

# LEGAL VALIDITY OF PRE-NUPTIAL AGREEMENTS IN INDIA

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Today in this 21<sup>st</sup> century, there is a transformation from traditional norms, where men and women are both working and living independently, especially women who are excelling in every sphere of life which is also creating a status of financial independence for her. These social achievements are also altering the marriage life around the world in many ways and India also, where marriage is considered as a sacrosanct divine blessing of God. Thus nowadays with marriage also comes a sense of financial responsibility and uncertainty for the future, like the marriage life may get disrupted or may even reach a point of breakdown which may turn into a mental and financial trouble for the couple.

Thus to avoid these kinds of conflict came the role of Prenuptial agreements which are now being used widely across the world for determining spousal rights and in event of termination of marriages or death of one of the partners.

*"A prenuptial agreement is a contract between two individuals who are about to get married, outlining the state of finances and personal liabilities in case the marriage fails<sup>1</sup>".*

In the current times due to the expansion of the financial, technological, and real estate sectors, younger couples are opting for prenuptial agreements in India to avoid the risk of sharing assets and incurring unwarranted liabilities. In India also, prenuptial agreements are gaining some ground but not as much as in western countries due to the religious and sacrosanct nature of marriages because of which prenuptial agreements are declared invalid or unenforceable instruments, whereas in some communities in India this prenuptial form of agreement do exist like in Christians and Muslims, where the existence of prenuptial agreements will compel the court to pass a decree on the settlement of property upon divorce<sup>2</sup>

Thus prenuptial agreements can be very beneficial in the long run for couple and their children and are gradually gaining popularity in India.

## Judicial Position On Prenuptial Agreements In India

Prenuptial Agreements in India are not governed by any specific Act or Legislation, rather being contractual, they are dealt with under the provisions of the Indian Contract Act, 1872 (ICA) and they have been declared void in some cases as against to public policy under the Section 23 of the ICA.<sup>3</sup> Yet there are different views on prenuptial agreements in different religions as in Islam prenuptial agreements are very frequent in *Nikah* (marriages in Islam, which is basically a civil contract) and are also common in Jewish religion in *Ketubah* marriages where a writ or deed is made up and given to the bride for the obligation and responsibilities between the couple.<sup>4</sup>

In India, we need to focus on Hindu and Muslim interpretation of prenuptial agreements as they constitute a very large size of the Indian population:-

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<sup>1</sup> Are Prenuptial agreements valid and enforceable in India?, The Economic Times (Oct 13, 2014 8:58 AM), <https://economictimes.indiatimes.com/analysis/are-prenuptial-agreements-valid-and-enforceable-in-india/articleshow/44782040.cms>

<sup>2</sup> Amrita Ghosh & Pratyusha Kar, Pre-nuptial Agreements in India: An Analysis Of Law And Society, 12 NUJS L. Rev. 2 (2019), NUJS Law Review, 1, 6, 2019.

<sup>3</sup> Divyanashi Chandra, Band, Baajaa, 'Bargain': Legal Status of Pre-nuptial Agreements in India, Manupatra, (last visited Dec 14, 2020, 6:13 P.M.), <http://www.manupatrafast.in.nludelhi.remotexs.in/articles/articleSearch.aspx>

<sup>4</sup> Ilana Tahan, The 2,000-year history of the Jewish prenuptial agreement that grants women legal rights, Scroll.in, (Jun 21, 2019 · 11:30 pm), <https://scroll.in/article/927364/the-2000-history-of-the-jewish-prenuptial-agreement-that-grants-women-legal-rights>

### ***In cases involving Hindu marriages:-***

#### ***Tekait Mon Mohini Jemadai v. Basanta Kumar Singh*<sup>5</sup>:**

In this case, the plaintiff and his family had an agreement before marriage with the defendant's family that the husband (plaintiff) would not be competent to take his wife to any other place other than her's father's house and will always carry out his inlaws order. This piece of the agreement was called *Pratijna Patra*. Then after 15 years of living at his wife's house, he left on account of some differences and filed a suit for directing his wife (defendant) to live at his own residence. The court declared this prenuptial agreement to be invalid as against to public policy. The court observed that an agreement on part of the husband that he will not be at liberty to move his wife from his parent's abode to his own abode defeats the clear rule of Hindu law.

#### ***Thirumal Naidu v. Rajammal Alias Rajalakshmi*<sup>6</sup>**

In this case, the court held that a prenuptial agreement to live separately in the future will also go against the public policy. The court observed that an agreement before or at the time of marriage controlling the rights of the parties which the laws confers upon them after the marriage would make the marriage itself nugatory or infructuous.

Thus from the above cases, it can be observed that Indian courts have declared prenuptial agreements void and opposed to public policy on grounds of invalidating the Hindu laws and traditions by regarding marriage as a sacrosanct relationship, Yet there have been cases where prenuptial agreements have been allowed in certain circumstances and have been held valid:-

#### ***In Pran Mohan Das v. Hari Mohan Das*<sup>7</sup>:**

In this case, the person who married a woman on a promise from the girl's father (plaintiff) will gift a house to her daughter as dower after marriage. Then afterward, his daughter and son-in-law sold the house to the defendants, and then the plaintiff sued the defendants for the recovery of the house. Thus the prenuptial agreement to transfer the house to his daughter was held valid by the Honourable Calcutta High Court and the plaintiff was estopped from the recovery of the property from the defendants.

#### ***In Sandhya Chatterjee v. Salil Chandra Chatterjee*<sup>8</sup>:**

In this case, an agreement took place between husband and wife whereas the husband would provide maintenance to his wife, daughter, and son in return for the withdrawal of all the previous allegations registered by the wife in the Matrimonial Court. Thus later on when the husband refused to provide maintenance, the wife filed a suit for the enforcement of her agreement. The court held that the husband and wife had the power to make a contract for separation by way of a compromise of legal proceedings and the contract to pay the wife the amount of maintenance was binding and enforceable<sup>9</sup>.

The above cases demonstrate that prenuptial agreements have not been properly acknowledged and legalized but have been allowed in certain circumstances and the prenuptial agreements are still recognized as contrary to public policy and the sanctity of Hindu law could not be altered.

### ***In cases involving Muslim marriages:-***

Unlike Hindus where the marriage is treated as a sacrament and is more religious than secular in character<sup>10</sup>. In Islam marriage is treated as a civil contract wherein they can put certain terms and

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<sup>5</sup> MANU/WB/0111/1901

<sup>6</sup> 1967) 2 MLJ 484.

<sup>7</sup> MANU/WB/0371/1924

<sup>8</sup> MANU/WB/0057/1980

<sup>9</sup> *Id.*, ¶26

<sup>10</sup> A.E. Thirumal Naidu v. Rajammal alias rajalakshmi, AIR 1968 Mad 201.

conditions like an agreement. The concept like Mehr and Mutah can be found which gives it a contractual nature.<sup>11</sup>

In the case of **Bai Fatma v. Ali Mahomed Aiyab**<sup>12</sup>:-

An agreement was formed between a Mohreadan Husband and his wife to provide maintenance to the wife in the event of any future separation between them. The learned judge while relying on the English law said that “any agreement such as this, which provides for, and therefore encourages, a future separation between the spouses, must be pronounced void as being against public policy<sup>13</sup>”

In another case of **Khatun Bibi vs Rajjab**<sup>14</sup> which was very similar to **Tekait Mon Mohini Jemadai v. Basanta Kumar Singh**:-

An agreement was formed between a Mahomedan husband and his wife before the marriage, in which it was agreed that the husband would always live with her wife at her's residence and not anywhere else, contrary to which, the wife can be remarried by her mother. The courts found that “an agreement by which the husband binds himself to live, presumably for all time so long as the marital relationship continues in his wife's house, is invalid<sup>15</sup>” Thus it would not be in consonance with the Muhammadan Law and would be against public policy.

In the case of **Muhammad Muin-Ud-Din v. Musammat Jamal Fatima**<sup>16</sup>:-

A prenuptial agreement was formed between a woman (plaintiff) and her future husband and father-in-law, for providing future maintenance in the event of any future conflict or separation as the prospective husband in past had mistreated her previous wives. Thus for the protection of the plaintiff, her father had secured maintenance through this agreement. The Honourable court observed that in the current circumstances, the agreement will not be considered violating the provisions of Section 23 of the Indian Contract Act, 1872<sup>17</sup>.

In **Saifuddin Sekh v. Soneka Bibi**<sup>18</sup>

A prenuptial agreement was formed between a Muslim husband(defendant) who already had two wives with Muslim wife(plaintiff), that whenever her husband would bring any of his formerly wives to stay with him without plaintiff's consent, the plaintiff would be at liberty to take the divorce on her own by virtue of the delegation through her agreement. Thus when the plaintiff filed for divorce because of non-compliance with the terms of the agreement by the defendant, then the husband also filed for restitution of conjugal rights. It was held that the agreement is not hit by the provisions of Section 23 of the Indian Contract Act nor it denies the other wives to have their marital relations with the defendant.

In **Bai Fatma v. Ali Mahomed Aiyab** the agreement was entered during the continuation of the marriage, which indicated the possibility that the agreement was entered for the purpose of having separation or for having a second marriage by the husband while in **Muhammad Muin-Ud-Din v. Musammat Jamal Fatima** the agreement was drawn before the marriage for the security of the wife, in the prospect of the future violence or separation which may be meted out against her. Thus in different situations and circumstances, prenuptial agreements have been held valid giving concern to public policy and Muslim laws or invalid in Muslim marriages

### Prenuptial Agreement in Goa

Goa is the only state in India where a Uniform Civil Code exists under the Codigo Civil Portuguese or the Portuguese Civil Code (PCC), 1867, and is the only state where a prenuptial agreement is legally

<sup>11</sup> Mousmi Panda, Prenuptial Agreements: Presence, Judicial Attitude and Roadblocks, manupatra, 70, 72, <http://www.manupatrafast.in.elibraryhnl.remotexs.in/pers/Personalized.aspx>

<sup>12</sup> MANU/MH/0159/1912.

<sup>13</sup> *Id.*, ¶3.

<sup>14</sup> MANU/UP/0134/1926

<sup>15</sup> *Id.*, ¶5.

<sup>16</sup> MANU/UP/0072/1921

<sup>17</sup> *Id.*, ¶2.

<sup>18</sup> MANU/GH/0054/1954

enforceable<sup>19</sup>. These agreements are drawn before the marriage by the couples to secure their assets from the dissolution of marriage. Responsibilities and obligations can also be laid down in these agreements.

The civil code provided under Goa's Civil Code has been appraised a lot, the Supreme Court of India in the case of **Damodar Ramnath Alve v. Shri Gokuldas Ramnath Alve**<sup>20</sup> has said that *"The Code has, thus, proved to be a powerful weapon to create and forge a cohesive, well-knitted and homogeneous society with its citizens living in peace and harmony, as well as to strengthen that basic unit of the society - the family - by safe-guarding the interests of the children and of the widows"*

### Prenuptial Agreements In Other Countries

In the US approximately 50% of marriages end in divorce<sup>21</sup> and due to recognition of the same-sex marriages, prenuptial agreements are on the rise in the US and many other western countries, but still, there is a long way to go. In UK prenuptial agreements are not legally binding<sup>22</sup>, but depending on the circumstances of cases they can be upheld as happens in India. In the United States, prenuptial agreements are legally valid and enforceable in all fifty states. There is also a Uniform Prenuptial Agreement Act (UPAA), which approximately 26 states have adopted, with their own modifications<sup>23</sup>, but some aspects like it should be in writing and it should be drawn before the marriage is common throughout the states.

In China also, prenuptial agreements are legally valid and enforceable through Article 19 of the Marriage Law of the People's Republic of China, 2001, which states that, *"The husband and the wife may conclude an agreement that the property acquired by them during the period in which they are under contract of marriage and the property acquired before marriage shall be in their respective possession separately or jointly or part of the property shall be in their possession separately and the other part jointly"*<sup>24</sup>

Although in China prenuptial agreements are legally enforceable, yet there is a reluctance on the part of citizens to go for a pre-nup, while the statistics show that, "the marriage registration rate of Chinese citizens has been declining since 2014 while the divorce rate has been rising for 16 consecutive years"<sup>25</sup>.

### How to make Prenuptial Agreement Relevant to India?

The first step towards making prenuptial agreements more acceptable to Indian society and the judicial system is by changing the perception of pre-nup agreements. For example, it destroys the sanctity of the marriage or increases the divorce rates is completely wrong, rather it helps to empower the women who when separated by the dissolution of marriage without any financial help, may get a share from husband's estate or may even get maintenance for her own and her children's survival. It can also prevent the husband from dissolving the marriage due to the expenditure in the form of maintenance after divorce.

The second step should be to develop procedural safeguards to prevent misuse of prenuptial agreements as if not implemented properly, it can be used to the disadvantage of either gender. In India, it can take the form of Coercive Control.

The last and most important step is changing the public policy towards prenuptial agreements which is rightly said in **Gherulal Parakh vs Mahadeodas Maiya and Others**<sup>26</sup>, "If it is said that the rules have to be molded to suit new conditions of a changing world but the same is true of the principles of common law generally".

<sup>19</sup> Mousmi Panda, Prenuptial Agreement: Presence, Judicial Attitude and Roadblocks, Volume 1 Issue 1, Jus Dicere Review, 70, 2018, <http://www.manupatrafast.in.elibraryhnl.u.remotexs.in/pers/Personalized.aspx>.

<sup>20</sup> MANU/MH/0535/1996

<sup>21</sup> Prenuptial Agreement: Yours, Mine and Ours, Pride legal, (August 17th, 2020), <https://pridelegal.com/prenuptial-agreement-california/>

<sup>22</sup> The Sun, <https://www.thesun.co.uk/news/3169738/pre-nuptial-agreement-legal-marriage-uk-mel-b/>, (last visited Dec 16, 2020).

<sup>23</sup> Gary A. Debele and Susan C. Rhode, Prenuptial Agreements in the United States,

[https://web.archive.org/web/20170828020040/https://www.iafl.com/cms\\_media/files/prenuptial\\_agreements\\_in\\_the\\_us.pdf](https://web.archive.org/web/20170828020040/https://www.iafl.com/cms_media/files/prenuptial_agreements_in_the_us.pdf)

<sup>24</sup> Marriage Law of the People's Republic of China, 2001, Art. 19 (China).

<sup>25</sup> Foreigners in Shanghai discuss the merits of signing a prenuptial agreement, Global Times, (Sep 10, 2018), <https://www.globaltimes.cn/content/1119028.shtml>

<sup>26</sup> MANU/SC/0024/1959.

## **CONCLUSION**

While India is witnessing some prenuptial agreements in affluent and wealthy society and in other religious communities apart from Hindus, pre-nup is still at a very nascent stage in India and is mostly out of the reach of the common couple because of the absence of specific legislation to deal with it. It has also been held by various courts in the country that it is void or against the public policy and also destroys the fabric of Hindu Marital laws, where marriage is given a very divine concept, but with the changing generations and advancement in the sociological mindset of the society, prenuptial agreement is being used as a safe option for couples who don't want division in their assets.

Thus what is needed is specified laws and regulations to deal with prenuptial, instead of just relying on judicial precedents and English cases. We need a comprehensive approach to develop this prenuptial agreement system in India by taking suggestion from all the stakeholders in the society like establishing a commission, consisting of experts of the subject domain, lawyers and judges, significant religious leaders, and most importantly representatives from the people.