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LEGAL VALIDITY OF PRE-NUPTIAL AGREEMENTS IN INDIA- Nupur Manshani¹**ABSTRACT**

As we're well aware that our nation prohibits the practice of pre-nuptial agreements, known as "pre-marriage agreements" commonly. Although our nation is filled with diverse groups following diverse religions, customs, ceremonies and trends, one thing that binds us all together is our faith and respect for each other. In a country like ours, marriage is worshiped as a sacred thread. And it is believed that this bond is a bond tied for life. Therefore, questioning the existence of one's marriage and moreover setting divorce criteria is deemed to be unethical and against our religious beliefs.

This is a mindset which has been passed on from generations to generations and is said to preserve the sanctity of Indian marriages. But as the times are passing, India too is delving into the modern world. The new generations look at these agreements as something which should be must if one wants to secure his/her future. They are a group of practical, well set minds which believe that the future is enforceable and the financial independency of an individual is a must to survive. In the following project, we will learn how our Indian constitution deems this practice as illegal and invalid. We will also see why they consider it to be so. Learning about every perspective will help you decide the pros and cons of this agreement.

Chapter 1: A Brief Review on Pre-Nuptial Agreements in India**What is an agreement?**

Before understanding pre-nuptial agreements, we need to know what is an agreement. In India, agreements are defined in the Indian Contracts Act, 1872 under Section 2(e) as, "Every promise and

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every set of promises, forming the consideration for each other, is an agreement.”²

What are Pre-nuptial agreements?

In simple language, Pre-Nuptial agreement can be described as an agreement which is made prior to a marriage by the couples. A prenup basically includes that in case the husband and wife get divorced/separated what will be the share of assets and liabilities between them and it also looks into matters of custody of the children. This agreement is generally entered into by couples to set a financially safer future for them, just in case something happens.

The Indian scenario

In India, Pre-nuptial agreements are not legally enforceable. In our country, marriage is something which is considered to be more sacramental than legal. Our judicial system thinks there does not exist a need for these agreements because India is a country where the bond of a marriage is treated like a religious bond rather than a legal bond.

Indian Contract Act, 1872 under its Section 10 defines contract and a pre-nuptial agreement fulfills all the obligations for this agreement to be a contract. But if we look at Section 23 of the same act, we can see it contains certain provisions which make an agreement unlawful, one of them being- “opposed to public policy”, which therefore makes these pre-nuptial agreements void.

The sacramental value the Hindu marriage holds in our country and its extreme pristine nature makes this agreement opposed to public policy.

As the Indian society is progressing, young couples are keen to enter into prenups, to go about with the idea of marriage in a more practical way. As more and more women are getting independent, they see this as a safe future point. Looking at the rising rates of divorce people have now started considering as a positive thing.

The Indian Judicial system has progressed a lot. Many outdated laws are changing every day. It is also trying to accept and accommodate developments through various judgements.

If we look at it in a simpler way, we can easily make out how essential it is with the continuous rise in divorce cases amongst millennials. Marriages are a sacred bond, yes. But in this era when we are teaching our daughters to be independent, then prenups are the safest way. For all his vision and

2. Cunningham, H. and Shephard, H., 1915. The Indian Contract Act, No. IX Of 1872. Madras: Published by th
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ambitions, Jeff Bezos (Amazon Founder) with a net worth of \$137 Billion approx., may not have ever imagined that he would be divorcing his wife, Mackenzie Bezos one day.³Lack of a pre-nuptial agreement caused him to give half of his estate as alimony to his wife.

Chapter 2: Cases related to Pre-Nuptial Agreements in India

Tekait Mon Mohini Jemadai vs Basanta Kumar Singh⁴ on 20 March, 1901

In this case, the plaintiff and defendant entered into a contract. The terms of the contract stated that the plaintiff would after marriage, forever reside in the defendant's house and his parents would never propose to take their son back to their own house. And their son put down in the agreement that he agreed to all those terms and that he would live in his wife's house for the rest of his life. It was signed by the plaintiff.

The contract went on for 15 years and the plaintiff resided in his wife's house. But eventually they had an agreement and the plaintiff demanded to shift back in his own house. He proposed the same to his wife and asked her to come along.

This argument resulted in the present suit. The defendant stated that the plaintiff was bound to an agreement to stay in her house and by proposing the deal of living in the plaintiff's house, he was breaching the contract.

The Madras High Court in this following case held that these kinds of agreements which required a husband to stay in the wife's house were deemed to be against public policy under section 23 of Indian Contract Act, 1872. Hence, the agreement was declared to be void.

Thirumal Naidu v. Rajammal Alias Rajalakshmi⁵, 1967

This was another case describing conjugal rights of a husband and wife. In this the case revolved around a husband and a wife living separately would or would not apply conjugal rights in a marriage. The court placed reliance on the Krishna Aiyar case and opined that as marriage under Hindu law is not merely a contract but is sacramental in nature, a prenuptial agreement for future

3. Legalserviceindia.com. 2020. Pre-Nuptial Agreements in India. [online] Available at: <http://www.legalserviceindia.com/legal/article-970-pre-nuptial-agreements-in-india.html>

4. Tekait Mon Mohini Jemadai vs. Basanta Kumar Singh [1901].

5. Thirumal Naidu v. Rajammal Alias Rajalakshmi [1967]

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separation is contrary to the public policy and therefore, invalid.⁶

To put in a pre-nuptial agreement the agreement of living separately is invalid too. Agreements of separation between a husband and a wife in a Hindu marriage go contrast to the public policy review and hence were declared void again in this case too.

“The Hindu law upon this subject still retains its archaic character. Marriage in that law is not merely a contract but also a sacrament, and the rights and duties of the married parties are determined solely by the law, and are incapable of being varied by their agreement.”⁷ is basically the crux of this whole judgment.

Sirbataha Barik vs. Musamat Padma⁸, 1968

The facts of this particular case involved the husband paying his wife 40/- monthly for the maintenance of herself and their child because of living separately. Before the marriage, an agreement was signed which stated the husband would reside in his father-in-law's house. With time, arguments started between the two resulting in major fights among the husband and the in laws due to which he left. He shifted to his own home.

The suit arose after this when the wife asked for a monthly maintenance but the husband did not want to do so.

The Orissa High Court in this case referred to the Tekait Mon Mohini Jemadai vs. Basanta Kumar Singh case. It was also said that this kind of arrangement of living separately is against the customs of Hindu Law. According to the Hindu Law, a wife is supposed to stay with his husband wherever he chooses to reside. And this is an obligation rather than a moral duty. Thus, living separately was declared as void as being against to the public policy.

Chapter 3: Pre-Nuptial Agreements in Muslim marriages

In the Muslim community, marriage is declared as a civil contract. Their contract for marriage clearly

6. 2020. [online] Available at: <<http://nujlawreview.org/wp-content/uploads/2019/12/12-2-Ghosh-and-Kar.pdf>> [Accessed 22 December 2020]

7. Scconline.com. 2020. SCC Online | Session Expire. [online] Available at: <<https://www.scconline.com/Members/SearchResult.aspx>> [Accessed 22 December 2020].

8. Sirbataha Barik vs. Musamat Padma [1968]

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states everything about their culture as well as the Islamic faith. Thus, a pre-nuptial agreement in Muslim marriages is thought to be very beneficial. It helps in protecting the spousal privilege. Muslim marriages generally have the ritual of giving/taking large sums of dowry, which is to put in the contract. To learn about the pre-nuptial agreements in Muslim marriages, we will look at the cases below.

Invalid Pre-nuptial agreements-

Bai Fatma v. Ali Mahomed Aiyab⁹

This was a very ironic case where the decision was to be taken that in lieu of future separation of a Muslim husband and wife, whether or not the wife should be provided with a specific amount of maintenance for her living. The Bombay High court at that time looked into the English Law and pronounced the judgement as invalid because of being against public policy. The irony here is that if we look into the present-day English Law, we will get to know that in the *Granatino vs. Radmacher*¹⁰ case pre-nuptials were made legally enforceable. It was held that in a marriage, or after the separation of one, it should be on the partners to decide how they need to manage their financial affairs and the court should respect that.

Ahmad Kasim Molla v. Khatun Bibi¹¹

The facts of this case stated that there was a prenuptial agreement between a husband and a wife whose terms stated that if the husband ill-treated her wife or treated her harshly in any way, the wife would leave him and he would be bound to pay monthly maintenance.

Subsequently, the husband did ill-treat the wife and she left him. The husband sent her wife a divorce notice which wasn't received by her.

The High Court of Calcutta held that for divorce to take effect it was not necessary that the talaknama must reach but for getting maintenance the bride must know about the divorce as the iddat period would be counted from the time that she gained knowledge about it.¹²

9. Bai Fatma v. Ali Mahomed Aiyab [1912]

10. Granatino v Radmacher [2010]

11. Ahmad Kasim Molla v. Khatun Bibi [1931]

12. Ghosh, a. and kar, p., 2020. *PRE-NUPTIAL AGREEMENTS IN INDIA: AN ANALYSIS OF LAW AND SOCIETY*.

[eBook] p.13. Available at: <<http://nujlawreview.org/wp-content/uploads/2019/12/12-2-Ghosh-and-Kar.pdf>> [Accessed 25 December 2020]

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It was then seen that in the prenup there was no period till when the allowance should be made was mentioned. Thus, the court held that the husband need not pay the maintenance after the divorce. Therefore, because of unclear drafting of the pre-nuptial agreement, it was declared to be unenforceable.

Valid Pre-nuptial agreements

In most of the cases, courts ought to have an optimistic attitude towards pre-nuptial agreements in Muslim marriages. Here are some of the cases involving the same.

Saifuddin Sekh v. Soneka Bibi¹³

In the above-mentioned case, the plaintiff and respondent i.e., husband and wife entered into a pre-nuptial agreement. The terms of the contract stated that the husband would have to ask for his wife's permission if he wants to bring any of his two former wives to their home. The agreement did not obstruct the man to keep relation with his other wives, it merely stated that consent was necessary. When the husband failed to do so, the wife filed for divorced. The Guwahati High court approved this prenup saying it wasn't something which was against the publicpolicy.

Razia Begum v. Sahebzadi Anwar Begum¹⁴

In this case, there was a pre-nuptial agreement between a muslim husband and a wifesaying that the wife was entitled to a sum of money each month for karch-e-pandan. The husband after a while stopped paying that to her without stating any reasons. The plaintiff approached the court asking for what she was entitled for. However, the respondent accepted his claim without any justifications. But if we look at the case and its nature, it would have been enforced.

Chapter 4: Why Pre-nuptial agreements are not accepted in India

The resistance of pre-nuptial agreements in India are a combination of a lot of factors. It's basically because of our nature and our surroundings. Pre-nuptial agreements are shaped according to their atmosphere. Some of the major factors influencing it are-

13. Saifuddin Sekh v. Soneka Bibi [1954]

14. Razia Begum v. Sahebzadi Anwar Begum [1958]

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Sanctity of marriage

The traditional Hindu Laws have described marriage as a very sacramental thing. It's obvious that a Hindu marriage is considered to be something very pure and establishing a family is said to be the most important part of one's life. Thus, mixing a sacred thing like marriage with legal dimensions is not accepted by our society.

This archaic angle closer to marriage might also additionally offer help to thoughts suggesting that introducing prenuptial agreements, which can be basically withinside the nature of contracts, in the broader idea of marriage will do away with from its sacred character. The incorporation of prenuptial agreements in the cloth of Indian marriages might also additionally in addition be challenged on the premise that prenuptial agreements can doubtlessly inspire couples to examine the quilt of the wedding previous to being sure withinside the marital bond itself, which in turn, might also additionally doubtlessly bring about termination of marriages being regarded because the norm in preference to the exception in India. One might also additionally in addition argue that legalizing prenuptial agreements can supply upward push to a view withinside the minds of married spouses that there's a without problems available break out path in case something have been to move wrong. It can also be said that this can in the end set off them to select separation or termination of marriage in preference to trying to paintings collectively to lessen the variations among them, thereby moving the decision of marital disputes out of the home sphere and into the general public area of courts. The argument could thus, be that if a majority of couples start taking the separation path because of the presence of pre-negotiated phrases of marriage and separation, the organization of marriage itself might also additionally start to lose its significance inside society.

Misuse of emotional affinity

Prenuptial agreements can also face resistance in India because of their perceived potential of getting used to the downside of the male spouse. Thus, the usage of this line of reasoning to argue in accordance to validity of prenuptial agreements might also additionally strain that girls or guys who are seeking to apply marriage as a method of obtaining wealth might also additionally result in their fiancés to go into phrases withinside the prenuptial agreements offering for big quantities of alimony and different monetary blessings which could accrue to them upon divorce or separation at the notion that such separation could now no longer take vicinity at all. Some can also argue that negotiations in such instances can place potential husbands in an inclined position, making it smooth for brides to take

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advantage of the emotional inclination in their potential husbands in the direction of them for his or her personal benefit.

In such instances, it can be said that by the point the husband or spouse discovers the 'schemes' of his or her spouse, it may end up tough for her or him to seek non-enforcement of the contract, due to the fact he had consented to the phrases on the time of signing the contract. Further, despite the fact that in such conditions there may be frequently a detail of deceit involved; it can end up being very tough to show the identical to a good enough quantity earlier than the courtroom docket for you to warrant voiding or annulment of the prenuptial agreement.

Possibility of exploitation off vulnerable women

If we look closely into it, one of the problems with it may also be that it can possibly be a weapon by which men can exploit their partners. As we are aware, India being a patriarchal society, women here are considered to be an inferior class. Thus, there's a chance that the females are shut up with such prenuptial agreements. The agreement may state some oppressive conditions which have to be agreed by the wife because of the nature of our Indian society.

More so, these pre-nuptial agreements can be used in a very wrong manner i.e. they can be used to bypass the provisions of the Dowry prohibition Act, 1961. to state the example of the same- suppose a very wealthy man ties a knot with woman from a relatively less financial background. The groom can make his in laws sign the prenup which states that they will pay him some amount of money as dowry and that they are paying it voluntarily as a gift to their daughter.

In a similar manner, the husband may even make her wife sign pre-nuptial agreements which state that he can assault her physically and he is permitted to hit her. This may be due to pressure from the household.

Public Policy issue

Indian courts have time and again held this as the main reason to argue against the legality of prenuptial agreements. This argument is particularly important to note since even if legal validity were to be accorded to prenuptial agreements, the same would be futile if the agreements are found to be against public policy.¹⁵

15. Indian Contract Act, 1872, §§10, 23 (India)

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Most of the cases in which these agreements were declared to be illegal were decided a long time back. Every country evolves with time and the social structure develops some changes. Some people have argued in the same context that these should be evaluated again through the modern lenses.

But this argument was still backfired by people who said that even if they agree that yes, public policy has evolved a lot but is it necessary that even the modern public policy will be in accordance to it? The same people have said this stating obvious facts which included that the recent judgements of pre-nuptial agreements held the same facts as those a decade before and both were still held unacceptable in the present-day society.

CONCLUSION

While we are well aware that these pre-nuptial agreements can be framed very efficiently in order to serve the needs of Indian couples, but we are also aware that the Indian judiciary may pose as a hurdle to it. But if enacted this will help young Indian couples to get married their way with future security as well.

Whatever we've studied in the above chapters determines all the reasons why these pre-nuptial agreements have not been enacted in India till now. All the cases we study, made perfect sense why they should not have been enacted. But, if we think about it, everything has its pros and cons. This too has a lot of pros, especially for the generation after us.

Pre-nuptial agreements for India need to be perfectly well drafted, removing all the objects which can cause harm to the inferior women of our society or may pose a threat to the wealthy males being catfished. This is not an unrealistic thing.

Consequently, there may be a want for extreme deliberation at the way wherein prenuptial agreements may be regulated and such guidelines as soon as formulated, have to be integrated in the Indian judicial machine to cope with such agreements withinside the presently judicial piecemeal way.

I explicit the desire that the Indian legislature and govt will quickly realize the rising necessity of prenuptial agreements with regards to marriages in today's India and now no longer best increase prison reputation to the same, however additionally don't forget the formula of 1 or greater version prenuptial agreements that can thereafter act as samples of legally legitimate phrases which couples in India can talk over with withinside the direction of formulating their very own prenuptial agreements.

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