

**LEGAL VALIDITY OF PRE-NUPTIAL AGREEMENT IN INDIA**- Aman Gupta<sup>1</sup>**WHAT IS PRE-NUPTIAL AGREEMENT?**

Pre-nuptial agreements are gaining their popularity in all over the world between young people, who want to protect their asset and reaching to a safe side if in future case their martial bond is going to end. There are rising in case of divorce and its bad consequences in current time this is also the reason for people opting for a pre-nuptial agreement. With the modernity of the society in india this agreement is going popular day by day.

A pre-nuptial agreement is a type of agreement in which two people who want to marry or going to marry soon make an agreement with mutual consent of each other in which they make certain provision to setting the distribution of their property, asset, liabilities and also the issue relating to the children, if any situation comes which may end their marriage.

**OVERVIEW OF PRE-NUPTIAL AGREEMENT IN INDIA**

The progress in the Indian society resulted in many social issues for the women which are necessary to solve the problem for interpreting a suitable democracy in the country in the post independent era. This issue also makes the judicial process more accessible and more participating in nature and Indian judiciary always take the first step in the development of the Indian society through their acceptance and judgment. Even in many cases, the give direction to legislature to make a necessary law on an issue. The progression in the judicial system with the social activism makes women more independent and gives her inner strength, thus a women being capable to walk out from a bad marriage. There has been a tradition in the Hindu society that a women is always blamed for the divorce, however the

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modernization of the society makes a women more regressive on this social stigma of divorce.

### **CURRENT STATUS OF PRE-NUPTIAL AGREEMENT IN INDIA**

India does not have any law on the pre-nuptial agreement. Such agreements are not generally accepted by the Indian people because in India marriages are seen as a belief which is created by the god in the heaven and they do not consider the marriage as an agreement, nevertheless the global people accepted this agreement very commonly and also in the Indian society divorce is seen as a big thing. There is also lack of significant legal provisions on this topic in India. The Supreme Court is quite active in the matter concerning to divorce and has taken no stand on the matter of pre-nuptial agreement. It is not possible to assure that such agreed term will be upheld in the Indian court. However in India, Islamic marriage which was governed by Muslim law has pre-nuptial type agreement in which both parties signed an agreement in which they have some provision to settle the wife property or money if the marriage is going to end known as mahr.

#### **With respect to Indian Law:**

As per the custom and tradition of Indian society, a marriage is a religious bond between two souls and they were created by the god and the judiciary preserves this on several cases like Krishna aiyar v. balammal case. The court also observed the Hindu marriage as a sacramental rather than a contractual agreement.

#### **With respect to Indian Contract Act, 1872:**

Although, this agreement was fulfilling each and every requirement of section 10 of Indian contract act 1872 , but the court declined this agreement on the basis of its violating the public policy under section 23 of ICA,1872 so it deemed to be void, the judiciary did not declare the whole agreement void as there are some clause of agreement like separation clause, child clause, these clauses are violating the public policy because divorce and separation of family are treated as a disaster in the Indian society, the supreme court made

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certain patent case for them.<sup>2</sup>

### **ANALYSIS WHAT OUGHT TO BE LAW ON PRE-NUPTIAL AGREEMENT**

The first argument itself is fragile in the validity of the pre-nuptial agreement under it as holy nature of the Hindu marriage law have turned a lot in past few years to include some contractual element. In Hindu, dharma divorce and love marriage are not allowed because the gandharava or present day love marriage are socially disapproved as per the Hindu dharma. The whole concept of the Hindu marriage is based on shastric tradition which only allow the marriage between same religion identity and caste and disapproved the inter caste and sagotra marriage. However in the present day, hindu marriage law do not exist in its pure form because there are some changes as per the modernization in the society and its existence in quasi-sacramental form.

However the main focus of this article is on the validity of this agreement in India and whether this agreement violates the public policy?

Section 23 of ICA said that wherein the object of or consideration of an agreement is opposed to the public policy, the agreement is said to be unlawful and become void and unenforceable. However, the ICA or any legislative enactment does not provide any definitional interpretation on the basis of public policy. As a result of this, legal position is settled in this agreement which patently violate the public policies as they harm the public good.

### **CHANGING THE JUDICIAL POSITION IN INDIA WITH RESPECT TO PRE-NUPTIAL AGREEMENT**

We review some important cases with regard to the religion communities and have a look at the interpretation made by court on pre-nuptial agreement.

In tekait Mon Mohini Jemadai v. Basanta Kumar singh,<sup>3</sup> the parents of the husband and he himself signed a pre-marital agreement when he was a minor and stated in the agreement that he would live in his mother-in-law house after the marriage throughout their life but after 15

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<sup>2</sup> Indrani Basu , What do modern , financially -independent india . women look for in a marriage ? HUFF POST (3 MARCH 2018 ) Available at [https://huffingtonpost.in/2016/03/08/india-women-marriage\\_n\\_9401650.html](https://huffingtonpost.in/2016/03/08/india-women-marriage_n_9401650.html)

<sup>3</sup> Tekait mon Mohini jemadai v. basanta kumar singh AIR 1901, ILR28, Cal 751

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years the husband left the house of his mother in law because of some issue and demanded the wife to left the house and live with him in his residence. The Calcutta high court held in this case that a pre-nuptial agreement was opposed the public policies and it was also meant that this agreement permanently control the right of husband was whole life as per granted in Hindu law, which is as per the court instigate the couple to separation of their marriage in the future and court held that the pre-nuptial agreement is invalid in this case.

In case of Krishna aiyer vs balammal,<sup>4</sup> Krishna aiyer (plaintiff ) filed a petition for restitution in his marital right, after some days of filing the suit they both are compromised to stay with each other and then the husband promised the wife to pay some money or marital property in the event if there is separation between them in future, however the wife after this agreement never returned to his marital life, thus this agreement does not fall under the categories of pre-nuptial agreement. In this case, Madras High Court referred the mon Mohini case and declared the agreement as void as it was against the marital obligation under Hindu law. The court held that in this case that the agreement was against the public policy because the future separation clause was mentioned in the agreement.

As the court established in earlier cases, in refusing the pre-nuptial agreement the Indian court gave the reason that it hurts the public policies. In the above cases the implementation of public policy by the court in two different ways. First, pre-nuptial agreement override the rights and liabilities provided under the Hindu personal law and the custom and tradition under the Hindu law was also struck down on the ground of public policy. Second, pre-nuptial agreement in which certain clause maintain for separation or future separation of a marriage also interpreted as against the public policy.

### **SOME MORE CASES ON PRE-NUTIAL AGREEMENT VALIDITY**

In the case of Pren mohan das v. hari mohan das<sup>5</sup>, a person agreed to marry a women on the promise that women's father will gift a house to his daughter. After the marriage, plaintiff shifted the possession of the house through the unregistered gift. The couple maintained the possession of house for some years and then sold the house to the other person. The plaintiff

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<sup>4</sup> Krishna Aiyar vs. Balammal , 1911, ILR 34 Mad 398

<sup>5</sup> Pren mohan Das vs Hari mohan Das , AIR 1925 , Cal 856

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later sued the couple for recovery of the house. The court held that the house is a gift given by plaintiff at the time of marriage thus this pre-nuptial agreement and is valid on the principal of part performance of the contract which estopped the plaintiff from the recovery of the house, moreover the agreement is not a marriage brokerage contract so it was not against the public policy.

In the case of Commissioner of Income Tax v. Mansukhari More<sup>6</sup>, the Calcutta high court held that the transfer of property in a pre-nuptial agreement is justified if it is for accomplishment of the commitment. In the case of Sandhya Chatterjee v. Salil Chandra Chatterjee<sup>7</sup>, it helped in understanding that how a logical contract between a husband and wife will not oppose the public policy under the pre-nuptial thus enforceable. In this case Calcutta high court referring the case of printing and Numerical registering co. v. Samposan held that declaring a contract invalid under the tab of against the public policy, court also considered that the public policy in term of voluntary contract between the adult person, thus it is observed that with the modernization in the society, law will also have to change with the society to fulfill the purpose of justice and a wife can demand for separate maintenance when she was not satisfied with the marriage and this is not considered against the public policy.

The above cases shows that with time as the society change, the judiciary also changed their direction in Hindu marriage law and pre-nuptial agreement, in most cases the judiciary does not validate the pre-nuptial agreement by themselves, instead of doing this judiciary should adopt some method to interpret the pre-nuptial agreement in India. They by enforcing the terms of pre-nuptial agreement with other legal principal and by creating some exception within the purview of the judicial precedent have a view that pre-nuptial agreement as invalid because they are against the public policy.

## CONCLUSION

Pre-nuptial agreement are popular in across the globe like in most of the western countries, this agreement gives you stability in life and if something happens in martial life or the marriage is going to end but they believe in god and god created this marriage in the heaven so they do not even thought about their marriage is going to end. They don't think their marriage as a contract because of this they are not able to get these benefit which is provided

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<sup>6</sup> Commissioner of Income tax vs mansukhari Das , 1988 , 174 ITR , Cal 703

<sup>7</sup> Sandhya Chatterjee vs Salil Chandra Chatterjee , AIR 1980 , Cal 244 .

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by this agreement and also the legislative and judiciary also think in the same ways. People are not aware about this agreement which is not going to contradict their custom and ethics and also will not hurt the public policy. This agreement give stability especially to the women if there is end in their marriage. This agreement is completely in the public interest to provide them legal support if the marriage is going to end and this agreement is in need of the time for India as well as the world also.



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