
(1988) 09 BOM CK 0046
In the Bombay High Court
Case No : Writ Petition No. 359 of 1988

Dr. Jaishree Banait

APPELLANT

Vs

State of Maharashtra and others

RESPONDENT

Date of Decision : 06-09-1988

Acts Referred:

Constitution of India, 1950 — Article 14, 226, 227
Indian Medical Council Act, 1956 — Section 33

Citation : (1989) MhLj 149

Hon'ble Judges : M.S. Deshpande, J; H.W. Dhabe, J

Bench : Division Bench

Advocate : V.G. Palshikar, for the Appellant; H. Ahmad, Asst. Govt. Pleader and M.G. Bhangde, for the Respondent

Final Decision : Dismissed

Judgement

H.W. Dhabe, J.—This is a writ petition in which the petitioner claims that she was entitled to get admission for post-graduate degree course in the subject of gynaecology and obstetrics which commenced in-February 1988. She has also asked for quashing the registration granted to the respondents 3 and 4 in the above subjects by the respondent No. 2, Dean.

2. Briefly the facts are that the petitioner passed her M.B.B.S. Examination in June 1985 from Jabalpur University in the State of Madhya Pradesh. She completed her internship and one year's house job at Jabalpur itself. She was registered as a Medical Practitioner under the provisions of the Maharashtra State Medical Council Act. Pursuant to the advertisement issued on 27-12-1987 the petitioner made an application for admission in one of the seats advertised for post-graduate degree course in Obstetrics and Gynaecology. The above advertisement dated 27-12-1987 was however cancelled and a fresh advertisement dated 18/21-1-1988 for admission to the post-graduate degree/diploma courses was issued. However, the candidates who had already applied pursuant to the advertisement dated 27-12-1987 were not required to make

fresh applications as per the fresh advertisement dated 18/21-1-1988.

3. The respondents Nos. 3 and 4 had also made similar applications for admission in the post-graduate degree course in Gynaecology and Obstetrics. The respondent No. 3 is an institutional candidate belonging to the respondent No. 2 College who has done one year's house job at Nagpur, but the respondent No. 4 is a candidate who passed her M.B.B.S. examination from Karachi University in Pakistan. However, according to her, she was granted Indian Nationality in 1985. Further according to her she had done the first house job in Karachi Hospital and the second house job in Matru Seva Sangh, Nagpur. It is relevant to see the marks secured by the petitioner and the respondents Nos. 3 and 4 in the subjects of Gynaecology and Obstetrics because according to the petitioner since she had higher merits than the respondent No. 3, she should have been given admission in preference to her. Their marks are as follows :

Petitioner : 242 marks out of 400

Respondent No. 3 : 239 marks out of 400

Respondent No. 4 : 384 marks out of 600

From the above marks it is clear that the percentage of marks obtained by the respondent No. 4 is higher than the percentage of marks obtained by either the petitioner or the respondent No. 3.

4. Although the respondent No. 3 had secured less number of marks as compared to the petitioner and the respondent No 4, she was given admission to the post-graduate degree course in Gynaecology and Obstetrics by the respondent No. 2 because she was an institutional candidate and according to the rules for admission the seats for post-graduate degree/diploma courses were to be filled in by the institutional candidates. It is in fact the case of the respondent No. 2 in his return that the advertisement in question was issued only for the institutional candidates as per the rules for admission and for the non- institutional candidates belonging to the Nagpur University for whom certain seats were carved out as per the judgment of this Court in the case of Arvind vs. State of Maharashtra, 1988 Mh.L.J. 576. As such the submission in the return of the respondent No. 2 is that the petitioner was not entitled to make application for post-graduate admission as per the above advertisement.

5. As regards the admission given to the respondent No. 4 the facts are that the respondent No. 4, realising that she would not get admission against the regular seats which were reserved for the institutional candidates only, made application to the Vice-Chancellor, Nagpur University, Nagpur, through the respondent No. 2 on 3-3-1987 requesting him to give her registration in a super numeracy seat in Gynaecology and Obstetrics. It appears that the respondent No. 2 i.e. the Dean had also sent the proposal for creation of an additional seat for her in the above subject to the Nagpur University. The Nagpur University by its letter dated 20-3-1987 communicated its acceptance of the above proposal to the respondent

No. 2. who thereafter addressed a letter dated 4-5-1987 to the Director, Medical Education and Research, Bombay requesting him to obtain the sanction of the State Government for creation of an additional seat for the respondent No. 4 in the above subject. It also appears that the respondent No. 2 had thereafter addressed a letter dated 7-12-1987 to the Secretary, Medical Education and Medicine of the State Government in this regard. The State Government then by its letter dated 28-1-1988 directed the Director, Medical Education and Research, Bombay, that the respondent No. 4 should be given admission in the non-stipendiary seat in the subjects of Gynaecology and Obstetrics in the respondent No. 2 College. Accordingly as per the aforesaid letter dated 28-1-1988 the respondent No. 4 was given admission to the post-graduate degree course in the above subject by the respondent No. 2. It is these admissions of the respondents Nos. 3 and 4 to the post-graduate degree courses in Gynaecology and Obstetrics which are impugned before us by the petitioner in the instant writ petition.

6. The learned counsel for the petitioner has raised two questions before us in this writ petition. The first question which he has raised before us is that according to rule 5 of the Rules for admission framed under the Government Resolution dated 20-8-1983 since the "petitioner is more meritorious than the respondent No. 3. she is entitled to admission. What is urged is that under the above rule 5, it is only when the marks obtained by the institutional candidate and the non-institutional candidate are equal that the institutional candidate has to be given preference. In support of the above submission heavy reliance is placed by him upon the decision of this court in *Abhay Darshane vs. State of Maharashtra*, 1985 Mh.L.J. 155. The second question which is raised in this writ petition is that the admission given to the respondent No. 4 by creating a non-stipendiary seat for her is violative of Article 14 and is also contrary to the rules for admission for postgraduate courses in the Medical Colleges under the State.

7. In regard to the first contention raised on behalf of the petitioner, it is pointed out to the learned counsel for the petitioner that in a later decision of this Court in *Arvind vs. State of Maharashtra*, 1988 Mh.L.J. 575 (cited supra) this Court has considered the ratio of *Abhay Darshane's* case, cited supra, relied upon by him. It may be seen that after distinguishing *Abhay Darshane's* case on the ground that rule 5 of the Rules for admission interpreted therein was a rule as originally framed in 1971 whereas the rules for admission to be considered was the rule 5 as substituted under the Government Resolution dated 20-8-1983 (for short the "present rule") and after holding that the ratio of *Abhay Darshane's* case was not applicable in interpreting the present rule 5 whose scheme was materially different from the scheme of the original rule 5 considered in *Abhay Darshane's* case, it was held in the case of *Arvind vs. State of Maharashtra* (cited supra) that the present rule 5 provided for wholesale reservation in favour of the institutional candidates and therefore, the said rule was within the mischief of the principle laid down by the Supreme Court in *Dr. Pradeep Jain and Others Vs. Union of India (UOI) and Others*, . This Court ultimately held in that case that the admission to the post-graduate courses under the present rule framed under the

Government Resolution dated 20-8-1983 would be governed by the directions issued by the Supreme Court firstly in Pradeep Jain's case and thereafter in its two later decisions in the Case of Dinesh Kumar and Others Vs. Motilal Nehru Medical College, Allahabad and Others, and Dr. Dinesh Kumar and Others (II) Vs. Motilal Nehru Medical College, Allahabad and Others, .

8. The learned counsel for the petitioner has, however, relied upon the subsequent decisions of this Court in the case of Dr. Sunil vs. The Bombay Municipal Corporation, AIR 1987 Bom, 291 and in the case of Dr. Hariprasad vs. The Dean, Topiwala National Medical College, 1988 Mh.L.J. 4 75 in support of his interpretation of the present rule 5 on the basis of Abhay Darshane's case. He has also relied upon the decision of this Court in the earlier case of Sarita Vs. The Dean, Govt. Medical Colleged, Nagpur and Others, to show that a different view is taken in the said decision by following Abhay Darshane's case. In view of the difference of view in Abhay Darshane's case followed in the above said decision and the case of Arvind vs. State of Maharashtra (cited supra) the submission on behalf of the petitioner is that the; matter should be referred to a larger Bench.

9. Before we turn to the cases we must first recapitulate what the Supreme Court has held in its various decisions, starting from Pradeep Jain's case (cited supra) which are also considered in the case of Arvind vs. State of Maharashtra (cited supra). In Pradeep Jain's case the Supreme Court held that the rule of wholesale reservation for admission in favour of the institutional candidates was violative of Article 14 of the Constitution. However, without striking down such rules prevailing in the States, including the State of Maharashtra which had appeared in the said case, the Supreme Court considered the question of the percentage that should be reserved for admission to the degree and post-graduate degree courses on merit on all India basis. After having considered the pros and cons of the said question, the Supreme Court held that 30 per cent open seats should be filled in on the basis of All India Merit. by holding an All India Entrance Examination for the said purpose so far as the M.B.B. S. courses were concerned and so far as the post-graduate courses were concerned except the super specialities, 50 per cent seats should be filled in on the basis of All India Merit by holding an All India Entrance Examination for the said purpose. As regards the super specialities, the Supreme Court held that all the seats in super specialities should be filled in on the basis of All India Merit

10. It may be seen that so far as the above ratio was concerned, there were difficulties experienced in giving effect to the said ratio because there were different percentages of reservations for reserved categories in various States. After considering various problems, the Supreme Court held in the case of Dr. Dinesh Kumar and Others (II) Vs. Motilal Nehru Medical College, Allahabad and Others, , that 15 per cent of the total number of seats without taking into consideration the seats reserved for the reserved categories should be filled in on the basis of All India Merit through the All India Entrance Examination so far as admission to the M.B.B.S. course is concerned, and as regards the admission to

the post-graduate degree courses, the Supreme Court held that 25 per cent of the total number of seats without taking into consideration the reserved seats should be filled in on the basis of All India Merit through All India Entrance Examination.

11. It may be seen that the directions given by the Supreme Court in Pradeep Jain's case were applicable for the year 1984-85 also but as there were already admissions made for 1984-85 in certain colleges, the Supreme Court in the case of Dr. Pradeep Jain and Others Vs. Union of India (UOI) and Others, , directed that whatever admissions were made in the academic year 1984-85 should not be disturbed on the basis of its judgment in Pradeep Jain's case and that the judgment in Pradeep Jain's case should be implemented with effect from the year 1985-86. However, when the judgment of the Supreme Court was to be implemented in 1985-86, certain difficulties arose in its implementation which were brought to its notice in the case of Dinesh Kumar and Others Vs. Motilal Nehru Medical College, Allahabad and Others, . In the said case in order to implement the decisions of the Supreme Court in Pradeep Jain's case, the respondent college gave admission to the candidates in the 50 per cent non-reserved category of seats on the basis of the marks obtained by them at the qualifying Examination held by different Universities/States. Dr. Dinesh Kumar challenged the said admissions before the Supreme Court. It was held by the Supreme Court in the said case that since the courses of studies in various universities/States were different, there was no uniform standard by which the merit of such candidates who had passed the M.B.B.S. examination from various universities' States could be judged. The Supreme Court, therefore, held that giving admission to such candidates was violative of Article 14 of the Constitution. (See para 10 of the said judgment). It is clearly stated in the last sentence in para 10 that the admissions made to 50 per cent non-reserved seats in the postgraduate courses were invalid and that the admissions should have been made in accordance with the old rules prevailing prior to the delivery of its judgment on 22nd June 1984, in Pradeep Jain's case.

12. In para 9 of the above judgment in Dr. Dinesh Kumar's case after considering the difficulties of the students like the petitioner in the said case who had started their house jobs prior to the date of the judgment in Pradeep Jain's case the Supreme Court directed that in the States/Universities where there is two year post-graduate degree course after completion of one year's house job, the admissions to the two year post-graduate degree course for the academic year 1985-86 should be governed not by the principle in Pradeep Jain's case, but by the old rules applicable prior to the date of the said judgment provided the students had started their house job prior to the date of the judgment in Pradeep Jain's case. It is worthwhile to see that the Supreme Court did not finally dispose of the above case because it had asked the Central Government to frame a scheme for All India Entrance Examination for degree as well as post-graduate degree courses in consultation with the appropriate bodies and the authorities and to submit it for its approval. In framing the said scheme the Union

Government and others countenanced certain difficulties which were considered and resolved in the second case of Dr. Dinesh Kumar and Others (II) Vs. Motilal Nehru Medical College, Allahabad and Others, .

13. It may be seen that after considering the scheme for All India Entrance Examination for post-graduate admissions, the Supreme Court held in para 12(3) of its judgment in the second case of Dinesh Kumar (see Dr. Dinesh Kumar and Others (II) Vs. Motilal Nehru Medical College, Allahabad and Others,) that it would not be possible to give effect to its judgment in Pradeep Jain's case before the academic year commencing in 1988 and therefore, the implementation of the directions in Pradeep Jain's case was postponed till then permitting admissions on the basis of the existing rules. It may be seen that in the instant case as per para 4 of the return filed by the respondent No, 2 the seats advertised as per the advertisement dated 18/21-1-1988 are the seats of 1987 mid-term registration and not of the year 1988 and are, therefore, to be filled in as per the existing rules of the State Government and not on the basis of the directions of the Supreme Court in Pradeep Jain's case. Moreover, the All India Entrance Examination for post-graduate admissions was not till then held but was actually held in March 1988 for 25 per cent of the seats for the academic year 1988 to be filled in as per the " directions of the Supreme Court in Pradeep Jain's case. It is, therefore, clear that in the present case, since the admissions are advertised and have taken place in January 1988 i.e. prior to the holding of the All India Entrance Examination in March 1988, the said admissions would be governed by the existing rules as interpreted by this Court.

14. Before going to the question about the difference of view between Abhay Darshane's case(cited supra) and the case of Arvind vs. State of Maharashtra "also cited supra, we may first dispose of the submission made on behalf of the petitioner on the basis of the two decisions in Dr. Sunil vs. The Bombay Municipal Corporation, AIR 1987 Bom. 291 and Dr. Hariprasad vs. The Dean, Topiwala National Medical College, 1988 MKL.J. 475. It may be seen that both these cases are in respect of super specialities. As regards the super specialities the Supreme Court has held in Pradeep Jain's case that all the seats in super specialities should be filled in on the basis of the sole criteria of merit on all India basis. However, as pointed out above, since the modalities of All India Entrance Examination were not determined the implementation of the directions in Pradeep Jain's case to fill the seats on merit on all India basis was postponed till the academic session 1988. In these circumstances the question considered in the said cases was whether the seats in super specialities should be filled in on the basis of the existing rules viz. by which preference is given to the institutional candidates or whether they should be filled in by following certain norms consistent with the mandate of Article 14 and also the principle laid down in Pradeep Jain's case which the court should lay down.

15. In appreciating the view taken by this Court in the above decisions, it may be seen that the courses in super-specialities are provided in a few colleges in the

State of Maharashtra i.e. one Government College and 3 Corporation Colleges in Bombay and the eligibility criteria of admission to the said courses is passing of post-graduate degree examination e.g. M.D./M.S. etc., wherein only grades and not marks are given. The admissions to such courses were, therefore, sought to be given on the basis of the marks obtained in the M.B. B.S. examination in which there were different courses in different Universities even within the State of Maharashtra which criteria was thus violative of Article 14 of the Constitution as held by the Supreme Court in *Dinesh Kumar and Others Vs. Motilal Nehru Medical College, Allahabad and Others*, . It is in the light of the above facts and circumstances that this Court held that even though the direction of the Supreme Court in *Pradeep Jain's* case that all seats in super specialities should be filled in on the sole criteria of merit on all India basis cannot be implemented till the academic session of 1988 because the modalities for holding an All India Entrance Examination cannot be finalised till then, still the principle" of giving admission on merit in super-specialities can be extended at the State level by holding an entrance examination at the State level of which the modalities can be and were determined in the said decisions. It is not necessary for us to refer to the difference of view in the two decisions on the question as to whether all the seats should be filled in through the entrance examination or only 50 per cent seats as held in the case of *Sunil vs. Bombay Municipal Corporation*, AIR 1987 Bom. 291.

16. It is difficult to see how the above decisions relied upon on behalf of the petitioner support her case that the preference rule contained therein should be interpreted in the manner in which it is interpreted in *Abhay Darshane's* case. There is not a whisper about *Abhay Darshane's* case in the above decisions. On the contrary the approach of this Court in the above cases is similar to the approach in *Arvind's* case. It may be seen that in *Arvind's* case as well as in the above cases also the rules for admission in question are held as making wholesale reservations for institutional candidates and therefore, void in view of the decision of the Supreme Court in *Pradeep Jain's* case. As regards the question as to how the admissions should be given during the interregnum ie. till the implementation of the directions given by the Supreme Court in *Pradeep Jain's* case read with its subsequent decisions in *Dr. DineshKumar's* case (cited supra) which was postponed by the Supreme Court till the academic session 1988, this Court held that in order to remove injustice which would be caused because of availability of facilities in super-specialities in the few colleges in the State only instead of filling the seats in super-specialities on the basis of the existing rules they should be filled in from amongst students in the State by holding an entrance examination for them at the State level (see para 3 pages 293-294 of the judgment in *Sunil Vasnat Sathe and Another Vs. The Bombay Municipal Corporation and Others*). It may be seen that for removing injustice to the non-institutional candidates belonging to the Nagpur University a similar approach was adopted by this Court in *Arvind's* case by providing 10% of the total seats of the institutional candidates for them. In fact in *Sunil's* case cited

supra in para 3, this court has relied upon Arvind's case in taking the view that the seats in super-specialities should be filled in on merit from amongst the students in the State for whom the facilities are available only in a few colleges at Bombay.

17. It may however be seen that this Court has observed in Sunil's case (cited supra) that in broad specialities ie. ordinary post-graduate courses since the facilities are available in all the medical colleges in the State not much injustice would be caused if the existing rule of institutional preference is followed which even then according to it was modified in Arvind's case as shown above. At any rate it is pertinent to see that in both the decisions cited supra the existing rule of institutional preference is modified by this Court to give admission on merit to the students in the State only and that too by prescribing an Entrance Examination for them at the State level and not on the basis of the marks obtained by them in M.B.B.S. examination which would be arbitrary as held in Dr. Dinesh Kumar's case. Since the petitioner has passed her M.B.B.S. examination from an outside University i.e Jabalpur University, she has to claim admission on merit on all India basis through the All India Entrance Examination when it is held as per the decision of the Supreme Court in Pradeep Jain's case read with its decisions in the case of Dr. Dinesh Kumar and not on marks obtained by her in her M.B.B.S. examination. It is, however, made clear that the ratio of the decisions of this Court in the above cases is applicable only to the super-specialities and not to the broad specialities i.e. ordinary Post-graduate courses to which admission is sought by the petitioner. Hence the petitioner cannot invoke the said ratio in her case. The above decisions are thus of no assistance to the petitioner in the instant case.

18. Turning now to the main submission made on behalf of the petitioner what is urged is that we should follow Abhay Darshane's case (cited supra) which deals with the rules of preference. The submission is that preference would mean that other things being equal an institutional candidate should be given preference. In the instant case it is urged that since the petitioner had more marks than the respondent No. 3, although she was an outside candidate, the respondent No. 3 could not be given preference as held in Abhay Darshane's case. It is not in dispute that the present admissions are as per the present rule 5 which was introduced on 20-8-1983. It may be stated that Abhay Darshane's case (cited supra) was heavily relied upon in the case of Arvind vs. State also, on behalf of the petitioners in the said group of petitions. This court held in the case of Arvind vs. State of Maharashtra that Abhay Darshane's case is on the interpretation of rule 5 as it originally existed under the Government Resolution dated 18-6-1971. After noticing that the said rule 5 was first amended under the Government Resolution dated 30-7-1982 and thereafter again amended under the Government Resolution dated 20-8-1983, it was held in the said case that what was to be interpreted in the said case was rule 5 under the Government Resolution dated 20-8-1983 which is referred to in this judgment as the "present rule" and not the original rule 5 interpreted in Abhay Darshane's case. It was

further noticed that the language of rule 5 under the Government Resolution dated 20-8-1983 was different from the original rule 5 and therefore, the ratio of the decision in Abhay Darshane's case was not attracted.

19. Thus distinguishing Abhay Darshane's case which was on the original rule 5 as it existed under the Government Resolution dated 18-6-1971, this Court in Arvind's case, proceeded to construe the present rule 5 as introduced under the Government Resolution dated 20-8-1983 and came to the conclusion that it was a rule of wholesale reservation for institutional candidates so long as such candidates were available barring any service personnel for which reservation of 15 per cent was made under rule 5(b). The word "preference" was construed in the light of and in the setting in which the present rule 5 under the Government Resolution dated 20-8-1983 was framed and it was held that there was no question of giving preference to the institutional candidate only after finding that his merit was equal to that of outside candidate because under the present rule 5, the reservation for him was total so long as he was available. It was, therefore, held in Arvind's case that the meaning given to the expression "preference" in Abhay Darshane's case was not applicable to the present rule 5.

20. Having held that there was wholesale reservation for institutional candidate in the present rule 5, this Court ruled in Arvind's case that the present rule 5 fell within the ratio of Pradeep Jain's case and hence the admissions to the post-graduate courses in the Medical Colleges under the State were governed by the directions issued by the Supreme Court in the said case and also the subsequent cases of Dr. Dinesh Kumar (cited supra). It is clear from these decisions that 25% of the seats in the post-graduate courses in all the Medical Colleges are to be filled in on the basis of the All India Entrance Examination and the remaining seats by the institutional candidates. The above directions were binding upon all the State Governments including the State of Maharashtra as is made clear in Dr. Pradeep Jain's case. It is, however, worthwhile to notice that the interpretation of the present rule 5 sought to be canvassed by the petitioner on the basis of Abhay Darshane's case was not pressed into service by the State Government to save the present rule 5 from the challenge of invalidity by showing that it does not provide for any reservation much less the wholesale reservation for the institutional candidates.

21. Be that as it may, since the directions of the Supreme Court about holding the All India Entrance Examination were postponed till the academic session 1988, it was held in Arvind's case after relying upon the two decisions of the Supreme Court in Dr. Dinesh Kumar's case that during the interregnum i. e. till the decision in Pradeep Jain's case was implemented, it was permissible to make admissions even in respect of the seats reserved for being filled in on the basis of All India Merit from amongst the institutional candidates as per the present rule 5. It may be seen that a similar permission to make admissions from the local institutional candidates as per the existing rules was granted for the academic sessions 1987-1988 in M.B.B.S. degree course also in the third case of Dr.

Dinesh Kumar and Others Vs. Motilal Nehru Medical College, Allahabad and Others, . However, as regards the non-institutional candidates belonging to the same University, it was found in Arvind's case that they were similarly situated as the candidates belonging to the same institution because they had undergone the courses prescribed by the same University. An interim direction was, therefore, issued in Arvind's case that till the decision of the Supreme Court in Pradeep Jain's case was implemented or till any further directions were also issued by the Supreme Court in this regard, 10 per cent of the total seats inclusive of reserved candidates meant for the institutional candidates should be reserved for them. However, as pointed out in the first case of Dr. Dinesh Kumar, admission to the outside candidate like the petitioner could not be given because there was no uniform standard laid down for them till all the formalities of All India Entrance Examination were finalised.

22. In the case of Arvind vs. State of Maharashtra (cited supra) various decisions of this Court following Abhay Darshane's case and Pradeep Jain's case, were cited before the Court and the said decisions were distinguished on various grounds including the ground that they were rendered prior to the decision of the Supreme Court in the second case of Dr. Dinesh Kumar. (See paras 33 and 56). It may also be seen that as pointed out in Arvind's case the construction of the present rule 5 was not raised or agitated in any of the judgments relied upon by the petitioner in the said case as also the judgment in the case of Sarita Vs. The Dean, Govt. Medical Colleged, Nagpur and Others, which is relied upon by the petitioner in the instant case but which was not noticed in Arvind's case. The present rule 5 was thus not in terms construed in the said cases which have thus mechanically followed Abhay Darshane's case decided on the original .rule 5 which was different and Pradeep Jain's case which was followed before Dr. Dinesh Kumar's second case postponed its implementation till the academic session of 1988 with the result that the effect of such postponement on the question of procedure for admission during the interregnum was not present in the said cases. There is, therefore, no question of any difference of view in the said cases including the case of Sarita Vs. The Dean, Govt. Medical Colleged, Nagpur and Others, and Arvind's case.

23. The learned counsel for, the petitioner has vehemently urged that there is difference of view in Arvind's case and the above cases including Abhay Darshane's case and therefore, the law of precedents requires us to make a reference to the larger Bench. As to the law of precedents it is well settled that unless it is a considered judgment in the sense that the point was raised and urged and decided, such a judgment would not become a binding precedent upon the subsequent co-ordinate Court before which the specific point is raised and agitated. This view is taken by the Full Bench of this Court in Parappa Ningappa Khaded and Another Vs. Mallappa Kallappa and Others, , (See also Tarak Chandra Mukherjee and Others Vs. Ratan Lal Ghosal and Others,) and Rajput Ruda Meha and Others Vs. State of Gujarat, . In other words when a decision was rendered subsilento as the point was not perceived or present in the mind of

the Court although it might have been involved in the facts of the case, such a decision cannot become a binding precedent in the subsequent case where the point is raised and agitated. (See Salmond on Jurisprudence, 12th Edition by P. J. Fitzgerald, PP. 153-158 and *Gerald vs. Worth of Paris Ltd*, 1936 (2) AER 905).

24. The learned counsel for the petitioner has, however, relied upon the judgment of the Supreme Court in *Sri Venkateswara Rice, Ginning and Groundnut Oil Mill Contractors Co. and Others Vs. State of Andhra Pradesh and Others*, in which it is laid down that one co-ordinate Bench of the same High Court cannot take a view contrary to the decision given earlier by another Bench of that Court and if a contrary view is to be taken, it is well settled that the matter must be referred to a larger Bench. No exception can be taken to the above principle. However the question in the instant case is different. As pointed out above, the Division Bench in *Arvind's* case has distinguished *Abhay Darshane's* case by pointing out that it was not a case in which the judgment was rendered upon the present rule 5 framed under the Government Resolution dated 20-8-1983 which rule was different from the original rule 5 framed under the Government Resolution of 1971 which was construed in *Abhay Darshane's* case. If *Abhay Darshane's* case is considered and distinguished rightly or wrongly in *Arvind's* case, it is the decision of the *Arvind's* case which would be binding upon this Court because as held in *Panjumal vs. Harpal Singh* 1975 Mh. L.J. 29, even a wrong view of the earlier Division Bench is binding upon the subsequent co-ordinate Bench. As regards the decision by the Supreme Court in *Ganpat vs. Sashikant*, 1978 Mah. L.J. 550 the observations in paras 12 and 13 of the report therein have no relevance upon the law of precedence as they are on the question of the exercise of its discretionary jurisdiction by the High Court under Articles 226 and 227 of the Constitution of India. It is thus clear that the ratio of the Division Bench in *Arvind's* case is binding upon us. In view of the said judgment, the case of the petitioner cannot be considered under the present rule 5 as she is an outside candidate who does not belong to the same University. Her case can, therefore, only be considered if and when 15 per cent seats are filled in on the basis of merit through the All India Entrance Examination. The admission given to the respondent No. 3 as an institutional candidate, therefore, cannot be set aside.

24-A. The learned counsel for the petitioner has, however, urged before us that in view of the G. R. dated 4-7-1986, and in particular in view of para "b" thereof, issued in the light of the judgment of this Court in *Abhay Darshane's* case which was followed in the case of *Rupkumar vs. State*, 1986 Mh.L.J. 229, the preference contemplated by the present rule 5(a) would mean that if there is equal merit of the institutional candidate and the non-institutional candidate, the preference should be given to the institutional candidate, but if the non-institutional candidate has secured higher number of marks as compared to the institutional candidate, he should be given admission in preference to the institutional candidate. It may be seen that the above G. R. dated 4-7-1986 does not lay down any new rule, but is merely in the nature of instructions issued by

the State Government for the guidance of the authorities concerned in the matter of interpretation of rule 5(a) made by this Court in the above judgments. The submission based upon the above G. R. dated 4-7-1986 is considered by this Court in the case of Arvind vs. State (cited supra) (see para 33A of the report) and is rejected. It is, however, urged on behalf of the petitioner that it is because the aforesaid G. R. dated 4-7-1986 was stayed by the subsequent G. R. dated 16-7-1986, that this Court rejected in the case of Arvind vs. State the above contention based upon the G. R. dated 4-7-1986. It is, therefore, urged that since the G. R. dated 4-7-1986 is made operative from the term commencing from January 1988 as per the G.R. dated 9-12-1986 which was not placed before the Court in Arvind's case, we should give effect to the G. R. dated 4-7-1986.

24-B. We have perused para 33A of the judgment of this Court in the case of Arvind vs. State. We have held therein that the construction of the present rule 5 would not depend upon what the Government says about it but upon what it really is. We have already pointed out above that the G. R. dated 4-7-1986 does not lay down any rule as such but is merely in the form of instructions to the concerned authorities to give effect to our judgments referred to therein which we have in terms considered in the case of Arvind vs. State. In fact the judgment in Abhay Darshane s case is only followed by the learned Single Judge in Rupkumar's case, cited supra. We have distinguished Abhay Darshane's case in Arvind's case. The view taken by us about the G. R. dated 4-7-1986 in Arvind's case is on its own merits and not only because the said G. R. was stayed by the subsequent G. R. dated 16-7-1987. Even otherwise we would adopt as shown above the same view in the instant writ petition even assuming that the said question was open before us. The above contention raised on behalf of the petitioner, therefore, deserves to be rejected.

25. We now proceed to consider the second contention raised on behalf of the petitioner in the instant writ petition. As regards the challenge to the admission given to the respondent No. 4, it is clear to us that her admission is contrary to the rules for admission and that there is a flagrant violation of Article 14 of the Constitution in creating a non-stipendiary seat to accommodate her in that seat. It is clear from the rules for admission that they do not make any distinction between the stipendiary seats and the non-stipendiary seats. In 1971 when these rules were framed in fact no stipend was given to the post-graduate students. All the admissions to the post-graduate seats whether stipendiary or non-stipendiary are thus governed by the rules for admission framed by the Government in 1971 as amended from time to time. As such if an additional non-stipendiary seat was created the State Government was bound to fill it in accordance with the above existing rules in which case it would have gone to an institutional candidate as held by this Court in Arvind's case and not to an outsider like the respondent No. 4. However, if the State Government wanted to carve out exceptions to the said rules for admission it was necessary for it to frame proper rules for admission in the alleged category of non-stipendiary seats by amending the existing rules or by making fresh rules and follow the same by

giving opportunity to all eligible candidates to compete under the said rules.

26. At any rate, when the State Government created a non-stipendiary seat in which the respondent No. 4 was accommodated, it was necessary in order to comply with the mandate of Article 14 of the Constitution that before the said seat was filled in, it should have been advertised so that all the institutional candidates similarly situated could compete and the claims of all of them could be considered before any admission could be made to the said non-stipendiary seat. All the authorities concerned in the creation of an additional seat for the respondent No. 4 seem to be oblivious of the injunction of Article 14 which is applicable also in the matter of admissions to the Medical Colleges of the State Government. It is clear from the letter dated 3-3-1987 addressed to the Vice-Chancellor by the respondent No. 4 and the correspondence of the various authorities concerned culminating in the letter of the State Government dated 28-1-1988 that since the respondent No. 4 was not entitled to any of the seats which were all reserved under the existing rules for the institutional candidates, an additional seat styled as non-stipendiary seat was created to solely accommodate her in the said seat.

27. It must be remembered that for creation of an additional seat for postgraduate students in the Medical Colleges of the State Government there must be some rational or exigency to be met particularly when the number of seats in postgraduate seats are fixed seats as they are determined on the basis of the student-teacher ratio of 1: 1 as per the norms prescribed by the Medical Council of India in the statutory regulations framed by it on February 12/13 of 1971 with the approval of the Central Government u/s 33 of the Medical Council Act to maintain the minimum standards in medical education. Thus for all these reasons the action of the State Government in creating an additional seat as well as in giving admission to the respondent No. 4 in the said seat are both illegal, arbitrary and discriminatory and are liable to be struck down under Article 14 of the Constitution.

28. It is, however, urged on behalf of the State Government that since the respondent No. 4 had recently obtained Indian Nationality in 1985, her case was specially considered and a super numeracy seat was created for her. In our view this can hardly be a reason which can satisfy the test of a rational criteria under Article 14 of the Constitution. But even assuming that the above criteria viz. obtaining an Indian Nationality recently or belonging to other nationality previously could be a valid criteria for a rational classification envisaged by Article 14, it was still necessary for the State Government to advertise the said seat so as to consider the claims of the candidates, if any, who might have satisfied the test before straightway giving admission to the respondent No. 4 in the said seat. There is, therefore, no doubt in our mind that the action of the State in giving admission to the respondent No. 4 is in flagrant violation of Article 14 of the Constitution and the rules for admission. Needless to state that the State should, hereafter bear in mind that while creating such additional seats

for admissions as well as while giving admissions in such seats it is bound by the mandate of Article 14 which must be followed by it.

29. The learned counsel appearing for the Nagpur University has stated before us that as regards the question whether the M.B.B.S. degree from Karachi University is equivalent to the degree of Nagpur University, no decision is taken by its Equivalence Committee upto now. The learned counsel for the respondent No. 4 has brought to our notice that the degree of Karachi University is recognised by the Medical Council of India by amending its Regulations in 1985 with the approval of the Central Government. However, this question need not detain us because the Nagpur University by its letter dated 20-3-1987 had already before the admission of the respondent No. 4 accepted the proposal of the Dean for creating an additional seat for the respondent No. 4. Moreover, it is open to the Nagpur University to take appropriate decision in the matter of equivalence of the M.B.B.S. degree of Karachi University if it had not done so far. The only important question which needs consideration is whether in the view which we have taken we should disturb the illegal admission given to the respondent No. 4 because after her admission in February 1988, she has already prosecuted her course for a period of more than six months by now.

30. In this regard it may be seen that even if the admission of the respondent No. 4 is set aside, the petitioner in the instant case is not going to get any benefit because her marks are lower than the marks of the respondent No. 4 and the seat would even otherwise go to an institutional candidate as per the existing rules if it is to be filled in now. Since a long time has elapsed and since by now the next batch of post-graduate students is being admitted or is already admitted in August 1988, no useful purpose would be served by requiring the State to advertise or to lay down appropriate rules for the non-stipendiary seat created for the respondent No. 4 and then to make the admission therein. We are, therefore, of the view that in the interest of justice although we hold that the action of the respondent No. 2 in creating a non-stipendiary seat and in accommodating the respondent No. 4 therein is illegal and unconstitutional we do not propose to disturb her admission now. We are fortified in adopting such a course at least by three recent decisions of the Supreme Court in which the Supreme Court did not disturb the admissions of the students concerned although their admissions were contrary to the rules for admission and/or were violative of Article 14 of the Constitution. (See . Dinesh Kumar and Others Vs. Motilal Nehru Medical College, Allahabad and Others, , Rajendra Prasad Mathur Ors. Vs. Karnataka University and Another, and A. Sudha Vs. University of Mysore and Another,).

31. In the result, the instant writ petition fails and is dismissed. However, in the circumstances of the case, there will be no order as to costs.