

Parental Alienation – International and Domestic Perspectives

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Abstract

A child is a product of both love and affection of his mother and father. Deprivation or alienation of either of the parent leaves the child with lack of utmost care and compassionate parenting. However, in cases of custodial battles been fought by the parents, the child is often alienated from one of them leading to unfulfilled common responsibilities of both parents in his upbringing.

The present paper aims to highlight the legal background of parent alienation and how it leads to a negative impact on the child. The authors have made an attempt to understand the laws existing on parent alienation by drawing a comparative of various jurisdictions such as United States of America, United Kingdom, Canada, Kenya, Brazil and India. The paper brings onto focus the lack of strengthened laws in India in the light of parent alienation and discusses the Guardianship Act. Several Indian precedents have also been analyzed wherein the courts have recognised the aspect of parent alienation and have granted justice in furtherance of child welfare.

KEYWORDS: alienation, custodial battles, child welfare, guardianship.

Introduction

“The family is supposed to be our safe haven, but very often it is the place where we find the deepest heartache”

- Iyanla Vanzant, American Lawyer and Motivational Speaker.

The greatest legacy parents can leave for their children are happy memories. When parents get separated, the child is in the custody of one parent. The child's inherent right to be cared for by both parents is immediately compromised. It is also seen that in many cases, the mother leaves the house along with the child or at times the child is left in the custody of the father. When the child leaves the home, he loses his cozy setup, friends, school and his familiar surroundings. When the child is adjusting to this new life, the custodial parent makes an effort to align the child with the parent's own disturbed line of action, subconsciously feeling insecure that the love for the non-custodial parent is like a threat for the child to leave. Comments commence and subtle behavioral indicators develop which can slowly destroy the relationship between the child and the non-custodial parent. This phenomenon is parental alienation or PA.

Alienation can occur in both friendly and acrimonious divorces. There is a tug-of-war between the parents to claim custody in Courts. Custody claims lead to the ugliest of allegations being put forth against each by the parents in order to win the custody of the child. The stage for PA is set when the custodial battle begins.

Divorce and long-drawn custodial battles are not new to the Indian judiciary. Neither is PA. However, PA is scarcely recognized by Indian Courts. Research on this topic in India is virtually absent and this is perhaps one of the reasons that the Courts, in their turn, refuse to acknowledge this dangerous phenomenon.

Various countries have various legal standards vis-à-vis PA. This paper looks at the legal framework of jurisdictions where the “best interests of the child” find favor and also at jurisdictions where “welfare of the child” assumes a paramount status. Through a critical analysis of two recent and path-breaking decisions of the Bombay High Court, the author attempts to drive home the point that there is more danger in sweeping the concept of PA under the carpet rather than taking positive and proactive steps to recognize and combat the phenomenon.

What is Parental Alienation?

Parental Alienation (PA) generally means destroying the relationship between the child and the non-custodial parent. The separated parent indulges in a process whereby the relationship between the child and the targeted parent is degenerated and disrupted. For instance, this could be to use the child as a tool of vengeance against the other parent. This can be harmful to the child.

Justice Graham described PA as “the child’s campaign of denigration against a parent, a campaign that has no justification. It results from a combination of a programme (brainwashing) parent’s indoctrinations and the child’s own contribution to the vilification of the target parent.”¹

Justice Action described PA as “when one parent convinces the children that the other parent is not trustworthy, lovable or caring – in short, not a good parent”.² PA involves the programming of a child by one parent to denigrate the other targeted parent, in an effort to undermine and interfere with the child’s relationship with that parent, and is often a sign of a parent’s inability to separate from the couple conflict and focus on the needs of the child. Such denigration results in the child’s emotional rejection of the targeted parent and the loss of a capable and loving parent from the life of the child.³

Kelly and Johnston state that an alienated child is one who freely and persistently expresses unreasonable negative feelings and beliefs (such as anger, hatred, rejection, and/or fear) towards a parent that are in disproportion to their actual experience of that parent.⁴

¹ *PLC v. CJP* 2007 Can LII 57080.

² Demosthenes Lorandos, William Bernet, and S. Richard Sauber (eds.): *Parental Alienation: The Handbook for Mental Health and Legal Professionals*, Springfield: Charles C Thomas Publishers Limited, p. 9 (1992)

³ Edward Kruk “The Impact of Parental Alienation on Children” www.psychologytoday.com posted April 25th 2013, accessed on August 18, 2016.

⁴ Nicholas Bala “Parental Alienation and The Child’s Voice in Family Proceedings” paper dated July 13, 2011, presented at the Nuffield Foundation, London U.K., <http://www.nuffieldfoundation.org/sites/default/files/files/Alienation%20UK%20July%202013%202011%20Bala%20Presentation.pdf>, accessed August 18, 2016.

Dr. Richard Gardner was the first child psychologist who coined the theory of Parental Alienation Syndrome (PAS) in 1987 in his work *“The Parental Alienation Syndrome and the Differentiation between Fabricated and Genuine Child Sex Abuse.”*⁵ He described PAS as a child’s organized goal to criticize unfairly the other parent. This is because the child is brainwashed by one parent to do so, in addition the child himself fabricates stories to support the alienating parent with whom he is aligned. Gardner believed that in most of the cases for custody, the allegations of sexual abuse were false, that PAS existed where such allegations were alleged, but also claims where such allegation was *bona fide* then PAS did not exist. There being lack of scientific evidence this theory has not been accepted by any other researchers. Even the American Psychological Association has rejected it as being a psychiatric disorder that can qualify for inclusion in the Diagnostic and Statistical Manual (DSM).⁶ In fact one author, Holly Smith has dismissed it as *junk science*.⁷ Alienation is not a syndrome; it is not a mental disorder of the child but a relationship behavior issue. Either parent may be at fault. It need not be only the custodial parent, she argues.⁸ A child may reject an abusive parent as he may have witnessed the abuse or it may be that he has seen the after effects of the abuses or may have been in the custody of the traumatized victim parent. This can be the cause for the rejection of the other parent; this being the fault of the abuser parent himself then the custodial parent cannot be blamed. A child can be shocked by any abusive act which may not be injurious or serious from the perspective of an adult.⁹

Causes and Effects of PA

PA is but one reflection of varied attitudes of people. An emotional or psychological disorder or an unstable attitude of the alienating parent is the cause and the alienated parent becomes the target of this behavior. The inability of the parents to separate their thoughts from the needs of their children is another cause¹⁰. The parents are unable to control the hurt and the pain they have gone through on a provocation, usually an acrimonious separation or previous experience of violence, which leads to their lashing out or re-enforcing alienation against the other parent can also be counted as major factors. The alienating parent due to being abused, treated badly or betrayed before divorce would be unhappy, feel bitter and these feelings continue to

⁵ A. Richard Gardner: *The Parental Alienation Syndrome and the Differentiation between Fabricated and Genuine Child Sex Abuse*. Cresskill: Creative Therapeutics, 1987.

⁶Joan S Meier ‘A Historical Perspective on Parental Alienation Syndrome and Parental Alienation’ *Journal of Child Custody*, Volume 6, pp. 232-257 (2009).
<http://www.dvleap.org/LinkClick.aspx?fileticket=dUauj0V-0Fs=&tabid=181>, accessed on August 19, 2016.

⁷ Holly Smith “Parental Alienation Syndrome – Fact or Fiction? The Problem with its Use in Child Custody Cases” *University of Massachusetts Law Review*, Volume 11, No. 64, pp. 64-99 (2012).
<https://www.umassd.edu/media/umassdartmouth/schooloflaw/students/studentorganizations/umasslawreview/vol1111/smith.pdf>, , accessed on August 19, 2016.

⁸Supra n. 4

⁹ Joan B. Kelly and Janet R. Johnston : *The Alienated Child - A Reformation of Parental Alienation Syndrome*”

Family Court Review, Volume 39 , No. 3, pp. 249-266 (2001).

¹⁰ Supra n. 3.

become more intense as the relationship has to be continued forcibly with the other parent because of their parental relationship to their child.¹¹

In many cases, one of the parents intentionally, or the family member of the parent, takes the support of the child, and together, they behave in such manner so as to destroy the relationship between the child and the other parent.

The alienating parent may go through a personality disorder where by the parent is unable to understand the feelings of the child, fail to realize that the behavior is harmful to the child. The alienating parent may have not adjusted to the separation, there by jealous of the other parent's adjustments to the separation leading to extreme rage of anger towards the other parent. The alienating parent in order to harass the other parent, out of vengeance, due to the belief of victimization is another acknowledged cause.

The alienating parent firmly considers that the other parent will harm the child in one way or the other. The alienating parent believes that the other parent had never cared or had love and affection for the child.¹²

A child rarely wants to break his attachment with his parent unless he is emotionally, physically or sexually abused. Basically, alienation is a child's emotional breakdown, the breaking of the bond of love and attachment between child and non – custodial parent. It can be programmed by the custodial parent due to various factors. The extended family members also play an important role in alienating the non-custodial parent. Consciously or sub – consciously, the alienating parent may not even realize the impact on the child.

A parent to keep his identity strong expects a child to choose a parent. In this process, there is a manipulation of the child to hate his other parent despite the fact that the child needs the love of both his parents. The child is forced to reject the other parent which, in other words, is emotional rejection of the other parent. It can also be said it is an emotional abuse.¹³

A child is a victim when separated from one parent. The child would suffer from long term psychiatric problems. As a child grows, his adolescent behavior is affected. The age of attachment between the child and the parent is 6 months to 5 years which is an important period. Once the attachment developed, thereafter the separation from a parent affects the child at home, school and in society. He is negative in his thought process rather than being positive. To get the attention of a parent, a child can have undesirable behaviors; a child can be disobedient, aggressive and can throw tantrums. The child, as he grows, puts himself into this mode of behavior which may then become his lifestyle or pattern of behavior with people around him. The child then

¹¹Ludwig F. Lowenstein: Emotional Abuse of Children due to Implacable Hostility Between Parents (Is it PA or Something Else?), Southern England Psychological Services, (2009), <http://www.parental-alienation.info/publications/53-EmotionalAbuseOfChildrenDueToImplacableHostility.htm>, accessed on August 19, 2016.

¹²Op. Cit. n. 3

¹³*Ibid* at 12.

starts believing that being aggressive will help him to achieve his goal in life. The child does not develop to think of constructive solutions to social problems.

Anger, loss of impulsive control, clinging and separation anxiety, development of fears and phobias, anxiety and panic attacks, obsessive compulsive disorders (OCDs), depression and suicidal ideation, poor peer relations, feelings of guilt are all common specific problems that associate with PA or PAS.¹⁴ Children often withdraw into their fantasy worlds and report problems of loss, confusion and fear. Motor Tension (Tics, Fidgeting or restlessness) and Psycho - traumatic Disorders have also been observed.¹⁵ They also have shown poor academic performance in schools.

Legal Responses to PA

Decisions regarding children are either taken for the welfare of the child or in the child's best interests. Legal responses founded on the latter doctrine are more germane to the development of a positive jurisprudence in so far as the response to PA is concerned. The former is archaic and has not led to the legal system developing a robust response against PA.

According to the United Nations Convention on the Rights of the Child, the CRC, "in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."¹⁶ The Convention directs the State Parties to ensure that "both parents have common responsibilities for the upbringing and development of the child."¹⁷ The CRC provides that a child should be separated from his or her parent(s) if there is "abuse or neglect of the child by the parent(s), or where the parent(s) are living separately and a decision must be made as to the child's place of residence."¹⁸

The Committee on the Rights of the Child has provided guidance regarding the best interest standard in its General Comment 14.¹⁹ The Committee stated that it is "useful to draw up a non-exhaustive and non-hierarchical list of elements that could be included in a best-interests' assessment by any decision-maker having to determine a child's best interests."²⁰

¹⁴Ludwig F.Lowenstein: Problems Suffered by Children Due to the Effects of Parental Alienation Syndrome,Justice of The Peace, Volume 166, No.24, pp. 464-466. (2002).

¹⁵Chaimstein Berger - "Father? What Father? Parental Alienation and its Effect on Children" 22 Law Guardian Reporter of the Appellate Divisions of The Supreme Court of the State Capital of New York, No.3 (Aug , 2006).

¹⁶Article 3, Child Rights Convention, 1989.

¹⁷Article 18, Child Rights Convention, 1989.

¹⁸Article 9, Child Rights Convention, 1989.

¹⁹ Committee on the Rights of the Child, General Comment No. 14 on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (art. 3, para. 1), U.N. Doc. CRC/C/GC/14 (May 29, 2013), available at http://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf, last accessed August 19, 2016.

²⁰ Ibid, at p. 50

As will be seen in the following pages, jurisdictions in countries where the best interest doctrine is dominant have a more progressive approach and confer parental responsibility on father and mother equally.

Position in the United States of America

In America, post-divorce, for the welfare of the child and equality of both parents, joint custody was considered apt. Joint custody allowed the children to be in contact with both parents and helped the mother to share the task of child care and the father to have equality.²¹

On January 1, 1980, California, in enacting Civil Code sections 4600 and 4601 became the first state in the United States to operate under statutes not only authorizing joint custody awards upon divorce, but also establishing a presumption that joint custody is in the best interests of the child when both parents request it.²² Joint custody works well when both parents cooperate and it confers equal dignity to both parents²³.

The law in UK

The Children's Act, 1989 has given paramount importance to the welfare of the child. The statute in Section 2, states that "in any proceedings in which any question with respect to the upbringing of a child arises, the Court shall have regard to the general principle that any delay in determining the question is likely to prejudice the welfare of the child."²⁴ Each parent will have responsibility if at the time of the birth of the child, the father and mother were married and if they were not married, the mother shall have parental responsibility and the father would acquire parental responsibility in accordance with the provisions of the Act. Section 2 (5) stipulates that more than one person may have parental responsibility for the same child at the same time. Vide Section 2 (6) parental responsibility shall not cease solely on the ground that someone else acquires parental responsibility subsequently. Parental responsibility or any part thereof cannot be surrendered or transferred but a parent can make arrangements for a person to act on his behalf with some or all responsibilities. Such person should already possess parental responsibility for the child²⁵. It must be noted that the making of such arrangements shall not affect "any liability of the person making it," in terms of Section 2(9) and 2(10) of the Act.

Parental responsibility means all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to a child and his property. It also includes the rights, powers and duties, which the guardian of a child's estate would have had in relation to the child and his property. if the parents are married at the time of the birth of the child or subsequently, then both parents have equal rights in the exercise of parental responsibility.

²¹Dinner Deborah: "Divorce Bargain: The Father's Rights Movement and Family Inequalities", Virginia Law Review, Volume 102, Issue 1, March 2016, pp.: 79-152.

²² Nancy K. Lemon: "Joint Custody as a Statutory Presumption: California's New Civil Code Sections 4600 and 4605", Golden Gate University Law Review, Volume 11 Issue 2, (2010) pp.: 485-531.

²³Supra n. 20.

²⁴Section 2, Children's Act. 1989. Available at www.legislation.gov.uk. Accessed on July 5, 2016.

²⁵Section 2 (9) and (10).

The Court in appropriate cases, where the question arises with respect to welfare of the child, may pass orders for care or supervision directing the appropriate authorities in whose local area where the child ordinarily resides to undertake an investigation of the child's circumstances. Such report is to be produced within eight weeks of the Court's direction. In any specified proceeding, the Court shall appoint a guardian *ad litem* for the child as a representative of the child and of his interests. In those circumstances where the child is not represented by a solicitor, and the Court is satisfied that the child has sufficient understanding to instruct a solicitor and wishes to do, a solicitor may be appointed by the Court, in the best interests of the child. The Court can pass child assessment orders for the protection of the child if there is a reasonable cause to prove that the child is suffering or likely to suffer significant harm. The Act makes the taking away of the child without a reasonable excuse, knowingly and without lawful authority from a responsible person an offence punishable by imprisonment up to six months and / or a fine not exceeding level five on the standard scale²⁶.

The law in Canada

Until the late eighties, the law of parental relocation was fairly clear in Canada and a custodial parent was free to move with the children, unless there was some agreement or Court order to the contrary.²⁷ In the nineties, the law adopted a more flexible approach as the Canadian Courts rejected the proposition that the custodial parent had a presumptive right to move with the child and instead opted for the application of a 'best interests of the child' test with no burden of proof allocated to one parent or the other.²⁸

In 1996, the Supreme Court of Canada changed the law of parental relocation yet again and adopted by majority 7-2 in this decision²⁹ wherein Madame Justice McLachlan, explicitly rejected the arguments that Courts should accord deference to the decision-making ability of the custodial parent. Instead, a highly indeterminate and individual case approach to the best interests of the child principle was reasserted. The Supreme Court also stated that the custodial parent's reason for moving must not be assessed by the Court except in the exceptional case where it is relevant to that parent's ability to meet the needs of the child. The Canadian Courts have also ruled that alienation of affection is not a tort.³⁰

The Kenyan Law

The Children's Act, 2001 defines Child as a human being under the age of 18 years. A child under the age of ten is considered a "child of tender years". Guardian is defined in the relevant section as any person who in the opinion of the Court has charge or control over the child. Parent means the mother or father of a child and includes any person legally liable to maintain the child or one who is entitled to the child's custody. In Part II of the Statute there are provisions or safeguards for the rights and welfare of the child. Kenya also follows the best interest of the child doctrine as primary and

²⁶£ 5,000/-

²⁷Wright v. Wright (1973), 1 O.R. (2d) 338 (Ont. C.A.).

²⁸Carter v. Brooks (1990), 2 O.R. (3d) 321 (Ont. C.A.).

²⁹Gordon v. Goertz [1996] 2 S.C.R. 27 (2 May 1996).

³⁰Richard Hugh Frane v. Elanor Margaret Smith and Johnston Smith (1987) 2 SCR 1987.

paramount consideration to safeguard, conserve, secure and promote the rights and welfare of the child.

The statute provides, in Sections 21 to 25 the right to parental care, duties and responsibilities of the child, parental responsibilities (which are defined as “all the duties, rights, powers, responsibilities and authority which by law a parent of a child has in relation to the child and the child’s property in a manner consistent with the evolving capacities of the child.” Sections 24 and 25 which are similar to the law in the United Kingdom³¹ provide that if the parents are married at the time of the birth of the child or subsequently, then both parents have equal rights in the exercise of parental responsibility.

Section 84 deals with restrictions on removal of a child and stipulates where the applicant has provided a home for three years at the time of application, no person shall be “entitled against the will of the applicant to remove a child except with the leave of the Court”.

In addition to the above, the Kenyan legislation is unique because it provides for the rights of the child. These include non-discrimination (Section 5), parental care (Section 6), education (Section 7), religious education (Section 8), health care (Section 9), protection from child labor and armed conflict (Section 10), name and nationality (Section 11), Right to dignity of the disabled child (Section 12), Protection from abuse (Section 13), Protection from harmful cultural rites (Section 14), Protection from sexual exploitation (Section 15) and Protection from drugs (Section 16).

The child has a right to leisure and recreation, protection from torture and deprivation of liberty and a right to privacy as enumerated in Sections 17 to 19.

The law in Brazil

The Civil Code of Brazil was amended in December 2014 to allow joint custody. The only exception to joint custody is when one of the parents moves to the court and desires that he or she does not want the custody of the child. Prior to the amendment, joint custody was the exception rather than the rule. The amendment also specifies the parental duties and expressly provides for the periods the child can stay with each parent. The object of this amendment is to ensure that the child gets a balanced division of time with each parent.³²

In 2010, Brazil made PA a criminal offence vide a new law.³³ An act of PA is defined “as the interference with the psychological formation of a child or adolescent that promotes repudiation of a parent or damage to the establishment or maintenance of ties with a parent, when such an act is practiced by a parent, grandparent, those who have the child or adolescent under their authority, custody, or supervision”.

The Law provides examples of PA, including but not limited to:

³¹The Children’s Act, 1989.

³² www.loc.gov, accessed on July 5, 2016.

³³ Law No. 12,318 of July 26, 2010

- a. waging campaigns of disparagement of a parent's behavior in the exercise of parenthood;
- b. hindering the exercise of parental authority and limiting contact between the child or adolescent and the other parent;
- c. making the right to have a close family life with the child or adolescent difficult;
- d. deliberately omitting relevant personal information about the child or adolescent, including educational, medical, and change-of-address data, from the other parent;
- e. submitting false complaints against a parent, family members, or the grandparents, preventing them from having a relationship with the child or adolescent; and
- f. moving to a remote site with no explanation, in order to hamper the relationship between the child or adolescent and the other parent or the grandparents or other relatives.

Once an act of PA is established, a judge may declare that it has occurred and warn the alienator; expand the regime of family life in favor of the alienated parent; fine the alienator; order counseling; change the custody to or from joint custody; or determine the setting of an interim residence for the child or adolescent³⁴

Indian Law

In the Indian context, the Guardians and Wards Act which was enacted in 1890 by the colonial state, continues the legacy of Common law, of the supremacy of the paternal right in guardianship and custody of children. While Sections 7 and 17 of the Act provides that courts should act in furtherance of the welfare of the minor, Sections 19 and 25 of the original Act subordinated the same to the supremacy of the father. It is only the Hindu Minority and Guardianship Act, 1956, enacted by the independent Indian state that provides that welfare of the minor shall be the paramount consideration superseding all other factors.

The law governing custody of children is closely linked with that of guardianship. Guardianship refers to a bundle of rights and powers that an adult has in relation to the person and property of a minor, while custody is a narrower concept relating to the upbringing and day-to-day care and control of the minor. The term 'custody' is not defined in any Indian family law, whether secular or religious. The term 'guardian' is defined by the Guardians and Wards Act, 1890 as a "person having the care of the person of a minor or of his property or of both his person and property."³⁵ Another term used by the law is 'natural guardian,' who is the person legally presumed to be the guardian of a minor and who is presumed to be authorized to take all decisions on behalf of the minor. It is submitted that this entire rubric prohibits any positive recognition or response to the problem of PA.

Judicial Recognition of PA in India at Long Last?

³⁴Article 6. See: <http://www.loc.gov/law/foreign-news/article/brazil-parental-alienation-criminalized/>, accessed on July 15, 2016.

³⁵Section 4(2), Guardians and Wards Act, 1890.

PA has never been openly recognized by any Court in India thus far. In matters regarding custody, the Court exercises *parens patriae* jurisdiction. It has also been recognized, that, in the matter of custody of minor children, this jurisdiction is more onerous.³⁶ In spite of this, Indian Courts have indirectly acknowledged PA but have failed to take any concrete steps to combat the menace, recently the Bombay High Court in two single judge decisions openly acknowledged and recorded parental alienation and victimization of the children.

The first of these decisions was the case of *Arwa Taha Saifuddin v. Taha Mufaddal Saifuddin*³⁷. The judgment was delivered by Justice M. S. Sonak on December 23, 2015. In this case, Arwa and Fatema were sisters who were married to Taha and Ibrahim who were brothers. The Petitioners were the great granddaughters of the 52nd Dai-ul-Mutalaq of the Dawoodi Bohra Muslim community who had passed away. The husbands were sons of one of the contenders for the post of the 53rd Dai-ul-Mutalaq. The father of the wives was also one of the contenders for the post. The two petitioners and respondents had nine children inter se and the family rift was thus between the maternal and the paternal grandparents for the post of the Dai-ul-Mutalaq.

The petitioners had taken their children to California where the Court returned the custody to the respondents (fathers) and remanded the matter to the local (Bandra, Mumbai) court in India on an issue of jurisdiction. By the impugned orders, the Californian Court ordered joint legal custody. Physical custody was granted to the fathers. The petitioners (mothers) were granted visitation rights up to a week in every thirty days. The mothers were further granted reasonable telephonic or other electronic contact with the children while the children were granted unlimited and unmonitored telephonic and electronic access to their mothers.

In this case counselors were appointed who noted that the children (who were in physical custody of their fathers) were indeed influenced and affected in their views and feelings towards their mothers. The counselors added that there were bonds between the mothers and the children and keeping in view the paramount welfare of the children, access to the mothers should be considered favorably and that counseling should continue.

The High Court Judge who interviewed the children noted that the elder children were indeed influenced by their fathers. “The smaller children though reeling under the similar influence were however more receptive to the prospect of interactions with their mothers”, the judge recorded³⁸. Complementing the children as “wonderful” the judge has observed that “these children like perhaps any other children, seem to wonder as to why they have been placed in such a predicament and why they cannot have a normal childhood, a normal family life, abounding in love and care from both their parents.”³⁹

³⁶*Ruchi Majoo v. Sanjeev Majoo* (2011) DMC 317 (SC).

³⁷ 2016 (2) Mh. L. J. 322.

³⁸ At Paragraph 15.

³⁹ Ibid

The parents were called upon to consider whether some common ground could be arrived at to settle the issues as “it was doubtful if either parent will be the ‘winners’ in the real sense in this unfortunate case, though quite certainly, the children will surely be the ‘losers’ in the ultimate run.” The Court further recorded that the children “were used as pawns upon the Chessboard which the parents have chosen to spread out for themselves”.⁴⁰

Although the parents’ ultimate aim was to win the battle for succession to the Dai-ul-Mutalaq’s post, the paramount consideration of the court was the welfare of the children, the Court noted. After going into great detail as to what constituted welfare and what constituted wishes of the children by considering several Indian and foreign verdicts, the Court was of the opinion that the wishes of the children are not statements made in the din of battle or some prepared statements made after tutoring and that the Court should create, as far as possible, circumstances conducive to the exercise of intelligent preference by the children. Justice Sonak has ruled that one of the most appropriate ways of ascertaining the wishes of the children by means of interviews and interactions with skilled welfare officers or counselors. The judge noted that children are the most important third party in divorce and custody proceedings and the Court should act in the child’s best interests and by using judicial discretion (after considering the relevant parameters of the counselors and welfare officers’ reports) delicately.

Having made a fine analysis of PA and charting the path that is adopted in most other jurisdictions like the US and UK in dealing with PA, Justice Sonak, however in his final order reduced the visitation rights to once a month (compared up to a week in every month) granted by the Californian Court. This is an inherent contradiction in the judgment because the judge noted that the fathers were influencing the children and yet reduced the amount of time that the children get with their mothers.

Another judgment that has dealt with PA and its disastrous consequences is the yet unreported judgment in *Tabbasum Vinchu v. Shafeeq Rahim Pagarkar*⁴¹. In this case, Justice R. P. Sondurbaldota in her judgment⁴² clearly ruled that the father and the paternal grandmother were guilty of serious PA. The minor daughter was seriously alienated from her mother and the father was sentenced to jail and asked to pay ₹ 5,00,000/- as costs to the mother.

The facts of this case, as noticed by the Court were shocking and the Court asked the father to hand over the custody of the daughter to the mother within a week of the Court’s order. The Court observed that it was not only not in the welfare of the child that custody be continued with the father but would also be harmful to her.

⁴⁰ Paragraph 17

⁴¹ Contempt Petition No. 509 of 2013,

<http://bombayhighcourt.nic.in/generatenewauth.php?auth=cGF0aD0uL2RhdGEvanVkZ2VtZW50cy8yMDE2LyZmbmFtZT1DQ1AzMTkzNjEzLnBkZiZzbWZsYWc9TiZyanVkZGF0ZT0mdXBsb2FkZHQ5MTMvMDcvMjAxNiZzcGFzc3BocmFzZT0xOTA4MTYxNDUyNTY=>, accessed on August 19, 2016.

⁴²Dated July 12, 2016.

The child, who was eleven years old at the time of the judgment, had been seriously alienated against its mother by a vengeful father and grandmother. The duo had not only denied access to the child on numerous occasions to the mother but had also falsely alleged that the child was sexually abused by her uncle. False cases were foisted upon the mother and the brother on more than one occasion and the father had on more than one occasion threatened the mother of dire consequences if she tried to meet the daughter.

The child had openly told the mother that her father would be angry and her grandmother would beat her if she accepted gifts or spoke to her mother. As Dr. Gardner has pointed out in his work, this case had all the ingredients of PAS. The husband acted out of revenge. False allegations of sexual abuse were made and the child was victimized in the battle between the father and the mother.

The facts of this case show that the uncle of the child was targeted after the child had spoken to him. The father had repeatedly violated access orders and refused the mother contact with the daughter on the phone. The mother was denied access on several occasions citing false medical reasons and commitments of the child in school. The mother had to take police assistance on almost all occasions to meet the daughter.

The father had even appealed to the Apex Court merely in a bid to avoid the daughter and the mother meeting and had taken the child who was then eight years old to Delhi. The minor child was subject to two medico-legal examinations and psychiatric evaluations after false charges of sexual abuse were foisted on her uncle.

While Justice Sondurbaldota's order sentencing the father to imprisonment for contempt for repeatedly violating the access orders and the imposition of costs is welcome, the fact that has to be noted is that although the Court had nearly two years before the final order noted that the father was a repeated contemnor and that the child was tutored and alienated, the child had to undergo the untold misery and trauma of having to live with her father and grandmother through these years. She was used as a tool and had to suffer the ignominy of being made to play the victim of sexual abuse twice in her life even before she was nine years old. Even in the final order, the father was given a week to hand over custody. No counseling was recommended and the child's scars will definitely continue for life, apart from having permanently lost the right of being brought up by both parents with love and affection.

Conclusion

PA is a universal problem that plagues the life of a child and affects a normal upbringing and healthy adulthood. Although it is as much as a problem in India, domestic law is woefully inadequate in combating the problem. The laws in some other jurisdictions as highlighted in the above analysis with reference to custody and alienation are definitely better models to be emulated by India. In our context, it is the lack of research and the consequent ignorance at the Bar and the Bench that has led to the concept being brushed under the carpet. It is submitted that this development is dangerous and if we do not acknowledge and deal with PA, we would be unfair to our children.

The two judgments of the Bombay High Court analyzed in this paper are perhaps the only two judgments that have dealt with PA directly. Although both have inherent contradictions and the final order may leave a lot to be desired, these two judgments are small steps that deserve kudos and encouragement.

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