Reserved On : 13/03/2026
Pronounced On : 08/05/2026

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/LETTERS PATENT APPEAL NO. 221 of 2026

In R/SPECIAL CIVIL APPLICATION/15268/2018

With
CIVIL APPLICATION (FOR STAY) NO. 1 of 2026
In R/LETTERS PATENT APPEAL NO. 221 of 2026

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KRUNAL THAKORBHAI TANDEL
Versus
STATE OF GUJARAT & ORS.

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Appearance:
MR VIRAL J DAVE(5751) for the Appellant(s) No. 1
MR. VENUGOPAL PATEL, ASST. GOVERNMENT PLEADER for the Respondent(s) No. 1
MR ARSHAD SHAIKH(11761) for the Respondent(s) No. 3
MR JAY SNEHAL SHAH(13391) for the Respondent(s) No. 3
MR PREMAL R JOSHI(1327) for the Respondent(s) No. 2

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CORAM:**HONOURABLE MR.JUSTICE N.S.SANJAY GOWDA**
and
HONOURABLE MR.JUSTICE J. L. ODEDRA

CAV JUDGMENT
(PER : HONOURABLE MR.JUSTICE N.S.SANJAY GOWDA)

[1] The appellant herein had challenged the selection of the third respondent as an Assistant Professor in Industrial Engineering by filing this writ petition which has been dismissed by the Learned Single Judge and thereby has upheld the selection of the third respondent. Consequently, this appeal has been filed.

[2] The following facts emerge from the pleadings and the arguments advanced by the learned Counsel.

[2.1] In the month of November, 2015, the Gujarat Public Service Commission (hereinafter referred to as "GPSC") issued a notification calling for applications for filling up the post of Assistant Professors in various disciplines. For the purpose of this writ petition, we are concerned only with the notification insofar as it relates to the post of Assistant Professor, Industrial Engineering.

[2.2] In the notification, there was a specific column, the heading whereof, when translated, reads as follows:

> *"Allied discipline according to the Education Department's Resolution No. SCT-1211/393-GH, dated 02/06/2011, and Resolution No. SCT-10-2013-616356-GH, dated 07/02/2014"*

[2.3] In this column, as against the post of Industrial Engineering, no allied discipline had been mentioned. This would, therefore, indicate that, as on the date of the notification, there was no equivalent educational qualification prescribed for the post of Assistant Professor (Industrial Engineering).

[2.4] The rules relating to the recruitment of the above posts are governed by Assistant Professor, Class-II in Engineering

and Technology (in different disciplines) Recruitment Rules, 2011. The eligibility conditions under these Rules for appointment by direct selection to the post of Assistant Professor in Government Engineering colleges are as under:

> *(i) A bachelors degree and a postgraduate degree in relevant branch of Engineering and Technology with first class or equivalent either in Bachelor of Engineering or Technology and Master of Engineering or Technology obtained from any of the Universities incorporated by or under the Central or State Act in India or any other education institution recognized as such or declared as deemed University under Section 3 of the University Grants Commission Act, 1956 or possess an equivalent qualification recognized by the Government.*
>
> *(ii) the basic knowledge of computer application as prescribed in the Gujarat Civil Services Classification and Recruitment (General) Rules, 1967;*
>
> *(iii) adequate knowledge of Gujarati or Hindi or both.*
>
> *Explanation:*
>
> *(i) If a class or division is not awarded, minimum 60% of aggregate marks shall be considered equivalent to first class; or*
>
> *(ii) If a grade point system is adopted, the Cumulative Grade Point Average (CGPA) shall be converted in equivalent marks as below:-*

Grade Point	*Equivalant Percentage*

6.25	*55%*
6.75	*60%*
7.25	*65%*
7.75	*70%*
8.25	*75%*

[2.5] The explanation appended to these sub-rules would not be necessary for the purpose of this writ petition.

[2.6] As could be noticed above, the Rule is in three parts:

[2.7] The 1st part states that in order to be selected to the post of Assistant Professor, the candidate must possess a Bachelor's Degree and a Postgraduate Degree in *the relevant branch* of engineering and technology with first class.

[2.8] The 2nd part states that a person who holds an equivalent bachelor’s degree in engineering or technology and master’s degree in engineering or technology obtained from any other university incorporated under a Central Act or a State Act, or any other educational institution recognized as a deemed university, is also eligible to apply.

[2.9] The 3rd part states that if a candidate possesses *an*

equivalent qualification recognized by the Government, he would also be eligible to be considered for appointment as an Assistant Professor.

[2.10.] As already noticed above, in the notification the column relating to allied qualifications i.e., equivalent qualifications, the notification did not specify any other equivalent educational qualification other than the engineering degree and postgraduate degree in engineering and technology in the relevant subject, i.e., in the subject of Industrial Engineering. Thus, as per the notification, only the candidates who possessed an Engineering Degree in Industrial Engineering could apply.

[2.11] The last date for submission of applications was 09.12.2015.

[2.12] A preliminary test was conducted on 18.03.2017.

[2.13] On 14.06.2017, the Government issued a resolution in relation to the equivalency of various graduate and postgraduate degrees in Engineering and Technology. The operative part of the resolution reads as follows:

"Resolution:

After careful consideration and clubbing all the previous Government Resolution in this regard read from serial No. (2) to (9) above the Government is pleased to decide equivalent graduate and post graduate degree courses in engineering or technology as requisite qualifications for appointment to the posts of Lecturers, Heads of Departments and Principals in Government Polytechnics and Assistant Professors. Associate Professors, Professors and Principals in Government Engineering Colleges, as shown in Annexure annexed to this resolution.

While recruiting the candidate for various teaching post mentioned in column 2, preference shall be given to the candidates of the appropriate basic branch shown in column 3.

In the Annexure, column 3 shows appropriate basic degree branch (B.E./B.Tech) in Engineering or Technology for the post mentioned in column 2 while column 4 refers to the equivalent branch of M.E./M.Tech. degree course in engineering or technology.

If a candidate is not available in basic degree branch mentioned in column 3 than candidates of corresponding B.E./B.Tech branch can be considered as mentioned in column 5 but such candidate must be having any one of the post graduate degree shown in column No.-4 of the relevant basic branch.

This Government Resolution shall come into force from the date of issue.

By order and in the name of the Governor of Gujarat.

[2.14] Pursuant to this resolution, a corrigendum to the recruitment notification was issued.

[2.15] In the light of this corrigendum which indicated the equivalent qualifications which were acceptable, the appellant herein submitted an application. It may be pertinent to state here that the appellant was a candidate who possessed a basic degree in Mechanical Engineering and a Postgraduate degree in Industrial Engineering.

[2.16] A list of successful candidates was thereafter published and they were called for verification of documents. This list consisted of 8 candidates.

[2.17] On 12.09.2017, a list of eligible candidates was published who were eligible for the oral interview.

[2.18] It may be pertinent to state here that apart from the list of candidates who were found eligible for oral interview in the branch of Industrial Engineering, lists were also published in respect of other branches. The said list in respect of other branches came to be challenged by SCA No.14742/2017 (in which there were 16 petitioners) and in SCA No.14764/2017 (which had 5 petitioners). These writ petitions were in relation to

the post of Assistant Professor in the subject of Information Technology.

[2.19] The contention advanced in those writ petitions was that the Government Resolution dated 14.06.2016 had clearly stated, while recognizing equivalent qualifications, that only when the candidates in the relevant branch were unavailable could the candidates who had equivalent degrees be considered. The dispute arose, because the GPSC was not in alignment with the view expressed in the GR, and therefore there was some disparity.

[2.20] A Learned Single Judge of this Court, on considering the contentions advanced by all the parties, including the GPSC, passed an order on 31.08.2017 holding that the GR dated 14.06.2016 was clear and the candidates who did not possess a degree in the relevant branch could be considered only if the candidates possessing degrees from the relevant branch were not available.

[2.21] In short, the learned Single Judge came to the conclusion that the preference ought to be given by the GR dated 14.06.2016 to those candidates who possessed a degree

in the relevant branch to which the post was being advertised, who would have a preferential right to be appointed, and only if no candidates from that relevant branch were available, candidates having equivalent degrees could be considered.

[2.22] It may however be pertinent to state here that the entitlement of the Government to make this preference while recognising equivalent educational qualifications was neither argued not considered before the Learned Single Judge in this writ petition.

[2.23] The GPSC appears to have challenged the order passed by the learned Single Judge by filing an appeal but it subsequently chose to withdraw the appeal and consequently bound itself to the interpretation given to the GR by the learned Single Judge of this Court.

[2.24] Pursuant to this decision of the learned Single Judge, a revised list of eligible candidates was published. Thereafter, a final list of the candidates eligible for oral interview was also published.

[2.25] The GPSC, accordingly, sent call letters to those candidates who had been found eligible for undergoing the

interviews. In this call letter, the GPSC had clearly stated that the requirement prescribed in the recruitment notification that the candidate was required to obtain minimum marks (35 out of 100) had been deleted, thereby, signifying that there was no requirement of securing minimum marks in the interview.

[2.26] On 29.02.2018, interviews were conducted. In this interview, the appellant herein, who possessed an engineering degree in mechanical engineering and postgraduate degree in Industrial Engineering was recommended for being appointed.

[2.27] The third respondent, who possessed a degree in Industrial Engineering and a postgraduate degree in the Manufacturing and System Engineering was placed in the waiting list at serial No.2.

[2.28] This recommendation in favour of the appellant was on the basis of the higher marks, i.e., 61 marks, that he had obtained in the interview. The third respondent was placed in the waiting list because he had obtained 20 marks in the interview. In short, the appellant had been recommended for selection because he was more meritorious than the third respondent.

[2.29] Being aggrieved by this declaration, the third

respondent filed a writ petition, in which it was fundamentally contended that by virtue of the preference granted to the candidate who had a basic engineering degree in the relevant branch, the recommendation in favour of the appellant, who did not possess the basic degree in the relevant branch, was incorrect.

[2.30] It was urged that candidates such as the appellant who did not possess the degree from the relevant branch could be considered for selection if and only if the candidates possessing the basic engineering degree from the relevant branch were unavailable. It was therefore contended that since the third respondent was the only candidate who possessed the basic engineering degree in the relevant branch, no other candidate could even be considered, let alone be recommended, and consequently the respondents were required to select the third respondent and not the appellant.

[2.31] The learned Single Judge, by the impugned order, has accepted the plea of the third respondent and has come to the conclusion that the GR dated 14.06.2016 clearly granted a preference to the candidates who possessed an engineering

degree in the basic branch of the relevant branch, and candidates who possessed a basic engineering degree in the equivalent branch could be considered only if the aforementioned candidates were unavailable, and he therefore set aside the recommendation made in favour of the appellant and directed the GPSC to prepare a fresh result on the basis of his observations and send an appropriate proposal selecting the third respondent to the State.

[3] Being aggrieved by this order, the present writ appeal has been preferred.

[4] Learned Counsel for the appellant contended that the GR dated 14.06.2016 has not been appreciated in the proper perspective by the learned Industrial Engineering. It was contended that the GR could only be considered for the purpose of recognising an equivalent degree, and the GR insofar as it related to granting of preference ought to be ignored in its totality, since it was beyond the jurisdiction of the Government to grant preference by virtue of the limited role that the Government had to play under the rules to declare equivalence.

[5] He submitted that once the Government recognised a

person who possessed a degree in mechanical engineering as equivalent to a candidate who possessed a basic degree in Industrial Engineering, in law, both the candidates possessed the requisite educational qualifications, and the selecting authority had to necessarily appoint the more meritorious among these candidates.

[6] He submitted that once the educational qualifications were considered equal, there was no question of granting a preference to either one of the candidates. He submitted that the very purpose of considering one educational qualification to be equal to the other was that the educational qualification prescribed for that particular post would be satisfied by either of the educational qualifications, and the most meritorious among them would have to be selected.

[7] He also submitted that even if the said GR had not been challenged, the same would be of no consequence since the preference granted under the GR was void ab initio. He submitted that the recruitment rules empowered the Government to only recognise and state the equivalent qualification, and apart from recognising the equivalent

qualification, the State had no jurisdiction to thereafter proceed to state that preference would be given to the holder of a basic engineering degree of that relevant branch.

[8] He submitted that this GR basically amended the statutory rules insofar as it related to the grant of preference, which was clearly impermissible and could not be considered. He also argued that it is a settled position of law that if a government resolution seeks to legislate while exercising its limited administrative power to declare equivalence, the same would be *void ab initio* and would have to be ignored.

[9] Learned Senior Counsel Mr. Dave, appearing on behalf of the third respondent, i.e., the candidate who possessed the basic engineering degree of Industrial Engineering, i.e., the relevant branch, argued that there was absolutely no infirmity in the order of the learned Industrial Engineering warranting interference in appeal. He submitted that the Government, which was the ultimate authority and the employer, had the right to choose which candidate could be appointed, and if the Government had sought to grant preference to the person who possessed a basic engineering degree in the relevant branch

over the person who had a basic engineering degree in an allied branch, the same could not be found fault with.

[10] Learned Senior Counsel pointed out that the intent of granting the preference was patently obvious, i.e., a person who possessed a basic engineering degree in the relevant branch, i.e., Industrial Engineering, would be much better equipped to educate the students who wanted to study and acquire a degree in Industrial Engineering as compared to a candidate who possessed a basic degree in some other branch.

[11] He submitted that essentially the person who possessed a basic degree in the relevant branch would be a specialist and better suited to impart education as compared to other candidates, and it was precisely for this reason the State had made it clear that only if these specific candidates were unavailable could other candidates be considered. He also submitted that the learned Industrial Engineering was merely giving effect to this policy, which was in the larger interest of the students, and therefore no infirmity could be attached to the said policy.

[12] Learned Senior Counsel also argued that the appellant got

a chance to even apply to the post only because of the GR dated 14.06.2016. He therefore submitted that the appellant could not disown the GR dated 14.06.2016 or argue for disregarding one portion of the GR dated 14.06.2016. He submitted that the GR dated 14.06.2016 would have to be applied in its totality and cannot be severed in two parts and only that part which was amenable to the interest of the appellant be adopted. He therefore submitted that the argument of the appellant's counsel that that portion of the GR which meant the preference should be ignored was wholly untenable and was required to be rejected in its totality.

[13] In the alternative, the learned Senior Counsel argued that the Government did have the power to step in and fill up a lacuna, especially when it noticed a clear lacuna in the rules. Since the recruitment rules were framed under Article 309 and these rules contained this lacuna of not having a preference, though the rule specifically stated that the person should possess a degree in the relevant branch, the State was basically acting and was exercising its powers under Article 309 and filling up the lacuna by providing a preference.

[14] He also submitted that even if Article 309 is inapplicable, the State would still have the power, that is an executive power available under Article 162 of the Constitution, to issue instructions whenever it was necessary to rectify a defect in the existing rules. He therefore submitted that the GR dated 14.06.2016 would have to be considered not only as the Government's recognition of an equivalent qualification but also the Government's creation of a rule granting preference, and this would basically supplement the existing rules.

[15] Learned AGP, Venugopal Patel, adopted the arguments of the learned Senior Counsel and supported the judgment. He contended that the State was justified in creating a preference in favour of the person who had the basic engineering degree in the relevant branch and this prerogative was available to the Government by virtue of being the employer and also because it did possess the power to frame rules. The mere fact that the intention was forthcoming through a Government resolution would not make any difference, and so long as the Government had the power to prescribe a preference in the matters of recruitment, the GR could not be found fault with. He also

submitted that the GR had been accepted by the appellant, and the appellant, having taken benefit of the GR, cannot disown that part of the GR which was adverse to his interest.

[16] Learned Counsel for the appellant also placed reliance upon the judgment rendered by the Hon'ble Supreme Court in (1995) 6 SCC 1 to contend that Government had the jurisdiction to issue executive instructions under Articles 73 and 162 to fill up the gaps and omissions in the rules. He also relied upon the decision rendered by the Hon'ble Supreme Court in (2009) 5 SCC 1 to contend that if the State had the legislative competence to frame rules, it could issue Government orders in exercise of its powers under Article 162. He relied upon the judgment rendered in (2023) SCC Online SC 724 to contend that when there was no challenge to the validity of the rules, no arguments could be advanced on them. Lastly, he relied upon the judgment rendered in (2023) 9 SCC 144 to support his argument that if no prayer was made in the petition challenging the vires of the rules, there would be absence of any foundation in the pleadings and this Court cannot entertain a plea regarding the validity of the rule.

[17] Learned Counsel appearing for the GPSC submitted that the

GPSC was bound by the order passed by the Government in light of the withdrawal of the appeal by GPSC in the connected matters. He, therefore, in a sense, supported the State and the respondent No. 3.

[18] In the light of the above submissions, the only question that arises for consideration in this appeal, is whether the Government could, while exercising its power under the Rule to declare equivalence in the educational qualifications, also create a preference in favor of the candidate who possessed the original qualifications sought for and, as a consequence, whether the order of the learned Single Judge was justified?

[19] The basic fact that the appellant did not possess a basic degree in the relevant branch, i.e., in Industrial Engineering, and that the third respondent possessed the basic degree in Industrial Engineering, is not in dispute. The controversy arises only because of this fact.

[20] In order to examine this contention, the basic requirement prescribed under the recruitment rules for being eligible to apply would be mainly relevant. As already extracted above, the educational qualification prescribed in respect of recruitment of

an Assistant Professor in Government engineering colleges was any one of three qualifications. Firstly, the candidate could possess a bachelor's degree and a postgraduate degree in the relevant branch of engineering and technology with first class or Secondly, the candidate could have an equivalent bachelor degree of engineering or technology and Master of Engineering or Technology obtained from any of the universities incorporated by or under the Central or State Act in India or by any other educational institution recognized as such or declared to be a deemed university or Thirdly, that a candidate could possess an equivalent qualification recognized by the Government.

[21] A plain reading of this particular rule would indicate that it was not necessary for the candidate seeking for recruitment as Assistant Professor to necessarily have only a degree in the relevant branch. The fact that the rule provided for a candidate who possessed an equivalent qualification which was recognized by the Government would, by itself, indicate that the degree in relevant branch was not mandatory. To put it differently, the basic degree of engineering in the relevant branch would also bring within its ambit any equivalent qualification recognized by

the Government.

[22] The rule would also indicate that the equivalent qualification was to be decided only by the Government. The moment the Government recognized a particular equivalent qualification, then, a candidate who possessed a bachelor degree and a postgraduate degree in the relevant branch and a candidate who possessed the equivalent qualification, would both be on par and would have to be construed as being eligible on the parameter of educational qualification.

[23] To put it differently, the candidate who possessed a basic engineering in a branch other than the relevant branch would be on par with the candidate who possessed a degree in the relevant branch of engineering and there would be no differentiating factor between them.

[24] The intent of this rule would indicate that to be an Assistant Professor in a Government engineering college, the possession of only a basic degree in engineering was required and it was not mandatory for a candidate to have a basic engineering in the relevant branch. If the rule had permitted the Government to declare an equivalent qualification to the degree in the relevant

branch, it would necessarily indicate that, that the said equivalent qualification was on par with the basic degree in engineering of that relevant branch and that would be sufficient for the discharge of duties of an Assistant Professor.

[25] As a consequence of this, it would also follow that if the candidate who possessed a degree in the relevant branch and the candidate who possessed an equivalent qualification will have to necessarily compete as equals in the matter of selection. In other words, once equivalence was declared by the Government, the candidate with a degree in the relevant branch cannot claim superiority over the candidate who possessed the degree in the equivalent course.

[26] If the Government declared two courses to be equal to one and another, it is obvious that the holders of the degrees from these courses would have to be considered equal. If both the candidates are considered as equals, it is obvious that their comparative merit would be the only criteria for being recruited, and no preference can be attached to the candidate who has the degree in the relevant branch over the person who has an equivalent degree.

[27] In the instant case, it is not in dispute that the appellant, who possessed an equivalent qualification, did secure higher marks in the interview, and this would translate in him being more meritorious than the respondent No. 3. If that is the resultant position, the candidature of the appellant would have to be preferred over that of the respondent No. 3.

[28] The learned Single Judge has, however, proceeded on the premise that the Government resolution which declared equivalence also contained a clause which provided a preference to the person who had the degree in the relevant branch, and this preference would have to be given effect, more so when the same was not challenged and the appellant, in fact, became eligible to apply only because of this Government resolution which declared his qualification to be equal to that of the respondent No. 3.

[29] It is for this reason that the learned Senior Counsel appearing for the respondent No. 3 laid great emphasis on the fact that the Government resolution, which had been accepted by the appellant, could not be read in isolation and the part relating to granting preference could be ignored in its entirety,

and only the part relating to equivalence can be acted upon.

[30] This argument of the learned Senior Counsel, on the face of it, appears to be attractive. However, on a closer scrutiny, of the recruitment rule, it becomes it clear that the rule only permitted the Government to recognize an equivalent qualification and nothing more. The Rule, which only conferred the power to recognise equivalent educational qualifications, did not enable the Government to modify the educational qualifications such as granting preference for one qualification over the other. If the recruitment rule *per se* permitted multiple education qualifications to be adequate for appointing an Assistant Professor, and it only imposed a condition that the equivalent education qualification should be recognized by the Government, then the Government cannot go beyond its limited role of determining equivalence and cannot be permitted to fundamentally amend the rule.

[31] It is to be noticed here that when the rule permits different education qualifications to be adequate and confers only limited power on the Government to recognize and declare the equivalence, the Government cannot exceed this scope available

to it and proceed to declare a preference for one education qualification over the other.

[32] It is also to be noticed that the recruitment rule did not categorically state that a basic engineering degree in that relevant subject was mandatory. The fact that the rule itself provided for other equivalent education qualifications to be considered was by itself indicative of the fact that the basic degree in the relevant branch was only directory.

[33] If the power of the Government was only to recognize and declare an equivalent education qualification, the prescription of a preference of one education qualification over the other would be *non est*. Once the education qualifications are declared and recognized to be equivalent, all candidates who possess the equivalent qualifications would be on par with the candidates who possessed the qualifications in relevant branch and it is only their comparative merit to determine their recruitment. If equivalence had been recognised and then a preference was conferred for the original qualification, the very concept of equivalence would be defeated.

[34] Learned Senior Counsel however sought to contend that the

recruitment rules are framed under Article 309 of the Constitution of India and the Government having issued the GR declaring the preference, the power of the Government can be traced back to its rule making power and would have to be construed as amending the rules.

[35] It is to be stated here that if the Government was to frame a rule, the procedure under Article 309 will have to be necessarily followed. The Government, no doubt, has the power under Article 309 to frame the rules which, in fact, it had exercised while formulating the recruitment rules in 2011. However, it is to be stated here that when the Government was specifically exercising that power conferred on it under the rule, i.e., recognizing equivalent degree, it could not traverse beyond this power. If the Government had traversed beyond this power of declaring equivalence, such as according preference to one education qualification, it is obvious that the said exercise of power is wholly illegal and the consequential preference granted would be *non est* and void.

[36] An argument was advanced that the GR dated 14.06.2016 had been considered by a learned single judge of this Court in

SCA No. 15268/2018 and this Court had declared that the preference given to the candidates holding a degree in the relevant branch was justified and therefore the preference cannot be challenged in this appeal. In the matter before the learned Single Judge, the question as to whether the Government possessed the power grant a preference while recognising equivalent qualification was not the subject matter of that petition and the Learned Single Judge accordingly interpreted the GR as it existed. However, in this appeal, the power of the Government to grant a preference while recognising an equivalent education has been raised and hence the same been considered in the aforementioned terms. Therefore, the judgment of the learned Single Judge, in a petition where the competence of the Government to grant a preference was not an issue, cannot be relied upon to say that the GR is valid.

[37] Learned Senior Counsel also sought to contend that the rule had not been challenged by the petitioner and therefore he cannot contend that the GR in so far as it relates to according preference should be ignored. As stated above, he placed

reliance on two decisions of the Hon'ble Supreme Court in the case of ***Dhanraj v. Vikram Singh and Ors.*** and ***Dr. Krushna Chandra Sahu & Ors. v. State of Orissa & Ors.***

[38] In the case of ***Dhanraj (supra)***, the Hon'ble Court was dealing with a case where the prayer in the petition was for a direction to the respondents therein to follow rotation policy for the general elections to the panchayats in compliance with the statutory rules, and in that context, the Hon'ble Supreme Court held that the decision of the High Court that certain provisions were in conflict with other provisions of the act and they were ordered to be ignored could not be accepted. It is obvious that in that case the petitioners wanted the rotation policy for general elections to be followed in compliance with the rules and therefore the Supreme Court noticed that there was no challenge to the validity of the rules and the High Court could not therefore have traversed beyond the prayer of the petitioners therein. Admittedly, such is not the case in the present case and therefore this decision would not be of any benefit.

[39] Similar is the situation in the case of ***Union of India v. Manjurani Routray & Ors.*** In that case, the Hon'ble Supreme

Court was dealing with the case of the petitioner therein whose request for being promoted had been rejected and the respondents therein had been promoted. In that case it was noticed that during the pendency of the application before the CAT, the rules were formulated and one of the rules prescribed a revised assessment procedure which was the basis for promotion. The applicant therein who approached CAT had participated in the process and her rating was assessed in accordance with the rules. In that context, the Hon'ble Supreme Court noticed that when the rule under which she had participated in the process had not been challenged, the High Court was wrong in declaring the rule as ultra vires. Such a situation is also not available in the present case.

[40] As already noticed above, the appellant did get a right to participate in the recruitment process only because the educational qualification that he possessed was recognized and declared to be equivalent by the Government and by virtue of this recognition a corrigendum came to be issued which enabled him to apply. The Government while declaring the education qualification of the appellant to be equal to that of the other

candidates could not possibly, at the same time, reduce the eligibility of the persons who possessed equivalent qualification by granting the preference to the other candidates. The power to recognize an equivalent qualification has basically been used to virtually amend the rule even though the rule was not actually amended. Such a procedure would therefore be clearly illegal. This judgment cannot also therefore be of any assistance.

[41] In so far as the argument of the learned Senior Counsel contending that the preference prescribed in the GR ought to be construed as a statutory rule being prescribed by the Government in exercise of its powers under Article 309, it is to be stated here that in the very case relied on by the learned Senior Counsel, i.e., in ***Dr. Krushna Chandra Sahu (Supra)*****,** the Hon'ble Supreme Court had clearly stated as follows:

> *"31. ……..If the statutory rules, in a given case, have not been made, either by the Parliament or by the State Legislature, or, for that matter, by the Governor of the State, it would be open to the appropriate Government (the Central Government under Article 73 and the State Govenrment under Article 162) to issue executive instructions……"*

[42] This would indicate that the power to issue executive

instructions under Article 162 would be available only if there are no statutory rules framed. In the instant case, admittedly, there were statutory rules formulated and were covering the field and therefore the question of exercising of Executive power would not arise.

[43] The reliance placed on by the learned Senior Counsel in the case of ***Andhra Pradesh Public Service Commission v. Baloji Badhavath & Ors.*** cannot be of any assistance as in that case the Hon'ble Supreme Court was dealing with a case where the Government of Andhra Pradesh had issued orders laying down norms to be adopted for filling up the vacancies and the Hon'ble Supreme Court noticed that the Government of Andhra Pradesh had issued a notification notifying 196 vacancies and laying down a procedure for filling up the vacancies. In that case, it has to be pointed out that the Supreme Court was not considering a case where rules framed under 309 existed. That was a case in which there were no rules under Article 309 and in that context the Supreme Court stated that if the State had the power to frame rules under Article 309, it was entitled to exercise its power under Article 162 and lay down a procedure.

[44] In this case, since there were rules framed under 309 in place, the exercise of powers under Article 162 would not arise. It is settled law that the power to issue executive instructions or to exercise executive power would be available only if the field is not occupied by any legislation. Once the legislation is existing, the power to issue executive orders will not be available. Now, the similar is the case of the Dr. Krushna Chandra Sahu (Supra).

[45] In the light of the above, these citations would also have no application.

[46] The result of the above discussion is that the order of the learned Single Judge cannot be sustained and will have to be reversed and accordingly it is reversed.

[47] The recommendation of the appellant to be appointed will therefore have to be acted upon and not the recommendation of the respondent No. 3 for being appointed, as per the impugned order. The respondent shall, therefore, act upon the recommendation made in favour of the appellant and conclude the process of appointment in his favour.

[48] Any action taken pursuant to the order of the learned Single Judge shall stands reversed in so far as the appellant and

respondent No. 3 are concerned by virtue of this order.

[49] Accordingly, the present Letters Patent Appeal is allowed and the writ petition shall stand dismissed. In view of the order passed in the main matter, the connected Civil Application does not survive and is accordingly disposed of.

(N.S.SANJAY GOWDA,J)

(J. L. ODEDRA, J)

Mehul Desai

FURTHER ORDER:

[1] A request for grant of an interim order for status-quo made by the respondent No. 3, is refused, since we find no justification for the said request.

(N.S.SANJAY GOWDA, J)

(J. L. ODEDRA, J)

Mehul Desai

Original copy of this order has been signed by the Hon'ble Judges.
Digitally signed by: MEHULKUMAR BHIMABHAI DESAI(HCD0075), ENGLISH STENOGRAPHER GRADE TWO CLASS TWO, at High Court of Gujarat on 11/05/2026 08:46:08