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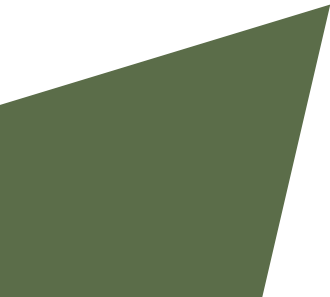
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Pre-Nuptial Agreements: An Approach Towards Togetherness

Shubhangi Nangunoori

ABSTRACT

Every other day in the newspapers and on television, we observe that there are many cases where the wife is cheated by the Husband or vice-versa. It can also be observed that a lot of divorce cases are still pending in the Family Courts and is a very popular area where arbitrations and mediations take place. This is one of the main reasons which led me to take up this topic. In all these cases, where parties decide to take a divorce, they will have a tough time going through this due to the mental trauma and stress that they will have to suffer and in addition to this, the separation of assets and custody of the child is just an add-on burden to the parties. In India, there exists a lot of dilemma as to the validity of such agreements because there have been certain cases where the Court has taken these agreements as one factor while dividing the assets between the parties but in some cases, it was totally against the validity of such agreements. Also, it is not accepted by the Indian Society because it is seen as a bad omen. What is not being understood by the society is that it is merely an approach to provide equal justice to the husband and wife in case of an event of their divorce and should not be seen as a bad start or a bad omen before the sacred event of a marriage. In Goa, these agreements are valid. Likewise, it should be accepted by the rest of India as well. Since this research is an approach towards achieving a good understanding between the families, it is only a step towards togetherness of their bonding and erasing all the misunderstandings. Hence, the title ‘Pre-nuptial Agreements: An approach towards togetherness.’

MARITAL AGREEMENTS

Those agreements that arise during the period of an individual's marriage are referred to as marital agreements. These marital agreements can be divided into three categories based on when the agreements are made, namely:

- Pre-nuptial Agreements
- Post-nuptial Agreements
- Separation Agreements

PRE-NUPTIAL AGREEMENTS

Pre-nuptial agreements (prenups) or pre-marital agreements are a recent change that can be observed in the society and refer to those agreements that are made between a husband and wife or any couple before their marriage, as the name suggests ("pre" nuptial agreements). The common notion that these agreements generally contain details only as to the distribution of assets between the parties to this agreement in case of a divorce is wrong because a prenup contains information not solely regarding assets, but also other clauses such as who will have the custody of the child, whether there should exist alimony or not, treatment of the earnings during the marriage, and any other clause as to the parties discretion. It can be very short or can also go to the extent of 60 pages.

Advantages of a Pre-Nuptial Agreement

- Prenups help in overcoming the stress that is caused to the parties in case of divorce
- Provides for any remedies, if any, mentioned in case of marital rape. The likelihood of this is more because, in the present generation, marriages happen even without knowing the person properly whereas in the olden times, arranged marriages used to occur after knowing a family properly.
- It provides for a fair division of all the assets owned by the bride and groom to be. These assets can include pre-marital assets already owned by the parties to this agreement and can also include the gifts that will be given to the bride at the time of their marriage.
- It has a legal recognition similar to that of any other contract provided that both the parties are eligible to contract and have signed the agreement on their consent. Hence, it can be a valid contract under Section 10 of the Indian Contract Act, 1872.
- When it comes to the question of "who will have the custody of the child, if any, after their divorce", the scope for any controversies in this area will decrease in case of the existence of a pre-nuptial agreement.

- Other aspects like adultery, marital fraud can be taken care of beforehand.
- For couples willing to get married under the Special Marriage Act, 1954, there is an option of enforcing the pre-nuptial agreement provided that it is submitted to the registrar during the tie of their marriage.
- To a certain extent, the presence of a pre-nuptial agreement can ensure that there are no dowry deaths because all the gifts that will be given to the bride during her marriage are mentioned clearly. So, the family members or the groom himself cannot demand more.

Disadvantages of a Pre-Nuptial Agreement

- The society is not willing to accept this agreement as it is seen as a bad omen. Due to this reason, it can be seen as something that opposes the public policy and will not be a valid contract under the purview of Section 23 of the Indian Contract Act, 1872.
- There is no particular law governing pre-nuptial agreements. Due to this reason, it will not become mandatory for the Courts to enforce a pre-nuptial agreement.

Clauses of a Pre-Nuptial Agreement

There can be many clauses in a prenup and there exists no hard and fast rule as to the number of clauses or as to what they should be. Some of the clauses that generally exist and form the main essence of a prenup are as follows-

Separate Property:

Separate property means the property that is owned separately by the husband or the wife. In the event of a divorce, then according to this clause, neither of them can have a say in the other person's own property. This is helpful because the hard-earned property by each of them can be kept by themselves.

Shared Property:

In a few cases, the property is owned jointly or is purchase together by the couple. This clause will clarify as to whether it can be divided or can be sold and the proceeds thereof will be divided. It is left to the couple in which manner they want to treat the property.

Custody of the Child:

The custody can be there with both the parents which happens in most of the cases or can also be only with the sole parent. This will determine who will have physical and legal custody as well. Again, it is up to the couple to decide upon this clause.

Earnings during the marriage:

During the marriage, both the spouses can be earning or only one person can be earning. They can decide as to whether they can keep their earnings to themselves or whether that will also be divided equally. Generally, they prefer to keep their earnings to themselves.

Alimony/Maintenance:

All types of situations should be dealt with by the parties like which one will get maintenance, in case one party starts earning in the future, then will he/she still be able to claim for maintenance. If both the parties are earning, then it is generally preferred that none of them claims for maintenance unless their salary is low and will not be sufficient.

Severability:

This clause, though optional, is suggested because this ensures that just because of one small clause is invalid, the others do not go in vain. If this clause does not exist, it can always be taken advantage of. This ensures that the essence of a prenup is not lost.

Expiry:

The parties can decide the expiry of a prenup because some of the clauses may not hold good after a certain point of time.

EVOLUTION OF PRE-NUPTIAL AGREEMENTS

The concept and idea of pre-nuptial agreements did not originate from India but were adopted from Western Culture. Even in the Western Culture, it is not a recent concept but has come into the picture about 1000 years ago and can be dated back to the old Egyptian Times when all that the women wanted was to ensure that they would not be left without anything (assets) in the event of their divorce or the death of the husband. Later on, it was adopted and changed as per their own requirements in various countries like Germany, Italy, France, and Canada. Few countries even have the existence of matrimonial regimes like in the Netherlands and Belgium. In Australia and The United States, more than 50% of the population is willing to enter into pre-nuptial

agreements and even the attorneys believe that these agreements will help solve divorce cases to a good extent.

In India, there exists a dilemma till date as to whether the idea of pre-nuptial agreements is opposing the public policy and hence if it is, will not be a valid contract as per Section 23 of the Indian Contract Act, 1872 and if it is not, will be a valid contract if entered into by both the parties by their own free consent and will be governed under Section 10 of the Indian Contract Act, 1872. Section 26 of the Indian Contract Act, 1872 also renders prenups void since they are being seen as agreements in restraint of marriage.

Circumstances for Rejection or Invalidity of a Pre-Nuptial Agreement

- It is preferred that the agreement be a written one because, in case of the agreement being oral, there is no proof as to what any of the parties are alleging to be true.
- When it is found out that either of the parties has not signed the agreement by their own free consent, the agreement will neither be valid nor be binding on the parties.
- In an event of not disclosing the true financial status of any party, the agreement will stand invalid.
- If anyone party did not go through the agreement during it's signing as if the bride signs the agreement along with a set of other marital papers, it is not valid.
- In case of unlawful or illegal clauses, the agreement is deemed to be invalid.
- If any of the parties are found not to have been in a proper state of mind during the signing of the agreement, it will not be valid.

IMPORTANCE OF A PRE-NUPTIAL AGREEMENT

The idea of pre-nuptial agreements came into existence in relation to divorce and the idea of divorce comes into existence only after one is married. Marriage, as one can define refers to the union of two souls and the promise made by both of them to live together till death does them apart. It is considered to be a sacred event that usually doesn't come very often in one's life. In the olden times, a marriage was considered to be a bond for seven lives that was decided in heaven, and once married, could not be separated until their death. This was the reason as to the non-existence of prenups during that era because the concept of divorce was itself very disturbing to society.

In comparison to the present-day situation, a diverse view can be seen where marriage is no more considered to be very sacred and has turned into more of a civil contract. In seconds, they can be

broke down and ended. An example of this can be Britney Spears, a famous figure from America who set a World record for getting divorced after 55 hours of her marriage. In cases of such events, divorce creates a void space because the individuals expect that they will have a marriage bond for a considerable amount of time. Pre-nuptial agreements can be seen as the air that can be filled inside the balloon which represents the hollowness in cases of divorce.

A pre-nuptial agreement is such a contract to validate the account of marriage¹. It is not a concept that originated from the Indian culture originally but was adopted from western culture. Studies show that about more than 60% of the population is willing to enter into pre-nuptial agreements in foreign countries like Australia.² The Indians should welcome this concept with open arms because merely not having such an agreement does not conclude that there will be no divorce that might occur in the future. Moreover, it can be seen as a measure to achieve gender justice because men and women are on equal footing. This concept can be seen as a step in order to help in bringing justice to the male society since, after divorce, it is generally the women who get an allowance (alimony) and this puts the husbands in a position of tearing his pockets. It is quite known that all the laws are women-centric because of their rights being suppressed from time immemorial but this, in my opinion, should not allow them to have an unfair advantage over their husbands. One solution to this dilemma can be the enforcement of the prenups, if any, made by the parties because this will be fair and equal to both the wife and husband and will ensure that no party is at an advantage over the other party.

There exists an ulterior motive behind getting married nowadays and an example of such a marriage can be those cases where the bride, in the greediness of acquiring citizenship of another country, gets married to someone. In such cases, there can be no guarantee given that the marriage will survive for a very long time and in case of a divorce, the existence of a prenup ensures that justice is achieved between both the parties since the terms and conditions are decided by their own will and wish.

In the recent past, the majority of the bridegrooms in Punjab and Northern states have married and left their better halves in the country. It was later discovered that all such bridegrooms were married. This will become a perfect scenario to enforce Pre-nuptial agreements in such instances. It ensures that at least little justice will be brought to the spouses in case of an unlikely event which

¹ Matthews v. Matthews, 162 S.E.2d 697, 698-99 (N.C. Ct. App. 1968) (refusing enforcement of an agreement entered during marriage due to lack of consideration).

² Band, Baaja & Prenup: Everything You Need to Know About a Prenup Agreement, THE BETTER INDIA (2018), <https://www.thebetterindia.com/131143/prenup-agreement-marriage-divorce/> (last visited Jan 6, 2019).

is divorce. It also helps in giving the bride's parents confidence that their daughter will not end up with empty hands and can get a part of the assets owned by her husband in the event of cheating.

REFERENCE TO PRE-NUPTIAL AGREEMENTS BY THE COURTS

The cases where there has been a reference made to prenuptial agreements by the Courts in India are as follows-

In the case of *Tekait Mon Mohini Jemadai v. Basanta Kumar Singh* [ILR (1901) 28 Cal 751], when the reference to the prenuptial agreements was made by the plaintiff, the Calcutta High Court did not consider this fact and even the appellate court held that these agreements were invalid.

A similar holding to that of the above-mentioned case can be observed to be given by the judiciary of India in the case of *Krishna Aiyar v. Balammal* [ILR (1911) 34 Mad 398] where the agreements were not held to be valid by the Court.

Sunita Devendra Deshprabhu v. Sita Devendra Deshprabhu [(2016) 6 Bom CR 567]: In this case, the question before the Honourable High Court of Bombay was regarding the separation of assets between the parties. However, it came into the notice of the Court about the existence of a prenuptial agreement and the Court did take into consideration this agreement for the consideration of the aspect of separation of assets.

Through the help of various judgments delivered by the Courts, it can be observed that there is no hard and fast rule as to the circumstances that will lead to the enforceability of a prenuptial agreement but a conclusion can be drawn that the Court takes into consideration the party's intention when they entered into a pre-nuptial agreement and a judgment is delivered based on this. Also, it is observed that in the earlier time like in the cases of *Tekait Mon Mohini Jemadai v. Basanta Kumar Singh* and *Krishna Aiyar v. Balammal*, the Courts refused for such agreements. As the world has evolved with time, the Courts have also started to accept the presence of such agreements as in the case of *Sunita Devendra Deshprabhu v. Sita Devendra Deshprabhu*.

PRESENT LEGAL STATUS IN RELATION TO PRE-NUPTIAL AGREEMENTS

There is no particular law that governs the pre-nuptial agreements in India, a reason for this being the non-acceptability in many regions of this idea. In order to create clarity and reduce the ambiguity in such agreements, there can be a clause inserted under Section 5 of the Hindu Marriage Act, 1955. This amendment can include the necessary clauses that need to exist in a prenuptial agreement and also the conditions for a valid prenuptial agreement like the time during which it

should be made, necessary approval from any authority if necessary. A provision that is similar to this can be interpreted from the Special Marriage Act, 1954 where, with all the necessary documents, a prenuptial agreement also if submitted along with the other documents to the Registrar, can be accepted and enforced at a later stage. The insertion of such a clause will help clear all the possible questions that might arise between the parties in the event of a case regarding divorce or separation of assets. Once again, there will arise a lot of opposition to this concept that might challenge its validity based on this provision being against public policy but it should always be kept in mind that the provision will be inserted for those who are willing to enter into such an agreement and is not mandatory on the part of those who are not willing to have such an agreement. It will just erase the possible misunderstandings. Hence, there should be a provision that should be inserted by the way of an Amendment Act. A similar proposition was made by the Modi Government but it did not have any progress so far.

CONCLUSION AND SUGGESTIONS

A pre-nuptial agreement is not a concept that everyone in society is familiar with. One reason for this situation is that there is no hard and fast rule or a law that is in existence regarding the same. The Courts are not following a certain set of guidelines and have differed from its own decision in a lot of cases related to pre-nuptial agreements. While this is the current scenario in India, this is not so in a few Countries abroad like Scotland, England, and Wales where these agreements are not considered as opposing to the public policy and are enforceable as it has already been observed so in a few landmark judgments. The enforcement of such agreements has shown a drastic change in the manner of division of assets and has a very bright future in all the places if made enforceable. The introduction of this concept in India will definitely show positive affect and will lead to peaceful ways of resolving disputes arising out of the breakdown of the marriage. It is always an advantage to the parties because it is upon their terms and conditions decided mutually that they enter into the agreement and shake hands on its fulfillment. For the population that considers these agreements as opposing to public policy, it should be made clear that this agreement is not binding on every couple that will marry but only on them who enter into such an agreement with their consent. It will also decrease the burden on the Courts because there is already a direction leading the Court to go in a certain way. Also, it can be ensured that no party can dominate the other because of their fiduciary relationship. Hence, this concept should be given a solid form so that it will be a rescue to all those willing to enter into such agreements. Therefore, there should be guidelines as well as amendments laid down by the Courts so that it can be used as a precedent and also that the Courts will not be the authority to misuse this concept and take undue advantage of the parties.