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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **W.P.(CRL) 1179/2025**

ESHA JAIN

.....Petitioner

Through: **Mr. CM Grover & Mr. Kashish
Dhawan, Advs.**

versus

THE STATE OF NCT OF DELHI & ORS.Respondents

Through: **Mr. Rajal Rai Dua & Ms.
Divyangana Kaloiya, Advs.**

CORAM:

HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

HON'BLE MR. JUSTICE HARISH VAIDYANATHAN

SHANKAR

ORDER

23.05.2025

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**CRL.M.A. 16113/2025 (Seeking modification of order dt.
21.04.2025)**

1. The instant application has been filed by the Appellant under Section 528 of the Bharatiya Nagarik Suraksha Sanhita, 2023 read with Article 226 of the Constitution of India seeking modification of Order dated 21.04.2025. The writ petition was one of *habeas corpus* and the same was disposed of on 24.04.2025 with the following order:

“1. The present petition has been filed by the Petitioner- Esha Jain under Article 226 of the Constitution of India read with Section 528 of the Bharatiya Nyaya Sanhita, 2023, *inter alia*, seeking the following:-

“a. pass a direction under articles 226 of the constitution of India read with section 528 of Bhartiya Nyay Sanhita, 2023 for issuance of writ of habeas corpus thereby directing the respondent no. 4 to 6 to produce the master “A.K.” aged about 5 year old i.e., respondent no.7 before this hon'ble court;



b. pass a direction under articles 226 of the constitution of India read with section 528 of Bhartiya Nyay Sanhita, 2023 for issuance of writ of habeas corpus thereby directing the respondent no. 4 to 6 to handover the master “A.K.” to the petitioner before this hon’ble court;

c. pass any other orders or directions which this Hon’ble Court may deem fit and proper in the facts and circumstances of the case, in the interest of justice.”

2. The petitioner has approached this Court for production of the body of her son, who, according to the Petitioner has been illegally taken by the father i.e. Respondent no. 4- Mr. Sumedh Kaushal.

3. Material on record indicates that the marriage of the Petitioner and Respondent no. 4 has been solemnized on 29.11.2023. A child was born on 20.08.2019. The child is therefore above five years of age. Ordinarily, in matters of custody, Habeas Corpus petitions are not entertained. However, keeping the welfare of the child in mind, the High Courts do entertain writ petitions, provided more detailed inquiry is necessitated.

4. The Apex Court in **Tejaswini Gaud and Ors. v. Shekhar Jagdish Prasad Tewari and others [2019] 7 S.C.R 335** has held the following:-

“19. Habeas corpus proceedings is not to justify or examine the legality of the custody. Habeas corpus proceedings is a medium through which the custody of the child is addressed to the discretion of the Court. Habeas corpus is a prerogative writ which is an extraordinary remedy and the writ is issued where in the circumstances of the particular case, ordinary remedy provided by the law is either not available or is ineffective; otherwise a writ will not be issued. In child custody matters, the power of the High Court in granting the writ is qualified only in cases where the detention of a minor by a person who is not entitled to his legal custody. In view of the pronouncement on the issue in question by the Supreme Court and the High Courts, in our view, in child custody matters, the writ of habeas corpus is maintainable where it is proved that the detention of a minor child by a parent or others was illegal and without any authority of law.

20. In child custody matters, the ordinary remedy lies only under the Hindu Minority and Guardianship Act or the Guardians and Wards Act as the case may be. In cases arising out of the proceedings under the Guardians and



Wards Act, the jurisdiction of the court is determined by whether the minor ordinarily resides within the area on which the court exercises such jurisdiction. There are significant differences between the enquiry under the Guardians and Wards Act and the exercise of powers by a writ court which is summary in nature. What is important is the welfare of the child. In the writ court, rights are determined only on the basis of affidavits. Where the court is of the view that a detailed enquiry is required, the court may decline to exercise the extraordinary jurisdiction and direct the parties to approach the civil court. It is only in exceptional cases, the rights of the parties to the custody of the minor will be determined in exercise of extraordinary jurisdiction on a petition for habeas corpus.

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26. The court while deciding the child custody cases is not bound by the mere legal right of the parent or guardian. Though the provisions of the special statutes govern the rights of the parents or guardians, but the welfare of the minor is the supreme consideration in cases concerning custody of the minor child. The paramount consideration for the court ought to be child interest and welfare of the child.

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35. The welfare of the child has to be determined owing to the facts and circumstances of each case and the Court cannot take a pedantic approach. In the present case, the first respondent has neither abandoned the child nor has deprived the child of a right to his love and affection. The circumstances were such that due to illness of the parents, the appellants had to take care of the child for some time. Merely because, the appellants being the relatives took care of the child for some time, they cannot retain the custody of the child. It is not the case of the appellants that the first respondent is unfit to take care of the child except contending that he has no female support to take care of the child. The first respondent is fully recovered from his illness and is now healthy and having the support of his mother and is able to take care of the child.”

The same rationale has been affirmed in **Nirmala v. Kulwant Singh [2024] 10 SCC 595**.

5. The father/Respondent no. 4 and the mother/Petitioner and the child are present in Court. This Court interacted with the father



and the mother, they are both well-educated and both of them have assured this Court that the interest of the child is paramount.

6. The parents have also assured this Court that they will not make the child a victim of their inter-personal differences.

7. Since the child has been traced and recovered, and in view of the judgments noted above, we dispose of the instant writ petition with the following directions:

(i) That the child shall be with the mother from Monday to Friday.

(ii) That the child shall be with the father on weekends i.e. Saturday and Sunday.

(iii) The father shall ensure that the child is picked up after school hours on Friday and dropped back in time, to attend school on Monday morning.

8. The Petitioner and Respondent no. 4 are directed to approach the Delhi High Court Mediation and Conciliation Centre on 25th April at 04:30 PM.

9. The Mediation Centre is directed to ensure that a Senior Mediator is appointed to resolve the differences between the husband and the wife.

10. The writ petition is disposed of with these directions.

11. This Court has not made any observations on the rights and contentions of the parties, in case the parties decide to approach the Court of competent jurisdiction for custody of the child.”

2. Minor problems seem to have arisen in the interim arrangement that had been finalised with the consent of both parties.

3. This Court had also referred the parties to mediation which, unfortunately, has failed.

4. Since the purpose of *habeas corpus* has already been achieved, it is for the parties to approach the Court of competent jurisdiction by filing an appropriate petition for custody and, it is only the Court of competent jurisdiction which can entertain any such dispute and make a detailed inquiry regarding the welfare and custody of the child.



5. It is open for the parties to approach the Court of competent jurisdiction forthwith.
6. As and when, a petition for custody is filed, the concerned Court is requested to consider the relief of interim custody expeditiously after hearing both the parties and taking into consideration the facts and circumstances of present case.
7. This Court has not made any observation on the merits/averments of the present application.
8. The application stands disposed of with these observations.

SUBRAMONIUM PRASAD, J.

HARISH VAIDYANATHAN SHANKAR, J.

MAY 23, 2025/v/va