

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**R/SECOND APPEAL NO. 339 of 2026****With****CIVIL APPLICATION (FOR STAY) NO. 1 of 2026****In R/SECOND APPEAL NO. 339 of 2026****FOR APPROVAL AND SIGNATURE:****HONOURABLE MR. JUSTICE MAULIK J.SHELAT**

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Approved for Reporting	Yes	No
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REKHABEN W/O SAGARBHAI PRAJAPATI D/O PUNJABHAI
NANJIBHAI PRAJAPATI

Versus**SAGARBHAI PREMJBHAI PRAJAPATI**

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Appearance:**MR. JIGAR B DAVE(17548) for the Appellant(s) No. 1**

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CORAM:HONOURABLE MR. JUSTICE MAULIK J.SHELAT**Date : 31/07/2026****JUDGMENT**

1. Heard Mr.Jigar B. Dave, learned advocate for the appellant.

2. The present second appeal is filed under Section 100 of the Code of Civil Procedure arising out of the judgment and decree dated 29.01.2026 passed by the Second Additional District Judge, Bhachau, Kutch in Regular Civil Appeal No.3 of 2024 whereby it has dismissed the aforesaid appeal and confirmed the judgment and decree of divorce dated 10.05.2024 passed by the Principal Senior Civil Judge, Bhachau, Kutch in H.M.P. No.18 of 2023.

SUBMISSION OF THE APPELLANT:

3. Mr. Dave, learned advocate would submit that the Appellate Court has committed a serious error in law by not discussing the evidence on record and without re-appreciating the findings of fact recorded by the trial court in regard to the issue of desertion and mental cruelty, mechanically dismissed the appeal.

3.1 Mr.Dave, learned advocate would further submit that irrespective of the fact as to whether any request was made by the appellant before the Appellate Court to re-appreciate the evidence on record, it was incumbent upon the Appellate Court to frame the necessary points for determination and to answer them.

3.2 Mr.Dave, learned advocate would further submit that the judgment and decree passed by the trial court was *ex-parte* and in the interest of justice, one opportunity should have been granted by the Appellate Court to the appellant whereby she could submit her defense before the trial court in the divorce suit filed by the respondent, who happens to be her husband.

3.3 To buttress his arguments, Mr. Dave, learned advocate has relied upon the following judgments:

- (i) **AIR Online 2000 SC 173 - State of Rajasthan vs. Haphoolsingh (Dead) through his L.Rs.**
- (ii) **Order dated 02.09.2022 passed by the Coordinate Bench of this Court in the case of Bulsara Kalaben Chandrakant vs. Dhimmar**

**Ramanlal Devabhai, being Second Appeal
No.140 of 2022.**

3.4 By making the above submissions, Mr.Dave, learned advocate requested this Court to admit the present appeal on the substantial questions of law framed in paragraph 4 of the memo of the appeal.

ANALYSIS :

4. Having heard Mr.Dave, learned advocate at length and upon perusal of the impugned judgment and decree passed by the Courts below, *prima facie*, it appears that despite service of notice of H.M.P. No.18 of 2023 (divorce suit) filed by the respondent against the appellant, she chose not to appear and contest the aforesaid suit. The trial court has categorically recorded the finding that notice was served upon the appellant. It is not even the case of the appellant that she was not served with the notice issued by the trial court. No explanation worth the name is forthcoming from the side of the appellant for not appearing before the trial court to contest the suit.

5. The respondent, who happens to be the husband of the appellant, instituted the divorce suit on the premise that without any justifiable reason, the appellant-wife has left the matrimonial home since last more than two years before the institution of the suit and during the short marriage span, he and his family members were inflicted with mental cruelty by the appellant. Thus, the aforesaid divorce suit was instituted

under Section 13(1)(i-a) & (i-b) of the Hindu Marriage Act, 1955. To prove the case, the respondent examined himself, his mother and neighbor at Exhibits 13 to 15, respectively. The oral evidence of the aforesaid witnesses remained uncontroverted by the appellant as the appellant did not remain present for their cross-examination.

6. The trial court has recorded a categorical finding that from the oral evidence of the witnesses, it is borne out that without any justifiable reason, the appellant deserted the respondent and he was also subjected to mental cruelty. Accordingly, the decree of divorce was passed by the trial court vide its judgment dated 10.05.2024. The appellant preferred Regular Civil Appeal No.3 of 2024 against the impugned judgment and decree of divorce wherein the Appellate Court has framed the following points for determination :

"Points of Determination

9. Considering the submissions made by the both the counsels for the parties as well as the facts of the case, following points emerges for the determination of this appeal.

- 1 Whether the Trial Court erred in proceeding ex-parte against the Appellant ?*
- 2 Whether the judgment and decree passed by the Learned Trial Court require interference by this Appellate Court?*
- 3 What order ?"*

7. The Appellate Court in Para 7 of its impugned judgment has recorded the submissions of the learned advocate

appearing for the appellant. A bare look at the aforesaid Para 7 would indicate that before the Appellate Court, the appellant has never requested the Appellate Court to re-appreciate the testimony of the witnesses examined by the respondent; rather, the appellant requested the Appellate Court to give her one opportunity of hearing.

8. In light of the aforesaid facts, the Appellate Court must have framed the points of determination as referred above. While answering the points which were framed by the Appellate Court, it has assigned its reasons, which read thus:

“12. In order to decide this aspect I want to refer to the judgment passed by the Hon’ble Supreme Court of India in the case of Sunil Poddar v. Union Bank of India, (2008 INSC 21), wherein the Hon’ble Apex Court had held that - “23. It is, therefore, clear that the legal position under the amended Code is not whether the defendant was actually served with the summons in accordance with the procedure laid down and in the manner prescribed in Order 5 of the Code, but whether (i) he had notice of the date of hearing of the suit; and (ii) whether he had sufficient time to appear and answer the claim of the plaintiff. Once these two conditions are satisfied, an ex parte decree cannot be set aside even if it is established that there was irregularity in service of summons. If the court is convinced that the defendant had otherwise knowledge of the proceedings and he could have appeared and answered the plaintiff's claim, he cannot put forward a ground of non-service of summons for setting aside ex parte decree passed against him by invoking Rule 13 of Order 9 of the Code.....” Therefore from the perusal of the above judgment it become amply clear that an ex-parte decree cannot be set aside if the party had notice and sufficient time to appear.

13. As point no. 1 and 2 have are interrelated and

therefore both the points are discussed simultaneously. In the present case the the Ld. Trial Court sent a registered notice which returned unserved and thereafter the summons was personally served to the present appellant by the Bailiff and the service report is placed at Ex. 9. Therefore it is undisputed that the Appellant/Defendant had the knowledge about the court proceedings, and she had ample time between the service of notice and the final disposal but despite that she failed to appear before the Ld. Trial Court for the reasons best known to her. Further the plaintiffs testimony was supported and corroborated by his neighbor who deposed as PW-3. Further the Ld. Trial Court observed that the Appellant and Respondent lived together for only 15 days and have lived apart for over three years. Therefore the Appellant's failure to appear was not a lack of opportunity but a willful default and under such circumstances the Ld. Trial Court's decision to proceed ex-parte was legally sound and there is no infirmity in the course of action adopted by the Ld. Trial Court."

9. Having gone through the aforesaid finding of fact recorded by the Appellate Court so far as the aspect of the *ex-parte* decree is concerned, no fault can be found either with the trial court or the Appellate Court inasmuch as, despite service of notice upon the appellant, she voluntarily chosen not to appear and contest the divorce suit filed by her husband.

10. So far as the argument canvassed by Mr.Dave, learned advocate, that irrespective of whether a submission was made or not in regard to the re-appreciation of evidence by the Appellate Court is concerned, it was for the Appellate Court to look into the evidence on record and to re-appreciate the same in accordance with law. According to my view, in absence of arguments made by the appellant, the Court

cannot on its own decide the point which was never argued. As no such request was made before the Appellate Court and during the course of argument, the appellant had not pressed such a point before the Appellate Court, no error can be found on the part of the Appellate Court if no finding of fact was recorded so far as the issue of desertion and cruelty is concerned.

11. Even before this Court also, the appellant has not submitted a copy of the oral evidence of the plaintiff's witnesses for perusal, from where this Court can also ascertain as to whether the finding of fact recorded by the Trial Court on the aforesaid issue is either perverse or grossly erroneous.

12. The decisions cited by Mr.Dave, learned advocate for the appellant, would be of no help to him for the simple reason that the Appellate Court in the case at hand has framed the points of determination and answered them accordingly. The point which was never pressed into service before the Appellate Court, there was no reason for the Appellate Court to frame such a point and answer it. Be that as it may, even after perusing the judgment of the trial court, *prima facie*, I am of the considered view that there is no gross illegality or irregularity committed by the Courts below while passing the decree of divorce in favour of the respondent.

12.1 In view of above, according to my considered view, the decisions cited by Mr. Dave, learned advocate, would not be applicable to the facts of the present case.

13. Lastly, it is required to be observed by this Court that this appeal is filed under Section 100 of CPC against the concurrent findings of fact recorded by the Courts below against the appellant so far as the non-appearance of the appellant before the Court and this Court cannot interfere with such findings of fact recorded by the Courts below, as the findings of fact recorded by the Courts below are neither perverse nor grossly erroneous.

14. At this stage, it would be profitable to refer to the recent decision of the Hon'ble Apex Court in the case of **Russi Fisheries (P) Ltd. v. Bhavna Seth - 2026 SCC OnLine SC 555**, wherein it has been categorically held that this Court should not interfere with findings of fact recorded by the Courts below unless it is so perverse or grossly erroneous, and / or contrary to a settled principles of law. The relevant paragraphs of the said decision read thus:

"31. It is settled in law that the findings of fact howsoever erroneous, cannot be reopened and disturbed in second appeal which is required to be adjudicated only upon the substantial question of law, if any, arising therein. Thus, the argument that the High Court in second appeal ought to have examined the evidence to ensure the correctness of the findings of the First Appellate Court has no legs to stand and fails.

*32. Long back in 1981, three judges of this Court in the case of **Bholaram v. Ameerchand** had ruled that even if findings of facts by courts below are wrong or grossly inexcusable that by itself would not entitle the High Court to interfere under Section 100 CPC in the*

absence of clear error of law. A similar view was reiterated in **Madhavan Nair v. Bhaskar Pillai (Dead) by Lrs.**, wherein it has been laid down that even if the First Appellate Court commits an error in recording a finding of fact, that itself will not be a ground for the High Court to upset the same.

33. In **Kashibai w/o Lachiram v. Parwatibai w/o Lachiram**, a similar proposition of law was laid down by this Court and it was held that the High Court cannot reappreciate the evidence and interfere with the findings of facts unless a substantial question of law or a question of law duly formulated is to be decided. The second appeal does not lie on the ground of erroneous findings of facts based on appreciation of the relevant evidence.

35. Again, in **Kulwant Kaur v. Gurdial Singh Mann (Dead) by Lrs**, it was emphasized that the fact remains that in a second appeal, a finding of fact, even if erroneous, will not be disturbed unless it is found that it stands vitiated for want of perversity. No such case for interference has been made out in the present case.”

(Emphasis supplied)

15. In light of the aforesaid facts and circumstances of the case and for the foregoing reasons, I do not find any merit in this appeal which is required to be dismissed *in limine*. Accordingly, it is dismissed. No costs. Consequently, the connected Civil Application also stands disposed of.

GAURAV J THAKER

(MAULIK J. SHELAT, J)