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## PRE-NUPTIAL AGREEMENTS - LEGAL ANALYSIS IN INDIA

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### ABSTRACT

The concept of marriage has gone through sea change from pre-globalisation to globalisation and liberalisation stage. Law is ever changing and changes with society. Visa versa is also true. Marriages are regarded as sacramental in one religion and a contract in another. There was no room for any agreement in any marriages, whether sacramental or contract. But now the young generation are talking of having formal agreements in case of separation. They are finding it as a solution to the long standing at the courts for separation and custody of children in case of separation. This is called Pre-nuptial agreements. These agreements have legal recognition in many parts of the world. Hence the author of this article is highlighting the matter when it comes to India and its applicability.

### KEYWORDS

Pre-nuptial agreements, Marriage, Contract, Public Policy and Live-in-relationship.

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### INTRODUCTION

Pre-nuptial agreements, also referred to as prenups, are contracts entered into by couples before marriage to determine and agree on issues related to the ownership, distribution and treatment of their assets, property, debts, etc. in the event of dissolution of the marriage through divorce or separation<sup>1</sup>. A pre-nuptial agreement (hereinafter referred as a prenup) is a legal document signed by two consenting adults before they get married. The agreement entails provisions as to what will happen to their possessions and/or their children if they divorce<sup>2</sup>. A prenuptial agreement, also known as a prenup, is a legally binding contract<sup>3</sup> between a couple that outlines how their assets and liabilities will be divided in the event of a divorce, separation, or death. It can also include arrangements for child

custody, visitation rights, and financial support for children.

A prenuptial agreement can help:

Avoid expensive divorce settlements

Keep sentimental items with the person who cares about them

Control who inherits your wealth

Protect business assets

Provide financial clarity

Safeguard individual assets

Ensure you're both on the same page about your future together

In India, where joint family properties and inherited wealth are common, prenups can be especially useful. Prenuptial agreements, known as "binding financial agreements," first became enforceable in Australia in 2000<sup>4</sup>.

## **PRENUPTIAL LAWS IN OTHER COUNTRIES AUSTRALIA**

Prenuptial agreements, known as "binding financial agreements," first became enforceable in Australia in 2000 with the enactment of the *Family Law Amendment Act*, 2000. Part VIIIA of the Family Law Act sets forth particular provisions concerning the oversight to be given to such agreements by family law solicitors. For a binding financial agreement to be binding it must be in writing signed by both parties.

*Black and Black*<sup>5</sup>, this was the first case on prenuptial agreement before the Australian court, but in this case, court held the prenuptial agreement between the parties was affected by lack of free consent as the husband had forced the wife to enter into an agreement. The Family Court of Australia ruled that a prenuptial agreement can be set aside if it is not fair and reasonable at the time of the agreement. The case involved a couple who signed a prenuptial agreement before their marriage, which provided that the wife would receive a small percentage of the husband's assets in the event of a separation. The court found that the agreement was not fair and reasonable at the time of the agreement and should be set aside.

In *Thorne v. Kennedy*<sup>6</sup>, this landmark case in Australian family law established a precedent for

prenuptial agreements. The case involved a couple with a large age and wealth gap, where the man pressured the woman to sign a prenuptial agreement. The court ruled that the agreement was invalid and unenforceable because it was signed under undue influence and unconscionable conduct. The case emphasizes the importance of fairness, voluntariness and full awareness when entering into a financial agreement.

## **BRAZIL**

Prenuptial agreements are normally enforceable in Brazil. See Article 256, II of the Civil Code. Brazilian courts will normally recognize a marriage contract that is valid under the law of the place of the marriage. The Brazilian Supreme Court ruled that a prenuptial agreement cannot waive the spouse's right to claim maintenance, as it is an inalienable right<sup>7</sup>. The court held that a prenuptial agreement must be registered with the relevant authorities to be valid<sup>8</sup>.

## **CANADA**

Prenuptial agreements are enforceable in Canada. Courts in Ontario and other common law provinces of Canada previously considered marriage contracts to be contrary to public policy and unenforceable, but the 1978 *Family Law Reform Act* (now continued in the Family Law Act) specifically authorizes marriage contracts.

*Hartshorne v. Hartshorne*: The Supreme Court of Canada ruled that a prenuptial agreement can be upheld if it is fair and reasonable, and if both parties had independent legal advice<sup>9</sup>.

*Miglin v. Miglin*: The court held that a prenuptial agreement can be set aside if it is found to be unconscionable or if one party did not provide full disclosure of their assets<sup>10</sup>.

*Ontario's Family Law Act* permits a court to set aside a prenuptial agreement or any portion thereof if a party failed to disclose significant assets or liabilities, if a party did not understand the nature or consequences of the contract, or otherwise, in accordance with the law of contract<sup>11</sup>.

## CHINA

Prenuptial agreements are now enforceable in China<sup>12</sup>. In 2003 the Chinese Supreme Court ruled that the types of property which could be the subject of a prenuptial agreement included a party's investment income, housing allowance, insurance, unemployment compensation, and income from intellectual property rights. In *Beijing Li v. Beijing Wang*, the Beijing Higher People's Court held that a prenuptial agreement can be set aside if it is found to be in conflict with Chinese laws or public policy<sup>13</sup>.

## FRANCE

Specific provisions concerning prenuptial agreement are set forth in the French Civil Code<sup>14</sup>. In France, before 1965, the "community of movables and acquisitions" regime automatically applied to all marriages without a prenuptial agreement. This meant that spouses equally owned all movable goods, but the husband managed the property. Since the 1960s, separate property regimes have become more common, which has led to a change in the nature of wealth. This has been seen as a form of female empowerment. Hence, a binding financial agreement must:

Be in writing and signed by both parties

Specify spousal maintenance

State that both parties received independent legal advice

Include a certificate from an independent lawyer

## ISLAMIC NATIONS

In Islam, the prenuptial contract (Arabic *Katb el-Kitab*, Urdu *Nikah-Nama*), has long been established as an integral part of the Islamic marriage, and is signed at the marriage ceremony. It outlines the rights and responsibilities of the groom and bride or other parties involved in marriage proceedings. It must necessarily be a public declaration and cannot be secretive. Both sections 2 and 22 of the *Islamic Family Law Act*, 1984 (Federal Territories) are guiding general provisions which are amenable to prenuptial agreement.

Further, prenuptial agreement has neither been tested in the civil court nor the Syariah court in Malaysia. Thus, any attempt, by the SIS or the parties themselves, to pre-empt the legality of prenuptial

agreements under the Syariah laws would contradict the Syariah "sub-judice" rule and be deemed prejudicial under such circumstances. In summary, the validity of any Taklik agreement or prenuptial agreement must be endorsed by the Syariah court in the respective States. In any event, there is no consensus that a prenuptial agreement is wholly un-Islamic<sup>15</sup>.

## PRENUPTIAL AGREEMENT IN INDIA

In India having traditional and cultural heritage, if it is difficult to conceive idea of prenuptial agreements we do not use agreement/contract in our marriage. We never speak about separation or divorce. But now we are in 21<sup>st</sup> century and talking about gender equality whether economically or value of life rate of divorces has increased. The family courts are burdened and cases are taking years to provide solution which is costing financial and emotional burden.

Amongst Hindu marriage is considered a 'sacrament'<sup>16</sup> or a religious institution rather than a contractual agreement in most beliefs and so is recognized under their personal laws. The word 'sacrament' signifies that once the marriage is instituted the marriage is abiding and inevitably related to a perpetual desire.

In the year 1956 Hindu Marriage Act was adopted where there was provision for divorce. From then, the sanctity of marriage among the Hindus took a significant transformation. It is now no more sacramental. Now there are evidences where couple are entering into prenuptial agreements. The government and legislator insist that prenuptial agreements cannot be legalized because of marriage being sacrament but it not a matter of marriage of just Hindu, India is diversity of religion and a bigger picture has to be thought of here. There are ways without uniform civil court to initiate discussion for the validity of prenuptial agreements<sup>17</sup>.

Amongst the Mohammedans in India, prenuptial agreements were entered to ensure protection of the bride in case of separation. A good illustration is *Nawab Khwaja Muhammad Khan v. Nawab Hussaini Begum*<sup>18</sup> where a contract was entered by the fathers of bride and bridegroom before marriage

that bridegroom father would pay Rs.500 a month in perpetuity for the betel leaf expenses and charged certain properties with payment, with power to the respondent to enforce it, (where this can be termed as prenuptial agreement), and when the husband and wife separated the court ordered that the respondent wife was entitled to enforce her claim. Thus, such instances shows there were prenuptial agreements and were enforced by the courts in India before independence.

### **SUPREME COURT AND PRENUPTIAL AGREEMENT**

India has shown a reluctance to grant legal status to prenuptial agreements. One could characterise India's stance on prenuptial agreements as unusually vague. As the word it suggests that due to civil nature of these agreements, it's quite difficult to infuse it with same religious understanding as given to the sacrament of marriage in Hindu laws. this makes easier for the court to deny the enforcements of such contracts if challenged as most of the time these agreements have no legs to stand on, and the road to enforce it then becomes difficult as there are no guidelines to be provided by the courts or the legislature in case both parties do want to take advantage of the same and since the courts do not want to promote any form of separation of marriage therefore they have a stance to dictate that such agreement are against the public policy of the country and therefore unenforceable<sup>19</sup>.

However, court interpretation has played a major role in the implementation of prenuptial agreements with respect to various religious communities. Notably, in the contemporary discourse around prenuptial agreements in Indian law, social viewpoints have assumed a prominent position, even superseding the viewpoints of the principal parties involved in the issue<sup>20</sup>.

In the case of *Tekait Man Mohini Jemadi v. Basanta Kumar Singh*<sup>21</sup>, was the case before the Calcutta high court wherein, one of the clauses of the a prenuptial agreement mentioned that the husband was not allowed to take away the wife from her mother's house and at all times was supposed to agree to everything as retreated by his mother in law without

disagreeing was found to be void by the courts in the instance of it being against the public policy of the country.. Similarly, a prenuptial agreement requiring the husband to perpetually reside in his wife's house was held to be against public policy by the Allahabad High Court since it was viewed to constitute a restriction on the liberty of the husband as looked upon in the religious text and the Hindu laws of the country as well<sup>22</sup>.

The court again and again has made very clear that any clause in the prenuptial agreements which limit the maintenance in advance to the divorce proceedings will be held against the public policy as well as it restricts the capability of the spouses to take recourse from other matrimonial laws as well. So also, a prenuptial agreement providing for payment of a fixed amount of money to the wife in case of her choosing to leave her husband for whatsoever reason was held to be against public policy by the Madras High Court in *Krishna Aiyar v. Balammal*<sup>23</sup>. Further, the Bombay High Court in *Bai Fatima v. Ali Mahomed Aiyab* held that a prenuptial agreement specifying maintenance for wife in the event of prospective separation, although entered into by a *Mahomedan* couple, was against public policy since the agreement encouraged separation in addition to providing for it. Public policy was also cited by the Jammu and Kashmir High Court in one instance to hold a prenuptial agreement providing that the husband would live like a servant in the house of his father-in-law to be unenforceable<sup>24</sup>. In another instance, a prenuptial agreement providing for separate maintenance for a Mohammedan wife was held by the Calcutta High Court as not opposed to public policy. Similarly, a prenuptial agreement providing for maintenance for the wife in case of future separation was not hit by public policy as per the decision of the Allahabad High Court. An agreement requiring payment of specified amount for leaving the house of the father-in-law and providing for operation of divorce in case of failure to pay the amount was also held to not be against public policy by the Jammu and Kashmir High Court<sup>25</sup>.

Public policy is an unruly horse. The foundation of public policy deeply rooted in common law,

consistently invalidated agreements that were harmful to the public interest. Given the view points of the judges on the breakability of Public policy it should be made a bit clear as to what the understanding of Public policy is. According to a very famous jurist of its time Lord Atkins suggested that the violation of public policy should be used as an excuse only when it is directly affecting the public at large and in no what should be uses to justify the idiosyncrasies if some judicial minds who just refuse to change their meaning to new ideas and changing society at large<sup>26</sup>.

The Supreme Court in *Central Inland Water Transport Corporation case* has held that, "public policy is not the policy of a particular Government; it connotes some matter which concerns the public good and public interest. The concept of what is for the public good or in the public interest or what would be injurious or lawful to the public good or the public interest has varied from time to time. As new concepts take the place of old, transactions which were once considered against public policy are now being upheld by the courts and similarly where there has been a well-recognized head of public policy, the courts have not shirked from extending it to new transactions and changed circumstances and have at times not even flinched from inventing a new head of public policy<sup>27</sup>.

## **PRENUPTIAL AND LIVE IN RELATIONSHIP IN INDIA**

Live-in relationship is generally said to living together without tying the knot. In India, living together before marriage was seen as a crime or offence as per the Indian culture for a long time. Previously, the Hindu Dharma preferred 'Ekapatni Vrata' which means 'one man, one wife' as one of the most holy forms of matrimony, but now people have started to evolve with time and started accepting a few refusing practices.

The live-in relationship concept is not recognized as a legal union in India like some other countries. However, the Supreme Court of India has said that a live-in relationship without tying the knot is not a criminal offence or illegal. Partners living together without marriage do not have the same legal rights

just like married couples but they have legal protection under laws<sup>28</sup>.

Nevertheless Premarital agreements are those in which a prenuptial understanding, prenuptial arrangement, or early understanding (commonly referred to as a prenuptial) is a written agreement entered into by a couple before marriage or a common association that gives them the authority to select and manage a significant number of the legal rights they obtain after marriage, as well as what happens if their marriage ultimately ends in death or divorce. Pre-nuptial agreements and live-in relationships are becoming more and more popular among younger people as opposed to older people. This is partly because younger people are more self-focused than older people and think that couples should test each other's compatibility before entering into a matrimonial partnership, which is a duty that should last until one of them passes away.

## **SUGGESTIONS**

It's time now that the legislatures and the courts recognise these prenuptial agreements as valid and endorse them.

There are chances that one party's consent may not be free. Courts have to look into the details of the agreement and find out the intention of the parties.

In case, any fact suggests that it would cause injustice to one party, the courts should correct the clause and ask for its implementation.

Public policy is an unruly horse. The need is to recognise such agreements under the Indian Contract Act which is secular in nature.

Agreements entered by the parties when they are in live-in-relation should also be recognised on par with the prenuptial agreement.

## CONCLUSION

The days have changed and so is the requirement of prenuptial agreement which is required to be drafted in every live-in relationships and marriages. This will be like a shield for the couples in case of separation, divorce, abuse and dowry. This will also lessen the burden of family courts and long pending cases where the couple are required to stand years waiting for the final decisions. It shall also be a tool for implementing mediation proceedings between the couple. It shall save money and time of people.

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## CONFLICT OF INTEREST

We declare that we have no conflict of interest.

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