Name

When we dictated our operative order on 29th April, 2016, in it there is an obvious typographical error. Instead of the words “reduce the period of suspension” appearing in the operative order dated 29th April, 2016, the same should read as “reduce the period of removal”. That order also should stand corrected accordingly.

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- [3] Section 2, 11, 22 of the Indian Medical Council Act, 1956.
- [4] Article 226 in the Constitution of India
- [5] Section 20 of the Maharashtra Medical Council Act, 1965

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