

**Surendra Kumar Vs. Kanta**

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**Court :** Madhya Pradesh

**Decided On :** Apr-23-1994

**Reported in :** II(1994)DMC459

**Judge :** A.G. Qureshi, J.

**Acts :** [Guardians and Wards Act, 1890](#) - Sections 7, 17, 25 and 47; [Code of Civil Procedure \(CPC\) , 1908](#) - Order 41, Rule 27; [Hindu Marriage Act, 1955](#) - Sections 13B

**Appeal No. :** M.A. No. 29 of 1988

**Appellant :** Surendra Kumar

**Respondent :** Kanta

**Advocate for Def. :** Kshirsagar, Adv.

**Advocate for Pet/Ap. :** R.S. Garg, Adv.

**Disposition :** Appeal dismissed

**Judgement :**

**A.G. Qureshi, J.**

1. This appeal has been filed under Section 47 of the Guardians and Wards Act, aggrieved by order dated 13-11-1977, passed by the 4th Additional Judge to the

Court of District Judge, Indore in Guardian Case No. 71 of 85, whereby the lower Court has dismissed the petition filed under Sections 7, 17 and 25 of the Guardian & Wards Act read with Section 13 of the Hindu Minority and Guardianship Act.

2. It is a common ground that the marriage between the appellant and the respondent took place on 14-4-76 and from appellant respondent gave birth to a child named 'Gaurav' on 17-3-77 at Indore. Before the birth of the child, the respondent Smt. Kantabai was residing at Indore. The appellant had filed an application under Section 9 of the Hindu Marriage Act against the respondent, seeking restitution of conjugal rights; but it was dismissed. It is also not disputed that the respondent had filed an application under Section 125 of the Cr.P.C. at Indore, which was also dismissed on 2-7-80, in default. Thereafter, application under Section 13 of the Hindu Marriage Act was filed by the appellant, which was also dismissed.

3. The case of the appellant before the lower Court was that on 4-9-76, the respondent came to Indore to attend the marriage ceremony in the family, and since then she has not returned back to the house of the appellant. In the maintenance application under Section 125 Cr.P.C., the respondent herself had pleaded that she is not in a position to support her self and her child. According to the appellant, he is serving in LIC and earning Rs. 1500/- per month. He is an educated person and his whole family is educated and hence the child 'Gaurav' can be maintained properly by the appellant and his family and his future will be bright. Furthermore, the appellant being a Punjabi, if Gaurav remains with the appellant he shall adopt the Punjabi culture as the appellant resides in Punjab. Therefore, the appellant be appointed guardian of the child and the custody of the child be given to him.

4. The application was resisted by the respondent on the ground that she is in a position to maintain the child. She is earning Rs. 400/- per month. Her father is a medical practitioner and owns a house, and his brother is an engineer, and both the father and brother love Gaurav too much. The mother of the respondent is also attached to the child, whereas the appellant has no attachment with the child and he never tried to maintain his son. The appellant had filed an application before

Sub Judge Amritsar for appointing him as the guardian and custody of Gaurav, which was rejected by the Court, therefore, the application is not maintainable on the principle of res judicata. According to the respondent, it is in the interest of the child that the child may be allowed to remain with her. It has also been pleaded that the petitioner has kept a concubine.

5. On the aforesaid pleading of the parties, the learned lower Court framed three issues to decide the application and after recording the evidence, the Court came to the conclusion that the petition is maintainable and that the appointment of the petitioner as a guardian of the child is not in the interest of the child and, therefore, the application was dismissed. Hence this appeal.

6. According to the learned Counsel for the appellant Shri Garg, the learned lower Court failed to take this fact into consideration that the petitioner never neglected to maintain the child, on the contrary, the family of the respondent refused the petitioner to see and meet the child. Actually the petitioner is trying since 1976 to get the custody of the child. Actually the welfare of the child is in giving the custody of the child to the petitioner because he can properly maintain the child whereas, the respondent had herself pleaded in her petition under Section 125 Cr.P.C. that she has no means to maintain the child and her parents are not also financially sound to support the child. It is actually because of the fault of the respondent, that the petitioner could not get near the child and therefore if the child does not recognise the petitioner, it is not his fault. Under the Hindu Law, the petitioner is the natural guardian of the minor and, therefore, he is entitled to the custody of the child, unless some strong reasons are shown against his right to custody. The Court has also wrongly held that the child can grow up in the Punjabi culture outside Punjab.

7. On the other hand, learned Counsel for the respondent Shri Kaheersagar has argued that the order impugned has been passed keeping in view the interest of the minor. According to him, Section 25 of the Guardians & Wards Act has no application in the instant case. He has also drawn my attention to the compromise decree passed by the District Judge, the certified copy of which has been filed with the application under Order 41, Rule 27 CPC.

8. An application under Order 41, Rule 27 CPC was filed before this Court wherein it has been stated that in case No. 5 of 89 the parties had mutually agreed in respect of the custody of the child with a further undertaking on the part of the appellant that he shall withdraw this appeal and bring an end to the dispute. Certified copies of the application under Section 13(b) of the Hindu Marriage Act, the statement of the appellant and the order of the D.J. on the application have been filed. The aforesaid application was allowed by this Court and the records of the Court of District Judge was called.

9. On perusing the judgment of the District Judge delivered on 31-7-89 in Hindu Marriage Act Case No. 5 of 89, I find that the District Judge after recording the statements of the parties to the case felt satisfied that both the parties to the suit have amicably and valunarily filed the petition on 29-7-89 and converted the petition under Section 13 of the Hindu Marriage Act to one under Section 13B of the Act and there being no possibility of reconciliation between the parties a decree of divorce on the basis of the consent in the interest of both the parties was granted. The statement recorded by the D.J. during the proceedings arc on record, wherein in para 3 the present appellant has stated that it has been mutually agreed between the parties that the non-applicant Smt. Kanta would not make any claim for maintenance of their son Gaurav and it has also been agreed that all the cases which are pending in the Court in respect of the custody of the child shall be withdrawn. It is also agreed that in the property of the petitioner Gaurav shall have no right and there shall be no litigation in respect of the custody of the child in future. This arrangement between the parties was made during the pendency of this appeal and a decree by the District Judge for divorce was passed on the basis of the statements recorded by the Court, wherein the aforesaid statement has been given by the petitioner. As such it is manifest from the statement of the appellant himself that the non-applicant-mother of the minor shall not make any claim on behalf of the minor for his maintenance and the minor will have nothing to do with the property of the appellant. This statement of the appellant before the District Judge lends support to the decision of the learned Additional District Judge challenged in this appeal that it is in the best interest of the minor to keep him in the custody of the mother.

10. In view of the aforesaid, I find, no force in this appeal. Accordingly it is dismissed. However, in the facts and circumstances of the case there shall be no order as to costs.

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