

PRE-NUPS: THE NEW WAY OUT FOR INDIA

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INTRODUCTION

Marriage in India, a religious bond between the husband and the wife is, is what the people considered it to be. In ancient India, though husbands dominated their wives did not really opt for taking a divorce due to social pressure but the situation has drastically changed. Divorce used reflected as a taboo. The number of divorce has increased due to various reasons and we can see the complications that occur during the due course of divorce. One can quality the change to the growing number of divorces in the country¹. What makes it unique in our country, however, is the fact that couples forego their rights to the traditional Hindu laws in order to make sure their individual finances are safe. Prenuptial Agreements can be a good tool to tackle the difficulties faced, as it would be an agreement agreed by both the parties having a legal sanction. At present, none of the special legislation recognizes a prenuptial agreement. Indian laws do not look. At marriage as an agreement. At the point when two individuals wed in India nobody anticipates a separation. Furthermore, this is the reason nobody even considers a pre-marital contract. In addition, it is considered as being against the public policy and law cannot recognize anything against public policy.

A prenuptial agreement is an agreement entered into by two people prior to a marriage or civil union. It includes distribution of assets, liabilities and issues relating to the custody of children in case of divorce or breakup of the marriage. Such an agreement helps in avoiding the dispute between the parties in the court of law, after the divorce since all the terms, and conditions are already laid down with the consent of both the parties regarding the status of the

¹ India, L. S. (n.d.). Pre-Nuptial Agreements. Retrieved from <http://www.legalserviceindia.com/article/1284-Pre-nuptial-agreements.html>

assets, liabilities, securities and custody of the children. Prenuptial Agreements being constitutionally valid would mainly help the people belonging to higher class of the society since the estate or the properties owned by them would be recognized specifically as to which is the marital property and which belongs to the particular individual. It should not be mixed up with the historic marriage settlement, which was concerned not primarily with the effects of divorce but with the institution and preserving of dynastic families.²

In a few nations, including Belgium and the Netherlands, the prenuptial understanding not just accommodates the occasion of a separation, yet in addition to secure some property during the marriage, for example if there should be an occurrence of a liquidation. Numerous nations, including Canada, France, Italy, and Germany, have marital administrations, notwithstanding, or a few cases, in lieu of prenuptial agreement. In European countries, this is a common sight that as there was a pre-nuptial agreement between couples; they eventually end up in bankrupt or pitiable state.

A few of the examples for the same can be the cases of sir Paul Mac Cartney, former band member of world renowned pop group Beatles, in the matter as even after few years of his divorce he is still reeling under huge outflow of assets and cash because of his painful break up with his wife. Which also resulted in making his ex-wife Heather Mills as one of the richest women in Britain, thanks to the pre-nuptial agreement that existed between them. There is no shortage of examples as we can also take up the case of Pop diva Britney Spears who after almost three years of marriage broke up with her husband Kevin Federline and because of prenuptial agreement between them, she had to part away with a major portion of her assets.

LEGALITY OF PRENUPTIAL AGREEMENTS IN THE INDIAN COURTS

At present, in Indian courts of law prenuptial agreements remain invalid. On the other hand, they are used maybe for the purpose of evidence and reference in court. Prenuptial agreements are uncommon in India. If entered into, it is considered as any other ordinary agreement. However, if in a pre-nup, the woman agrees to give up her legal rights, the court is likely to strike off

² (n.d.). Retrieved from http://dbpedia.org/page/Prenuptial_agreement

such an agreement as opposed to public policy of India. This is because an agreement by which a party gives up his or her legal remedies is considered void³. There are loopholes in the Indian Legal System, but they are not foolproof. If a person breaks a prenuptial agreement signed on a stamped and notarized paper, it becomes a case of fraud. In addition, fraud is a ground for divorce under the Marriage Act. This has been held in two or three cases but the document is not watertight under Indian Law. Prenuptial agreements are not valid in India. The Contract Act nullifies all contracts with respect to marriage or which has marriage as a consideration. This is why; you will never come across Indian couples entering into a contract.

Interestingly, Hindu marriage is not considered a contract in the way Muslim marriages are. Prenuptial agreements are likely to run over the domain of personal laws (religious laws that govern family law), considered a holy cow in India – so it is unlikely to be allowed very easily. To allow such agreements, new law will have to be created to give validity and delineate what matters can be governed by such agreements and what will continue to be governed by statute or personal law.

Reason behind signing a pre-nup lies in addressing to the problems regarding interests in the property of either spouse or any other material rights. The basic reason is to save ones property or prohibit the spouse from acquiring the property owned by the maker of the instrument. This suggests that the husband would prohibit his wife from demanding any form of money from his husband or vice versa at the time of divorce. In an Indian scenario, there are two concepts through which the person can divest his or her property namely Transfer of property example sale, gift, mortgage, bailment and other such transactions. Second, one is by will but only the property owned by that man or woman not the inherited property.

One of the strongest ground for divorce is Adultery, considering a spouse claiming divorce of Adultery then the divorce is granted by the court and a compensation is paid to the spouse for such a tormenting act of the other spouse. This would cause the well-settled family to shatter. Therefore, the court and the maintenance as per Section 125 of the code of criminal procedure grant a compensation. If prenuptial agreements are made legal, it is believed that it would defeat the provisions of law specifically Section 125 of the Crpc, the Maintenance and Succession Act and more so the Contract Act. Therefore, it is assumed pre-nup would be misused to an extent that would hurt the mere act and protection under marriage act. In addition, As per Indian

³ Section 28 Contract Act 1872

contract act, a contract shall not be based on future and uncertain contingencies. Such contract shall be invalid where the occurrence is highly uncertain. Thus, pre-nup is violation of Indian contract act too.

Therefore, as per the current law, prenuptial agreements are not valid in the court of law as it is considered that a pre-nup leads to invocation of many criminal activities to which Indian laws have been stern from the beginning. However, in many cases Courts have ruled that apart from being a sacrament, marriage is also a civil contract. In addition, it needs to be noted that Section 23 of the Indian Contract Act states that consideration or object of an agreement is lawful unless the court regards it as immoral or opposed to public policy. Non-advocates of pre-nuptial agreements state that it is opposed to public policy as it increases the rate of divorces. There is no legislation exclusively prohibiting prenuptial agreement or there exist a special legislation to allow it. This matter falls under Grey area.

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children in case of divorce or breakup of the marriage. Such an agreement helps in avoiding the dispute between the parties in the court of law, after the divorce since all the terms, and conditions are already laid down with the consent of both the parties regarding the status of the assets, liabilities, securities and custody of the children. Prenuptial Agreements being constitutionally valid would mainly help the people belonging to higher class of the society since the estate or the properties owned by them would be recognized specifically as to which is the marital property and which belongs to the particular individual. It should not be mixed up with the historic marriage settlement, which was concerned not primarily with the effects of divorce but with the institution and preserving of dynastic families.⁵

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PROS OF A PRENUPTIAL AGREEMENT

Some of the benefits of a prenuptial agreement include

- Documenting each spouse's separate property to protect it as separate property,

⁵ (n.d.). Retrieved from http://dbpedia.org/page/Prenuptial_agreement

- Supporting your estate plan and avoiding court involvement to decide property distribution,
- Distinguishing between what is marital and what is community property,
- Documenting and detailing any special arrangements between you and your spouse
- Avoiding extended court proceedings, which result in the time of expensive divorce attorneys,
- Reducing conflicts during a divorce
- Establishing procedures and rules for issues that may arise in the future, and
- Assigning debt, such as credit cards, school loans, and mortgages, to the appropriate spouse to avoid both spouses sharing debt liability
- Pre-nups will definitely cut short acrimonious battles in court and save the court's time

A prenuptial agreement can also cover assets, which have not yet come into the marital estate, for example by clarifying how inheritances will be treated in the event of divorce. Many people fear that discussing these matters, or even bringing up the word prenuptial agreement; will cause turmoil in their relationship. Often times, just the opposite is true. One of the main irreconcilable differences leading to divorce is finances. Talking to your spouse ahead of time regarding finances, property, and marital asset management can avoid many of these disagreements. It brings both on the same page in the beginning so that the issue does not pop up and cause an argument later. Furthermore, discussing these issues nurtures healthy communication. Even if you and your spouse decide a pre-nup is not for you, discussing the mentioned issues is a very good idea.

CONS OF A PRENUPTIAL AGREEMENT

- Although nuptial agreements carry a lot of benefits, there are some downsides that you should consider before creating one
- It is considered as unromantic as you discuss separation of property and finance may hamper your relationship. For this not becoming an issue, the couple need to be open-minded and recognize the importance of a prenuptial agreement.

- The time of discussing a pre-nup is generally when a couple is about to marry, this may also be a drawback in a relationship as discussing what should be the end and how it needs to be tackled at the start of a relationship when it is time of marital bliss can create differences in a marriage. You discuss issues before the marriage that you may not foresee and imagine but the truth is that in a relationship such issues will eventually come up and a discussion prior to marriage can help or you will neglect those issues thinking that the timing is not correct.
- The state law may already cover an issue that may appear in your situation and a pre-nup will not have an overriding effect to it. Different states have laws that determine how property is distributed in the case of a separation or divorce. These laws may be ideal for you. If so, there is no need of going through the trouble of creating a prenuptial agreement. On the other hand, there may be certain issues in your situation that are not covered by the law and would nudge you towards clarifying the issue in a pre-nup if there exist a state law; the parties are bound by it.
- A pre-nup cannot include child support or child custody issues. The court has the final say in calculating child support. The court determines child support based on a "best interest of the child" standard, with several factors at play. A court would never uphold a provision of a prenuptial agreement that dealt with child support
- A court can set aside any provisions it finds to be unfair or not in the interest of justice. For example, courts have set aside provisions that do not allow
- A spouse any share of the other's bank account, if the account holder contributed greatly to that bank account during the marriage. The most commonly set aside provisions are alimony agreements and alimony waivers
- A pre-nup cannot include personal preferences, such as who has what chores, where to spend the holidays, or what school the children should attend. Prenuptial agreements are designed to address financially based issues. Judges grow uncomfortable when they see private domestic matters included in a contract, and will often view the document as frivolous, striking it down.

UK SUPREME COURT RULES IN FAVOR OF PRE-NUPTIAL AGREEMENT

The UK Supreme Court has ruled that a pre-nuptial agreement is binding in the case of a German paper company heir. Katrin Radmacher's ex-husband Nicolas Granatino went to the Supreme Court after appeal judges slashed his divorce settlement from more than £5m to £1m. The Supreme Court said it agreed that in the right case such agreements can have decisive or compelling weight. Lawyers saw the case as a test of whether pre-nup agreements were applicable in law in England and Wales.

The justices dismissed Mr Granatino's appeal by a majority of eight to one. They said that following their ruling, which was published on the Supreme Court's website, "it will be natural to infer that parties entering into agreements will intend that effect be given to them". Lord Phillips, president of the Supreme Court, said the courts would still have the discretion to waive any pre-nup or post-nup agreement, especially when it was unfair to any children of the marriage. Ms Radmacher, who was present at the Supreme Court for the ruling, said afterwards: "I am really pleased with the ruling but saddened at the four-year process that brought us to this point. I am delighted that Britain has upheld fairness. It is important to me that no-one else should have to go through this."

Nicholas Mostyn QC, representing Mr Granatino, had told the Supreme Court the contract was impermissible because it amounted to a court legislating over pre-nuptial agreements which were not recognized in English law.

Mr. Granatino, a French investment banker who became an Oxford University researcher, and his German former wife signed their prenup in 1998. They spent most of their life together in Chelsea, west London, until their divorce in 2007.

Ms. Radmacher's former husband had agreed not to make any claims on her fortune if they split up but was awarded £5.85m by a High Court judge in 2008. She challenged that decision and judges at the Court of Appeal agreed that the couple's pre-nuptial contract should have been taken into account.

The Appeal Court had agreed that Ms Radmacher, thought to be worth £100m, should be protected by the terms of the German marriage contract. Mr. Granatino was fighting to get that ruling overturned. They slashed his lump sum payment to about £1m. Mr. Granatino also received a £2.5m fund for a house, which would return to Ms Radmacher when the younger of their two daughters, aged 10 and seven, reaches 22. Mr Granatino said being forced to accept the smaller settlement would leave him in financial ruin, and he asked the Supreme Court to reverse the decision. In a later statement, the mother-of-two said she believed a pre-nuptial agreement was a "natural part of the marriage process".

She said: "For Nicolas and I, in our homelands - France and Germany - these agreements are entirely normal and routine." "We made a promise to each other that, if anything went wrong between us, both of us would walk away without making financial claims on each other. The promise made to me was broken. I know some people think of pre-nuptial agreements as being unromantic, but for us it was meant to be a way of proving you are marrying only for love."

Her former husband, who made no public comment after the judgment was handed down, hugged his lawyers before leaving court. Before the Court of Appeal judgment was handed down, it was understood pre-nuptial agreements were not recognized in English law. The Law Commission is due to report in 2012 on whether a change in the law should be made to ensure pre-nuptial agreements are fully enforceable.

LATEST CASE LAW DEVELOPMENT ON PRENUPTIAL AGREEMENTS

Kanye West and Kim Kardashian

According to reports, in the event of divorce Kim will receive \$1 million for every year she stays married to Kanye until that sum reaches a cap of \$10 million. She will be allowed to keep the title to their Bel Air mansion, all gifts given to her by Kanye, including her wedding ring, and any income she makes from her TV show, clothing line and appearances.

What's interesting is that there is no child custody clause in the agreement regarding baby North, but Kanye has, purportedly, added some verbiage that bans 'Momager' Kris Jenner from making career decisions that affect Kanye and Kim as a couple.

Angelina Jolie and Brad Pitt

Their pre-nup reportedly stipulates that each of them allowed exiting the marriage with the assets they brought to it, or roughly \$240 million for Pitt and \$185 million for Jolie. Anything the couple makes while married is put into a trust for their six children.

WW v HW⁶[2015]

The High Court gives significant weight to a prenuptial agreement even though it did not provide for the husband's needs. The court took into account the husband's financial conduct.

The approach of the Family Court to prenuptial agreements has changed significantly since the first reported case involving a prenuptial agreement of F v F⁷ (Ancillary Relief: Substantial Assets) in which Thorpe J. gave no weight to the parties' agreement, stating that "in this jurisdiction they must be of very limited significance."

In the years that followed the decision in F v F there was inconsistency and confusion over the courts' approach to prenuptial agreements, which alternated between supports for greater recognition of properly, concluded nuptial agreements and judicial anxiety about the public policy implications of relying too heavily on nuptial agreements. In 2010, that position changed with the US Supreme Court decision in Radmacher v Granatino⁸ is now the "landmark" case providing guidance on how much weight given to a nuptial agreement.

Nuptial agreements are not binding the case on the court. The Supreme Court stated that it can be inferred as a starting point that a party who enters into an agreement intends to give effect to it. The factors however that might detract from the weight to be given to an agreement are a material lack of disclosure; the presence of one of the standard vitiating factors, fraud, duress or misrepresentation; unconscionable conduct, such as undue pressure which falls short of duress; unworthy conduct, such as exploitation of a dominant position and the emotional state of the parties and unfair terms of the agreement.

In the latter case of BN v MA⁹ Mostyn J said that there is nothing inherently unfair about an agreement that seeks to ring fence non-matrimonial property, including assets owned before

⁶ [2015] EWHC 1844 (Fam)

⁷ [1995] 2 F.L.R. 45

⁸ [2010] UKSC 42

⁹ [2013] EWHC 4250 (Fam)

the marriage (pre-marital assets) and assets a party anticipates receiving from a third party during the marriage, through lifetime gift or inheritance. In determining whether the pre-nuptial agreement is fair, where an agreement leaves one party in real need, it is likely to be considered unfair. What constitutes real need appears to have been set at a very low level, per Mostyn J. “need may be interpreted as being that minimum amount required to keep a spouse free from destitution.” It is not however fair to allow an agreement to prejudice the reasonable requirements of any child of the family.

In the recent decision of WW v HW¹⁰, the court gave significant weight to a pre-nuptial agreement protecting the wife’s inherited wealth of some £27 million, where the husband had been fully legally advised and his disclosure in respect of the agreement contained grossly exaggerated income and assets. The husband (H) claimed for financial provision against his wife (W) after the failure of their marriage, despite having signed a pre-nuptial agreement not to claim against her.

The agreement given significant as a weight in the case. Husband was aware the agreement was a condition of Wife marrying him and individual autonomy was important. Any need-based award to Husband would not impact on the quality of life for Wife or the children but would come from the non-matrimonial assets protected by the agreement, so would not be generously assessed. In assessing Husband’s income needs, Husband should not be over protected, as the risks to his future security arose from uncertainties created by his conduct.

The former matrimonial home was worth some £4.365 million. The parties’ contributions suggested that the respective proportions should be 86% to Wife and 14% to Husband.

The court held that the former matrimonial property was held in the above proportions, which meant that the value of the parties’ respective interests was £3,753,900 for Wife and £611,100 for Husband. A housing fund of £1.7 million was to be provided for Husband’s life. A step down when the younger child was aged 23 and Husband was aged 69 would return 45% of the fund to Wife. H was likely to have around £300,000 of his own and had a potential to earn £20,000 per year until retirement. The court found that his reasonable annual net income should be £50,000 per year with a step down to £35,000 at age 65 and Wife was consequently ordered to pay him a lump sum of £215,000 to meet his income needs.

¹⁰ [2015] EWHC 1844 (Fam)

CONCLUSION

It is the duty of the legislature to make changes in the existing laws as the society, especially if it related to a fundamental unit of the society i.e. family. It is to a certain extent clear that nuptials made are no longer in heaven as prenuptial agreements are attaining an increase in the Indian society. Before taking the vows, couples are at present determining as to what to take away if; their marriage does not work out after the wedding. In today's world since the number of divorces has increased and people have started marrying a couple of times the importance of prenuptial agreements have increased considerably. Not just the celebrities but in urban areas prenuptial agreements have become popular in India but lack legal backing. 12% of Indian couples signed a prenuptial agreement in the year 2006¹¹; Delhi had surpassed the list of most prenuptial agreements trailed by Mumbai and Bangalore.

One of the reasons for couples to choose for these agreements is for avoiding the trauma post-divorce, attainment a fair division of assets which stands to providing remedies for marital rape, cheating, philandering and adultery and most important of all regarding custody of children which often is mentally draining.

Under the present law in India, prenuptial agreements come under contract law but courts do not recognise its validity. Indian judiciary has declared such agreements as invalid in *Tekait Mon Mohini Jemadai v. Basanta Kumar Singh*¹² and *Krishna Aiyar v. Balammal*¹³.

Under Section 10 of the Indian Contracts Act¹⁴, prenuptial agreements have as much validity as any other contract, oral or written; just for the reason that litigation has not arisen in this area does not necessitate that considered it is any different and enforcing it is possible. "Courts do take cognizance of a prenuptial agreement if both parties have mutually agreed, are competent to contract, and the prenuptial agreement clearly states the fair division of property, personal possessions and financial assets of the parties".¹⁵

This is another motive to favor prenuptial agreements as this will allow parties to state their intentions and expectations beginning from the marriage beforehand and if the terms of such

¹¹ Statistics by Tata Institute of Social Science.

¹² (1901) ILR 28 Cal 751

¹³ (1911) ILR 34 Mad 398

¹⁴ 1872

¹⁵ Rohan, Prenuptial Agreement is the need for hour <http://www.merineew.com/article/pre-nuptial-contracts-is-the-need-of-the-hour/15711364.shtml> (Accessed on 27/10/2013)

an agreement are similar to the law of the land. 'It will be cherry on the cake, as they accepted likely as valid by the courts in India'. Though prenuptial agreements are on the rise in India, it much guarantee on the terms of uniform acceptability across the nation because of the Indian tradition and culture, where trust places a huge role. At present, they remain invalid in an Indian court of law. However, they in may be used for the purpose of evidence and reference. Prenuptial agreements are rare in India. If entered into, they taken are as ordinary agreements. However, if in a pre-nup, the woman agrees to give up her legal rights, the court is likely to strike off such an agreement as opposed to public policy of India. This is because an agreement by which a party gives up his or her legal remedies considered void. There are loopholes in the Indian Legal System, but they are not foolproof. If a person breaks a prenuptial agreement signed on a stamped and notarized paper, it becomes a case of fraud. In addition, fraud is a ground for divorce under the Marriage Act. This been held in two or three cases but the document is not watertight under Indian Law. Prenuptial agreements are not valid in India. The Contract Act nullifies all contracts with respect to marriage or which has marriage as a consideration. This is why, you will never come across Indian couples entering into a contract. Interestingly, Hindu marriage is not considered to be a contract in the way Muslim marriages are. Prenuptial agreements are likely to run over the domain of personal laws (religious laws that govern family law), considered a holy cow in India – so it is unlikely to be allowed very easily. To allow such agreements, new law will have to be created to give validity and delineate what matters can be governed by such agreements and what will continue to be governed by statute or personal law. Reason behind signing a pre-nup lies in addressing to the problems regarding interests in the property of either spouse or any other material rights.

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¹⁶ Criminal Procedure Code, 1980