

Prenuptial Agreements: Presence, Judicial Attitude and Roadblocks

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Abstract

With the Changing dynamics of marital relations, skyrocketing percentage of divorce and spouses becoming more and more protective towards their assets, spouses to-be are entering into different types of agreements for regulating their relationship- one of such agreement is the prenuptial agreement. Though, prenuptial agreements have been legally recognized in countries like Canada, Belgium, Netherlands and France; the position of these agreements in India need to be appraised. The purpose of this article is to ascertain the presence and position of these agreements in our country. Through this paper, an attempt has been made to understand the judicial attitude towards prenuptial agreements and identify the hurdles in their enforcement. In order to analyze the stance of Indian courts towards prenuptial agreements, case laws have been relied on extensively. The challenges faced by these agreements and suggestions on overcoming them have also been dealt with.

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Introduction

Prenuptial agreement, premarital agreement or ante-nuptial agreements or most commonly Prenups are the contract entered into by the prospective spouses prior to marriage. The contents of these agreements varies widely, but commonly includes provisions for division of property, conditions relating to divorce, custody of children. These agreements basically try to regulate the marital rights and obligation of the spouses. A prenuptial agreement can also address issues not hitherto provided for by the personal law of the parties in India except under the Special Marriage Act and the Parsi Marriage law i.e. maintenance to husband by wife.² There could be various reasons for the party entering into prenuptial agreements and these reasons vary from securing marital rights, avoiding conflicts relating to children, maintenance, securing property or additional rights in event of divorce. The breach of these agreements by spouses can lead to adverse consequences depending upon the particular agreement.

The courts in India in series of judgment have ruled that prenuptial agreement controlling the marital rights of the other party to be against public policy. One of the pertinent questions arising out of these rulings is the liberty of a person to enter into a contract and the need to regulate these agreements so that they are enforceable in the court of law.

Indian Position on Prenuptial Agreements

In India, there is no specific legislation dealing directly with prenuptial agreements. The validity, conditions and enforceability of this agreement depend on the terms of contract and has to satisfy the requirement of valid contract under Indian Contract Act. Therefore, governing law for these agreements is Indian Contract Act, Marriage law applicable to the parties. Parties' signing these agreements has to ensure that these agreements are reasonable and does not violate pre-existing laws. Though prenuptial agreements are considered to be an increasing trend associated with life style changes and one of the aspects of modernization, but the truth is that some forms of prenuptial agreements existed in pre-independence India. The courts before 1947 also dealt with legality and enforceability of such agreements as we would see in the following cases.

²Devanshi Saxena and Surbhi Lal, *Prenuptial agreements in India: westernization or modernization*, SCC Online.

In the case of *U Po Kha v Ma Gyi*,³ a suit was filed by respondent wife against her husband for a sum of money due to her under an agreement made before the marriage. The agreement was made on 11th April 1924 and they married couple of months later. The respondent sued the husband as he had been paying 24 Rs a month instead of higher rate of monthly allowance if amount agreed upon in the agreement if they separated. Thus, the wife claimed for recovery of certain sum of money due as damages under the prenuptial contract. The court said that the relief claimed by the respondent cannot be granted in law and the application was dismissed.

In *King V King*,⁴ as a condition for entering into marriage, the wife stipulated that husband should reside with her after marriage at a bungalow belonging to her father where she carried on her business. The husband pressed the wife to go with her to which she refused and thus he filed for dissolution of marriage on ground of desertion by the wife. The court held that the husband had no valid reason to go back on the understanding into which he entered, and then to use that as an excuse for trying to put the wife in the wrong. The court thus dismissed the prayer of the petitioner and granted the decree in favor of the respondent wife.

Islam and Prenuptial Agreements

In Islam, marriage is treated as a contract and the parties to a marriage are free to make certain agreements and even put conditions regulating their marriage. It is due to the nature of marriage in Islam, agreements like Mahr and Mutah could be found. All the conditions of marriage such as the amount of dower, mode of payment, questions relating to custody of children, dissolution of marriage, maintenance and any other conditions which the contracting Parties desire to lie down are incorporated in a deed of marriage called Kabin-Namah or Nikah-Namah.⁵ The parties are bound to follow those terms and conditions provided that they are not against public policy, violate the law of the country or run contrary to the principles of Muslim law.⁶

³U Po Kha v Ma Gyi ,AIR 1935 Rang 497 (India).

⁴ [1942] P. 1

⁵ Ameer Ali II, 287; Bokhari 67-68, cited in Nishi Purohit, supra note 3 at 127.

⁶Nanda Chiranjeevi Rao, "Marriage agreements under Muslim law - a weapon in the hands of Muslim Women", *JILL*, Vol. 55 (2001).

Mahr and Mutah

Mahr is a sum of money or other property which the wife is entitled to receive from the husband in consideration of marriage.⁷In Mahr agreements,groom agrees to pay the bride, money or bestow upon her property, jewelry or anything of economic value as a mark of respect. Mahragreements (usually specified in the NikhaNamah) are legally binding and constitute an essential part of Muslims Marriages.

Mutah marriage is a type of temporary marriage practiced by Itanasahari sect of Shia, in which the parties enter into marriage for a specific period for a specified sum as compensation. The parties to the Mutah marriage need to declare their intention to get married and agree to the terms of the marriage.All the conditions and terms of Mutah marriage are accorded prior to marriage and same cannot be altered afterwards.

A comparison between a prenuptial agreementand Mahr agreements indicates that though there are parallels between the two, both are far different in purpose and effect.The former isgoverned by legalprovisions; latter is governedby religious tradition.Moreover, Unlike Mahr, prenuptialAgreements do not provide for a sum of money solely to the wife in order to compensate for inequities in marital law. Rather, prenuptial agreements seek either to protect the separate character of property owned before Marriage or to define the character of any property acquired during the Course of the marriage.⁸Though these agreements cannot in absolute terms be termed as prenuptial but it does gives us insight into some sort of prenuptial agreements that have existed and continues to exist in Muslim communities.

Judiciary on Muslim Prenuptial Agreements

Like Hindu Marriage law, in Muslim law also, the court has refused to enforce an illegal agreementi.e. an agreement which is against public policy, violates any law or runs contract to the Muslim law.Therefore, an agreement by the husband refusing to pay Mahr is against Muslim law and is most likely to be not enforced by the Courts also. A perusal of the cases below would give us insight into the type of prenuptial agreement entered into by the parties, and the judicial decision on same.

⁷Mulla, *Principles of Mohammedan Law* (17th edn) 277.

⁸Lindsey E. Blenkhorn, "Islamic Marriage Contracts in American Courts: Interpreting Mahr agreements as prenuptials and their effect on Muslim women"*SCLR*, Vol. 76:189.

In *HamidunnessaBiwi v. ZohiruddinSheikh*,⁹ in a suit by husband for restitution of conjugal rights, the wife relied on an prenuptial agreement, executed by the guardians of the husband, then a minor, and also by the husband, stating that the husband would always live at his mother-in-law's house and the wife would never be required to leave her parental home or reside somewhere else; the court refused to uphold the agreement. Similarly, in an agreement between the plaintiff husband and wife, stating that the husband would live at father's house after marriage, the court said; it was inclined to view that such agreements are forbidden. The court in this case placed reliance on the earlier judgments in *Tekait Mon Mohini Jemadai v Basant Kumar Singh and Meherally v Shakerkhanoobha and Krishan Iyer v Ballamaland* asserted that they do not find anything in the Mohammedan law either definitely forbids or definitely sanctions an agreement like the present and the commentators also differ in the opinion.¹⁰

Likewise, in *Khatun Bibi v. Rajja*,¹¹ the husband and wife entered into a prenuptial agreement stating that the husband would be living at his wife's house till the continuance of marriage and in the event of a breach of this agreement; the wife would be entitled to divorce. The husband moved the court for the restitution of conjugal rights but the wife sought to rely on this agreement. Since the court had already settled the question of legality of these kinds of agreements in *HamidunnessaBiwi v. Zohiruddin Sheikh* it was declared invalid.

The courts have however upheld agreements which it found reasonable and in consonance with Muslim personal law. Like, an agreement entitling the wife to divorce¹² or entitling her to fixed or separate maintenance on the happening of some contingencies¹³ have been declared as valid agreements by Court. Some of the cases, where the courts have enforced the prenuptial agreement are as follows:

In *Nawab Khwaja Md. Khan vs. Nawab Husaini Begam*,¹⁴ an agreement was executed by father-in-law prior to marriage according to which the bride was liable to get karcha-e-pandan and the said agreement was enforced by the Court. Further, an agreement by the husband to pay a monthly sum of Rs 25/- in addition to the maintenance even if the wife lived

⁹HamidunnessaBiwi v. Zohiruddin Sheikh (1890) 17 Cal 670 (India).

¹⁰Chuto and Anr. v KhudaBux AIR 1916 Sind 10 (India).

¹¹Khatun Bibi v. Rajja AIR 1926 All 615 (India).

¹²Banne Saheb v. Abida Begum, AIR 1922 Oudh 251 (India).

¹³Mahmud Ali v. Ghulam Fatima, AIR 1935 Lah 902 (India).

¹⁴Nawab Khwaja Md. Khan vs. Nawab Husaini Begam (1910) 12 Bom LR 638 (India).

separately was held to be enforceable.¹⁵ An agreement authorizing the wife to divorce her husband in the event of him contracting a second marriage without her consent was upheld by the Calcutta high court.¹⁶In *Razia Begum VSahebzadi Anwar Begum*,¹⁷ there was an alleged prenuptial agreement in which the respondent had agreed to pay his wife a sum of Rs 2000/month as kharcha-e-pandan which was too enforced by the court.

Portuguese Civil Code and Prenuptial Agreement

Goa is the only Indian state where a prenuptial agreement is legally enforceable, as it is governed by *Codigo Civil Portuguese* or the Portuguese Civil Code (PCC), 1867. The Parties to marriage may sign an agreement stating the regime of ownership and this cannot be changed after the marriage. These contracts give Liberty to parties to manage their property according to their will and can protect the assets of both in event of divorce. But these contracts must be drawn before the marriage as not even a single clause can be changed afterwards. While contracting a pre-nuptial agreement dealing with the distribution of property, the couple has three systems available to choose from.

First, if the parties have not signed any contract prior to marriage, then it is the custom of the country that will govern by default and it will be assumed that the couple married under communion of property. According to the provisions of the Communion of Assets Law, the wife will then have equal ownership of her husband's property and the marital property will simply be divided equally between husband and wife.¹⁸*Second*, the parties can also choose a combination of communion and separate assets. All the separate properties of the spouses need to be registered separately and the property that is acquired during the marriage will be considered joint property. In such a framework, Article 1108 of the civil code would apply and the property will be divided equally between the husband and the wife, with each getting 50 % of it in the case of divorce. *Third*, couples rejecting the communion of property can also marry under separate property regime. Each of the property acquired even after marriage can only be registered in the name of one of the spouses and there is no dual ownership.

¹⁵(1929)11, Lah 85.

¹⁶*Moharam Ali v. Ayesha Khatun*, (1915)19 CWN 1226.

¹⁷*Razia Begum V Sahebzadi Anwar Begum* AIR 1958 AP 195 (India).

¹⁸*Mayura Janwalkar, Why marriages are made in goa* (Mar.3,2008, 03:42am) <http://www.dnaindia.com/mumbai/report-why-marriages-are-made-in-go-1154015>

So far, the agreements in Goa also, mostly deal with distribution of property than marital rights and obligations. But, it can be inferred that prenuptial agreements exist under Goan family law.

Prenuptial Agreements among Hindus

Marriage among Hindus is treated as a sacrament and a union for life. As Marriage among Hindus means communion of property and forging of unbreakable ties, any prenuptial agreement indicating dissolution of this union whether of property or marriage is unheard. Unlike, Muslim marriages, there are very few instances of spouses entering into prenuptial agreements. Nevertheless, the courts have found themselves adjudicating upon the validity of these agreements among Hindus also. The judicial decisions below would help us to understand the position of prenuptial agreements among Hindus.

*Tekait Mon Mohini Jemadai v Basant Kumar Singh*¹⁹ is considered one of the important judgments dealing with the aspects of prenuptial agreement among Hindus. In this case, a suit for the restitution of conjugal rights was filed by Hindu husband. The wife relied on an agreement executed at the time of marriage by their guardians, according to which, the husband would always live with his wife at his mother-in-law's house and would not be entitled to take her away. It was held that, under Hindu law, marriage besides being a contract is a sacrament. It being more religious than secular in character and it is the bounden duty of the wife to live with her husband wherever the latter may choose to reside and to submit obediently to the authority of the husband. It was also held that his agreement relied on by the wife, if permitted, would defeat a rule of Hindu law and is opposed to public policy. Justice Ghose while delivering the judgment observed:

an agreement before and at the time of the marriage, controlling the rights of the parties, which the law confers upon them after the marriage, and which if enforced might make the marriage itself nugatory or infructuous and such an agreement would seem to be opposed to public policy. The present agreement permanently controls the rights of the husband, as conferred upon him by the Hindu law and it is against the public policy.

*Krishan Iyer v Ballamal*²⁰ was dealing with the question, whether an agreement between husband and wife to live apart from each other is valid or not said: *Even apart from the Hindu*

¹⁹ *Tekait Mon Mohini Jemadai v Basant Kumar Singh* (1901) 23 Cal 751 (India).

²⁰ *Krishan Iyer v Ballamal* (1911) 34 Mad 398 (India).

Law the agreement, we think, must be regarded as opposed to public policy and therefore not enforceable. It may well be deemed to be forbidden by the Hindu Law.

In *Sribataha Barik v Musamat Padma*,²¹ the petitioner's wife filed a suit against her husband, alleging that, she being the only daughter of her parent, her parent had negotiated with the husband and on getting his consent kept him as gharjamai. The petitioner lived with his wife in his father in law's house but after few years he left the place. The case proceeds mostly on the basis that they should live with her wife in her parent's house according to the alleged prenuptial agreement. The High court of Orissa overruled the decision of the trial court and said the finding and other order of the trial court are untenable, illegal, opposed to public policy. The court placed reliance on *Tekait Mon Mohini Jemadai v Basant Kumar Singh* and ordered that petitioner is liable to pay only for the maintenance of his child and set aside the order of the court below granting maintenance to the wife and directing the husband to stay with his wife in her parent's home.

In *Jamna Das v Smt Sahiboo*,²² there was a prenuptial agreement between the spouses, conveying that in case the provision made for the wife's upkeep after the marriage was insufficient he would pay Rs 50/ month and in appeal, the husband directed to pay the maintenance.

Public Policy and Prenuptial Agreements

*"Public policy is an unruly horse, and when get astride you never know where it will carry you."*²³-Justice Burrough

Indian Judiciary has declared vast number of agreements as unenforceable under Section 23 of the Indian Contract Act as being in contradiction with the personal law and therefore is opposed to public policy. An agreement controlling the rights of the parties, which the law confers upon them after the marriage, and which if enforced, might make the marriage itself

²¹Sribataha Barik v Musamat Padma AIR 1969 Ori 112 (India).

²²Jamna Das v Smt Sahiboo AIR 1975 HP 18 (India).

²³Richard v Mellish, (1824) 2 Bing, 229.

nugatory or infructuous would be opposed to public policy.²⁴ A contract or agreement in a country is not only governed by statute but also by the values, social mores and public policy of that country. Therefore a prenuptial agreement should be in tune with all of them. Chitty states the contract whose object is injurious to marriage would be against public policy:²⁵

Section 23 of the Indian Contract Act provides: “The consideration or object of an agreement is lawful, unless it is forbidden by law, or is of such nature that, if permitted, it would defeat the provisions of law; or is fraudulent; or involves or implies injury to the person or property of another, or the court regards it as immoral, or opposed to public policy”.²⁶

It is a well-recognized principle of contract law that court may not choose to enforce a contract if it violates public policy. It is not enough that the terms of contract have been brought to the knowledge of the other party by a sufficient notice before the court is entered into, it is also necessary that the terms of the contract themselves should be reasonable. If the terms of the contract are unreasonable and the courts consider it to be opposed to public policy, they will not be enforced merely because the parties have expressly or impliedly agreed upon between the parties. Therefore, in our country, it is for the judiciary to decide what type of contracts is against the public policy. Public policy connotes some matter which concerns the public good and the public interest.

There may be various reasons why the court will not enforce a contract which offends public policy. First by refusing to enforce the contract, the court hopes to deter the others for making similar contracts. Secondly, the court does not want to assist the promise by permitting him or her to use the judicial system to enforce a contract that violates public policy.²⁷

The concept of what is for the public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time.²⁸ Unfortunately, the Courts sticks to traditional approach in dealing with matters related to marriage, divorce. But, what it is to be deduced from the precedents is that none of these judgments declares that these agreements are not at all enforceable thus retaining the scope of these agreements.

Liberty to Contract

²⁴ Tekait Mon Mohini Jemadai v Basant Kumar Singh 181 SCC 2002 (India).

²⁵ Chitty on Contracts, 28th Edn., 838.

²⁶ The Indian Contract Act, Act No. 9., 1872, Section 23 (India).

²⁷ Barbara L. Atwell, “Surrogacy and Adoption: A case of Incompatibility”, CHRLR, 774(2002-03).

²⁸ Central Inland Water Transport Corp. Ltd v Brojo Nath Gangnguly, 1986 AIR 1571.

Article 21 uses crucial expression called personal liberty. 'Personal liberty' in Article 21 is of the widest amplitude and it covers a variety of rights which go to constitute the personal liberty of man.²⁹The personal liberty not only means the right of free movement but also the right to other civil liberties like contracting with other parties. Thus, in a civilized society, personal liberty would also include the liberty to enter into a contract of one's choice and the freedom to determine the terms of marriage and its consequences.

Section 23 creates a limitation on the freedom of a person in relation to entering into contracts and subjects the rights of such person to the overriding considerations of public policy and the others enunciated under it.

Under Art. 226 of the Constitution, a person can approach the high court for the enforcement of its legal rights under a contract. But it has to be understood that the claim for the legal right would depend upon the validity of such right and not each and every right. The courts have been unwilling so far enforcing these type of agreement as it would be treated as invalid in courts of India and its conclusion cannot be challenged on the ground that it involves encroachment on the citizen's freedom to enter into any contract he likes.

Overcoming Hurdles

There are some possible hurdles that a party may face in enforcing prenuptial agreement in the court of law. The prenuptial agreements are hit by the Section 23 of the Indian court and for a prenuptial agreement to be enforceable it has to be legally recognized.

Firstly, the spouses must draft the agreement to meet their specific requirements. They should make sure that it does not go against the public policy or violate the marriage laws by which they are governed.

Secondly, in countries, where prenuptial agreements are legal, there is either specific legislation or suitable amendments are made in marriage laws to legally recognize them. In India also, there should either be a law specifically dealing with it or amendments should be made to the marriage laws. Testing the validity or enforceability of prenuptial agreements according to the provisions of the India Contract Act is not correct.

²⁹Maneka Gandhi v Union of India, AIR 1978 SC 597 (India).

Thirdly, while entering into prenuptial agreements, substantive and procedural fairness is also to be kept in mind. Even if the prenuptial agreements become enforceable, one of the impediments is regulation of these contracts. In countries, where prenuptial agreements are legally valid and enforceable, there are following conditions that has to be fulfilled.

1. The agreement should be in written and recorded.
2. The parties should be competent (age and consent) to contract.
3. The agreements should be reasonable and strengthen the respective right of both the parties.
4. Full and/or fair disclosure at the time of execution.
5. Provisions for termination of Contract should also be incorporated in the agreement. Agreement must be in writing and must be executed voluntarily.

Finally, for a prenuptial agreement to be treated as valid there should be acceptance by the people because it is ultimately the people who would be bound by these agreements. India is still by and large not ready to give place to prenuptial agreements and there are only a few people from the affluent families who enter into these agreements.

By analyzing various cases covering a span of time, I have arrived at the conclusion that though prenuptial agreements have by far not received any positive response from Indian courts, there is no precedent completely prohibiting them. In Muslim law, a certain type of prenuptial agreements like Mahr and Mutah agreements have been allowed. In Goa, spouses to- be have the liberty to enter into prenuptial agreements and choose the property regimes that suits them best. In my research, I found most of the agreements to be in conflict with the marriage laws, Personal laws of the parties or against the public policy.

As our society is still caught in the net of public policy and personal law, it is unlikely that prenuptial agreements will see the light of day anytime soon.

Conclusion

The reason prenuptial agreements continue to be a far-fetched idea is because of the complex nature of marriage in our country, unlike the western society. It is a concept relatively new to India as compared to its western counterparts and in the present social setup and prevailing precedents, it is unlikely to be taken up either by the legislators, people or the courts. Due to the existence of Mahr and Mutah agreements among Muslims and uncodified Muslim

personal law, the scope for development of prenuptial agreement is far more in Muslims law. On the other hand, it is rather difficult to incorporate such provisions in Hindu marriages. Mahr and Mutah agreements are not governed by any codified law but the religious codes of the community practicing it and hence, cannot go beyond it

These agreements are foreign to our country and therefore, enforcement has always been an issue and continues to be so. In almost all the cases where prenuptial agreements were declared void by the court, it was due to the conflict with marriage laws or were against public policy. A well drafted prenuptial agreement ensuring substantive and procedural fairness is likely to be enforced by the court.

The analysis of the cases also depicts that regardless of enforceability or non-enforceability of these agreements, courts have dealt with the prenuptial agreements in some way or other. The courts might recognize agreement that complies both with the public policy and the Hindu marriage act and marriage laws of the parties. The proponents of prenuptial agreements argue that enforcement of prenuptial agreements promotes stability, provides greater negotiating power to women and secures rights of both the parties in a marital relationship. The validity of this argument can only be ascertained once these agreements are allowed to operate in India.