

## **PRENUPTIAL AGREEMENT AND ITS ENFORCEMENT IN INDIA**

Marriage is a social, economic, legal relationship between two genders. In most part of the world, this culturally universal institution is considered a binding contract between two people and acknowledged by religious institutions or validated by State. India being a secular country with many religions, marriages are solemnised in accordance with religion, varied cultural rituals, traditions, and ceremonies. The dissolution of marriage, maintenance, adoption, succession, are therefore governed by personal laws depending on the persons' religion and practice. Societal perspective on marriage and dissolution has also changed vastly over time and has created space for unique and novel measures to address financial security, dependency, and custody of children. One such measure is entering into a prenuptial agreement.

### **PRENUPTIAL AGREEMENT:**

As the name suggests, prenuptial agreement (commonly called prenup) or premarital agreement or ante nuptial agreement is a written agreement entered into by couples before they are married. The prenuptial agreement addresses the financial rights, distribution of assets, liabilities, maintenance and custody of children in the event of separation or divorce by the couples in future. Prenuptial agreements may be beneficial in mitigating the uncertainty post dissolution of marriage by clearly demarking the spousal or marital property, securing the assets and finances of the couples earned before marriage and setting out terms of settlement of property earned together. It also limits the liability of the spouses and saves the couples from legal hassles and negotiations in future, including the alimony and responsibility in raising children.

### **POSITION OF PRENUPTIAL AGREEMENT IN PERSONAL LAWS:**

While the prenuptial agreements are common in the western world, it is not accorded a legal status in India. The concept of marital agreements is not defined in any personal laws in India, for marriage is predominately considered a sacrament, especially under the Hindu Laws. Any agreement promoting separation or altering the tenets of personal laws have been shunned by Courts. In the cases, Tekait Man Mohini Jemadi v. Basanta Kumar Singh<sup>1</sup> and Krishna Aiyar v. Balammal<sup>2</sup>, the Courts upheld the view and declared such prenuptial agreements as void as they are against public policy. However, not all prenuptial agreements are regarded being against public policy by the Courts. In a

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<sup>1</sup>(1901) ILR 28 Cal 751

<sup>2</sup>(1911) ILR 34 Mad 398

handful of cases<sup>3</sup>, the Courts have taken prenuptial agreements into consideration and found that they were not restrictive or promoting separation or related to marriage and hence not opposed to public policy. In a most recent case, *Sunita Devendra Deshpabhu v. Sitadevi Deshpabhu*<sup>4</sup>, the Court considered the premarital agreement for deciding distribution of assets among the parties.

Muslim marriages are contractual in nature (Nikhanama). There is an offer, acceptance and consideration - *Mahr* which is offered to the bride at the time of marriage. The consideration is an economic security to the bride to secure her well-being in case of divorce and the Nikhanama, in that light can be considered as Premarital agreement, although there is no mention of Premarital Agreement in Muslim Law. However, the Courts are careful in not sanctioning legal validity to premarital agreements, if the nature of the agreement is against public policy. In *Bai Fatma v. Ali Mahomed Aiyab*<sup>5</sup>, the Bombay High court observed that ‘an agreement providing for and thereby encouraging future separation between spouses must be pronounced void on account of being against public policy’<sup>6</sup>.

The closest to specific mentioning of prenuptial agreement in personal laws can be seen in The Divorce Act, 1869<sup>7</sup>, where Section 40 of the said act<sup>8</sup> states that the District Court may inquire into “the existence of ante-nuptial or post-nuptial settlements” before passing a decree of dissolution of a marriage. The prenuptial agreement entered into between the Christian couples may be taken into consideration in arriving at conclusion on settlement of property. Further, under the Portuguese Civil Code, 1867 applicable only in the State of Goa, the couple are required to register the properties that each own before marriage and can establish their entitlement over the listed properties and in the event of divorce the couple can have their separate properties without any disputes.

### **PRENUPTIAL AGREEMENT AND INDIAN CONTRACT ACT, 1872**

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<sup>3</sup>*Bai Appibai v. Khimji Cooverji* [AIR 1936 Bom 138]; *Pran Mohan Das v. Hari Mohan Das* [AIR 1925 Cal 856]; *Muhammad Muin-Ud-Din v. Musammat Jamal Fatima*, (1921) ILR 43 All 650

<sup>4</sup>2016(6) BomCR 567

<sup>5</sup>(1912) 14 BomLR 1178

<sup>6</sup>*Ibid* 5

<sup>7</sup>Act relating to the divorce of persons professing the Christian religion

<sup>8</sup>The Divorce Act, 1869

The contractual nature of Prenuptial agreement has also drawn attention to its validity under Section 10<sup>9</sup> of the Indian Contract Act, 1872. However, Section 23 of the Act<sup>10</sup> lays down what consideration and objects are lawful, and what not<sup>11</sup>. As seen in the earlier case laws, if the objects of the prenuptial agreements are against public policy, the Court regards it unlawful and unenforceable. In A.E. Thirumal Naidu vs Rajammal Alias Rajalakshmi<sup>12</sup>, the Court was of the view that the terms of the agreement of couples to live separately was against public policy and hence unenforceable and void contract. Though there is no definition of ‘public policy’ being available and as it varies from generation to generation and from time to time<sup>13</sup>, the object or consideration of the contract is scrutinised by the Courts to arrive at conclusion whether such agreements are against public policy or not.

As there are no specific legal enactment or case laws addressing the enforcement of prenuptial agreement, there exist different views on the same. However, while the prenuptial agreements are not legally binding or executable in India, the Courts may still consider the premarital agreement to reach proper settlement in case of divorce. The intention of couples entering into a premarital agreement are to be carefully captured and meticulously set out, so as to not contradict the prevailing customs and public interest and policy at large. Given the change in outlook and dynamics of marriage and sky rocketing divorce rates, it becomes imperative to provide measures for amicable settlement between the couples and protecting each other’s financial needs and prenuptial agreement may serve as an inevitable tool.

- Shelley Anandhavalli E., Associate Partner at Altacit Global.

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<sup>9</sup>All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void

<sup>10</sup>Indian Contract Act, 1872

<sup>11</sup>a consideration or object of an agreement is unlawful, if it is forbidden by law, or of such a nature that, if permitted, it would defeat the provisions of any law, or the Court regards it as immoral or opposed to public policy

<sup>12</sup>(1967) 2 MLJ 484

<sup>13</sup>ONGC Ltd. v. Saw Pipes Ltd 2003 (2) RAJ 1 (SC)