

***LPA No.450 of 2020(O&M) in
CRWP No.4587 of 2020***

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**IN THE HIGH COURT OF PUNJAB & HARYANA AT
CHANDIGARH.**

LPA No.450 of 2020(O&M) in

CRWP No.4587 of 2020

Date of Decision:-05.08.2020

Simranjeet Kaur.

.....Petitioner.

Versus

State of Punjab & Ors.

.....Respondents.

**CORAM:- HON'BLE MR. JUSTICE JASWANT SINGH
HON'BLE MR. JUSTICE ASHOK KUMAR VERMA**

Present:- Mr. Chajju Khan, Advocate for the Petitioner.

Ms. Monica Chibber Sharma, Senior Deputy Advocate General,
Punjab.

Mr. Rajesh Khurana, Advocate for Respondent Nos.4 to 6.

JASWANT SINGH, J.

*[The aforesaid presence is being recorded through video conferencing since
the proceedings are being conducted in virtual court]*

This intra-court appeal has been filed by writ petitioner-mother of a minor male child seeking his custody, being aggrieved against the Judgment dated 06.07.2020 passed by Ld. Single Judge, who has relegated the writ petitioner to alternative remedy available under various statutes.

On the last date of hearing i.e 21.07.2020, this Court had

passed the following order:

“ It is contended that the three year old minor boy was throughout in the custody of mother/appellant(petitioner), till 27.06.2020,when the father-Jagtar Singh/respondent No.4 forcibly took away thechild from the custody of the mother. Although, we find no legal infirmityin the order passed by the ld. Single Judge and to an extent themaintainability of the present LPA, however, to determine the bestinterest of the minor child in the backdrop of the stated fact, we deem itappropriate to seek a report with regard to the welfare and best interestof the minor boy.

Notice of motion for 05.08.2020.

At this stage, Ms. Monica Chhibber Sharma, Sr. DAG, Punjabaccepts notice on behalf of respondents No.1 to 3/State.

Counsel for the appellant undertakes to furnish requisitenumber of copies of the paper book to counsel opposite by hand orthrough e-mail.

Liberty is granted to the appellant to serve respondents No.4 to 6 through e-mail or some other electronic mode for the date fixed.

We request Ms. Monica Chhibber Sharma to submit a report in the aforesaid context and we direct respondent No.2-Superintendent of Police, SAS Nagar, Mohali and respondent No.3-Station House Officer.Police Station Khizrabad, District SAS Nagar, Mohali to produce theparties before Ms.Monica Chhibber Sharma at her convenience requestand direction. ”

In compliance of the said order, Ms Monica Chhibber Sharma has submitted a report dated 31.07.2020, whereby after interacting with the parents of the minor child, minor child himself and the overall interest and welfare of the child, she has submitted that he should remain in the custody of father-Jagtar Singh-respondent no 4, as minor child was comfortable in his company. Copy of report dated 31.07.2020 is taken on record as ‘Mark-A’. Registry is directed to place the report dated 31.07.2020 at appropriate place of the paper-book and paginate it.

Ld. Counsel for appellant has argued that the custody of the minor child should be handed over to the appellant, being mother. He has argued that admittedly, the age of minor child is 3 years and as per Section 6 of the Hindu Minority and Guardianship Act, 1956, the custody of a minor child, who is less than 5 years of age, is required to be given to mother. He has further argued that the Ld. Single Judge ought to have considered the matter on merits instead of relegating the petitioner to a new round of litigation, as great inconvenience would be caused to appellant-lady, especially when in view of Section 6 of the Guardians and Wards Act, 1890 custody is required to be handed over to mother. Thus, prayer has been made for setting aside the judgment dated 06.07.2020 passed by Ld. Single Judge and consequently, allowing the appeal.

On the other hand, it is argued by the Ld. State Counsel that she had interacted with the father, mother and minor child and after considering the overall situation, had given her report dated 31.07.2020, as the welfare and interest of child is of paramount importance. On merits, it is submitted that the Ld. Single Judge had rightly relegated the appellant-writ petitioner to avail her appropriate statutory remedies, as factual disputes cannot be adjudicated by Writ Court. Hence, prayer has been made for dismissal of the appeal.

We have heard Ld. Counsel for the parties at length and with their assistance have scrutinized the record. However, we are of the view that the present appeal is devoid of merit and liable to be dismissed.

At the time of issuance of notice of motion, we had considered the age of the child as well as the allegations levelled against the father, especially that of forcibly taking away the child by father from the custody

of mother. It was for this reason that we had requested Ms. Monica Chhibber to submit a report after interacting with the minor child alongwith the parents. However, a perusal of the report dated 31.07.2020 makes it clear that minor child was not at all comfortable in the company of the mother and infact was more comfortable in the company of father. It is further evident from the report that father had projected a totally different story than that asserted by appellant. As per the father-respondent no 4, it is the appellant-Simranjeet Kaur who had herself left the matrimonial home. This is corroborated by the Sarpanch of the said Village. Thus, the story projected by appellant of forcible custody seems to be prima-facie incorrect. Undoubtedly, as per Section 6 of the Hindu Minority and Guardianship Act, 1956 mother has been given primary right for custody of a minor child less than 5 years of age, however, the said right is not absolute. For ready reference relevant provisions of Section 6 of Act, 1956 are reproduced as under:

“ 6. Natural guardians of a Hindu minor.—The natural guardians of a Hindu minor; in respect of the minor's person as well as in respect of the minor’s property (excluding his or her undivided interest in joint family property), are—

(a) in the case of a boy or an unmarried girl—the father, and after him, the mother:

provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother;

Xxxx ”

(emphasis supplied)

A bare perusal of Section 6(a) shows that ‘ordinarily’ the

custody of a child less than 5 years of age is to be awarded to mother. However, the word ‘ordinarily’ leaves the court with the final discretion to consider the facts and circumstances of each case, before handing over the custody of a child. The entire purpose of 1956 Act, Guardians and Wards Act, 1890 or any other act dealing with the custody of minor child, is to consider the interest and welfare of the minor, as it is the sole and predominant criterion.

In the present case it is evident, at least prima-facie, that the interest of minor child would be best served in case he remains in the custody of father-respondent no 4 instead of his mother-appellant at this stage. Thus, there is no ground to hand over the custody of minor child to appellant.

Apart from the above, we have noticed that the writ in the nature of Habeas Corpus is being misused by the litigants so as to surpass the statutory provisions governing the issue vis-à-vis the custody of a minor child and have been approaching directly to this Court, as if to avail a ‘*short-cut remedy*’. We are of the view that the Ld. Single Judge had rightly relegated the petitioner-appellant to appropriate remedy as available to her under statutory laws, as High Court cannot be converted into a fact finding authority, while exercising powers under Article 226 of the Constitution. It is only under rare and exceptional circumstances that such power can be exercised by the High Court. As observed earlier, present case is not such rare and exceptional case where power under Article 226 of the Constitution is/was required to be exercised.

Before parting with the judgment, we may also observe that present appeal was being entertained on account of the facts noticed in the

In view of the above, finding no merit, present appeal is hereby ordered to be **dismissed**.

(ASHOK KUMAR VERMA)
JUDGE

<i>Whether speaking/reasoned</i>	<i>Yes/No</i>
<i>Whether Reportable</i>	<i>Yes/No</i>