

**IN THE HIGH COURT OF DELHI**

**FAO No.219/2006**

# Smt. Raj Roshini ..... Appellant  
! through: Mr.Rohit Chaudhary, Adv. with  
Appellant in person.

VERSUS

\$ Shri Surinder Kumar ..... Respondent  
^ through: Mr.Yogesh Kumar Chandna, Adv.  
with Respondent in person with  
Master Anish and Master Siddhant.

% DATE OF DECISION: 03.03.2008

**CORAM:**

\* **Hon'ble Mr.Justice Pradeep Nandrajog**

1. Whether reporters of local papers may be allowed to see the judgment? Yes
2. To be referred to the Reporter or not? Yes
3. Whether judgment should be reported in Digest? Yes

: **PRADEEP NANDRAJOG, J.** (Oral)

1. Before hearing learned counsel for the parties I met the parties in chamber in presence of Master Anish and Master Siddhant.

2. The elder son Master Anish has shown extreme hostility towards his father and in presence of his father has given specific incidents of his father having assaulted not only his mother but even him. Details of the assault have been

given by Master Anish. After initially denying having assaulted his wife and Master Anish, the respondent attempted to argue out with Master Anish that he was provoked into so doing.

3. Master Siddhant has hardly any memories of his father for the reason over 7 years back the parents separated and since then he has been living happily with his mother.

4. Master Anish was born on 24.1.1991. He is aged 17 years and 1 month. Issue of his custody would lose all meaning after 11 months. Master Siddhant was born on 24.6.1996. He is aged 11 years and 8 months.

5. The issue which concerns me in the instant appeal is the order dated 3.8.2006 passed by the learned Guardianship Judge directing appellant to hand over custody of both children to the respondent, who as father, claimed custody of the children.

6. Reason given by the learned Guardianship Judge is that the appellant did not defend the petition. She did not file the written statement. She never cross-examined the respondent.

7. In para 8, learned Judge has noted that his predecessor had examined the children in chamber and that the children informed the Judge their disinclination to be with their father. However, learned Guardianship Judge has opined

that since children were residing with their mother for a long time they could have been tutored.

8. I may note that during chamber hearing, confronted with the situation as afore-noted, I enquired from the respondent whether he is agreeable to have visitation rights. The respondent stated in the negative and insisted upon the custody of his children.

9. The appellant as also the children informed me that the respondent has refused to pay maintenance directed to be paid vide order dated 9.11.2001 passed by the learned Matrimonial Judge as also another order dated 18.11.2003 passed by another Matrimonial Judge.

10. Under the first order, monthly maintenance awarded to the wife is in sum of Rs.2,500/-. The same has to be paid with effect from 27.3.2000. Under second order dated 18.12.2003, monthly maintenance awarded is Rs.3,000/- with effect from 8.7.2003.

11. I note that the first order was passed in a petition filed by the wife which has since been dismissed. The second order has been passed in a petition filed by the husband seeking divorce. The interim order passed has not been challenged. The husband has paid not a penny as maintenance to the wife. His petition seeking divorce has

been adjourned sine die.

12. Both children are conscious of the fact that due to their father not paying a penny for their maintenance they are deprived of the comforts of life.

13. The wife is working as an Assistant in the National Insurance Company. The respondent is likewise working and as per order dated 18.12.2003 is placed in the pay-scale of Rs.6,500 – 10,500 with gross emoluments at Rs.14,205/- as of July 2003.

14. I tried to reason it out with the respondent that if he pays some money for the benefit of his children he would earn their love and regards for him. The respondent responded saying that he has taken loan from his friends to pay for Flat No.G-5/6, Sector-15, Rohini, New Delhi and is repaying the same and hence has no money to spare.

15. It is unfortunate that the respondents wants to eat his cake and have it too.

16. It is unfortunate that the respondent is not willing to pay any money to his wife who is single handedly bringing up the two children.

17. Turning to the merits of the controversy, pertaining to Master Anish, no useful purpose would be served in handing over his custody to the respondent for the reason after 11

months Master Anish would be free from the bondage of minority. He would be free to decide for himself.

18. Master Anish is a young boy aged 17 years. In my opinion, he can form reasonable opinions of matters concerning his affairs. Having spoken to the parties in the chamber I am of the opinion that there is no question of Master Anish being tutored.

19. I note that Master Anish gave specific references to incidents of being beaten by his father, to which, after initial denials, respondent made virtual admissions.

20. If Anish has to stay with his mother I see no reason why Master Siddhant should not stay with his mother for the reason the brothers are well bonded and to separate the two would be unfair and unjust to both.

21. My further reason is that Master Siddhant could not be tutored to say anything for the reason he said nothing. He only told the Court that he has no memories of his father. Indeed, the children parted company with their father 7 years ago. Master Siddhant has truthfully told to this Court the reason for not joining company of his father, being that, he is happy to live with his elder brother and his mother.

22. Proceedings relatable to guardianship or custody have to focus on the interest of the children as the primary

concern of the Court. These litigations have not to be treated as an ordinary lis between a husband and a wife. Lack or absence of pleadings or cross-examination recede in the background when children are prima facie opined to be forming intelligible opinions. Further, the job of the Court is to satisfy itself that the children are not being tutored. Attendant circumstances, like welfare of the children, means of either spouse to give good education to the children etc. has to be kept in mind.

23. Considering the totality of the circumstances I am of the opinion that the impugned order dated 3.8.2006 needs to be quashed.

24. I do so accordingly.

25. On the issue of visitation rights, unfortunately due to the obstinate stand of the respondent who refused to pay any maintenance to his wife, resulting in the children telling the Court that if their father does not want to pay even a penny for their well-being they would not even like to meet their father, I have no option but to deny even visitation rights to the respondent. However, if the respondent pays the maintenance awarded to his wife and children and on children being informed of the same, on proof of compliance of the orders passed by the learned Metropolitan Judge it would be

open to the respondent to move an application in the instant petition praying that at least visitation rights be granted to him.

26. Appeal stands disposed of quashing impugned order dated 3.8.2006.

27. The petition filed by the respondent seeking custody of Master Anish and Master Siddhant is dismissed.

28. No costs.

March 03, 2008  
d.k.bainsla

(PRADEEP NANDRAJOG)  
JUDGE