

PRE- NUPTIAL AGREEMENT: - POSSIBILITY IN INDIA

ABSTRACT

Law is a reflection of society. In this social structure of society, the basic unit of society is family and this notion of the family is based upon the very institution of marriage. This institution of marriage ensures stability and order in society. So that is also a very ancient institution. This institution is a trademark of a civilized society.

But time never remains the same and society gradually changes over time and this dynamism also affects the very institution of marriage. In this scenario, a new concept is developing as a pre-nuptial agreement, which is an agreement done before marriage. In various religions, marriage is a sacrosanct institution. So, this pre-nuptial agreement is very much contradictory to the traditional norms of the institution of marriage. But as we know by time the modernization, constitutionalism, issues of the rights of equality, privacy, etc. are evolving and these factors do not affect and hits upon the foundation of the institution of marriage but just molding and modifying in a new modern or non – conventional terms.

INTRODUCTION

This concept is very flourishing in western countries but for Indians is still a concept of criticism and suspicion mostly in the eyes of traditionalistic views adheres but there is many changes, possibilities, and capabilities to make applicable the pre-nuptial agreement with legal backing and still is enforceable by the court subject to some conditions of contract act. It has its benefits and demerits, but we need to absorb the benefits from it to make our marital laws up to date and try to drain out its demerits to protect the very foundations of marriage and social order.

But it is not a cakewalk as it looks like. There are many complexities of various religious and personal laws, secondly, still, there is no uniform civil code is applicable despite various landmark judgments of the apex court of India. There are also doubts in the mind of the people that the pre-nuptial agreement could become a boon to the institution of marriages and makes marriages highly prone to divorce. But we need to clarify all these integrities. As the law is the for the people governs according to their need-based system until his needs fulfill from that system or institution, is fine, but as the needs change the law must also adopt some changes.

THE CONCEPT OF A PRE-NUPTIAL AGREEMENT

The pre-nuptial agreement in simple words means that the agreement is done between the spouses before marriage regarding the terms and conditions of the marriage which are maybe related to during marriage or at the time of divorce. It is a western concept where civil laws are very specific, uniform, and strong so that the two major persons can enter into an agreement which consists of terms and conditions of their marriage and that agreement is valid so that as a contract, that would be enforceable by law and in the case breach, any aggrieved party can seek a remedy through the court.

HISTORY

If we search out the very earlier history of the pre-marriage agreement, the very first instance occurred 2,000 years ago in an ancient Hebrew Marriage called Ketubah. In Indian Ancient there is no such kind of instance but indirectly in Mahabhart, the story of the marriage of Maa Ganga and Shantanu, in that story Maa Ganga put some major conditions for the marriage. Likewise, in Islamic Law the concept of *Khana-damad* is somewhere has the shadow of the prenups, if the husband firstly agreed to be a Khana-damad means agreed to live in wife's native house and after marriage, if he refused to do so, then he must pay the sum of expended towards the marriage. So that the non-fulfillment of the conditions leads to automatic divorce. But in Indian Culture there is no specific legal kind of agreement between the spouses before marriage.

As prenups is a western concept in the legal sense, so that the prenuptial agreement solidified in the legal sense in 1848, in New York through the Married women's Property Act.

POSSIBILITY OF LEGALIZATION OF PRE-NUPTIAL AGREEMENT IN INDIA

In India, it is a noble concept in a legal scenario but with the increase of awareness regarding women's rights, human rights, civil rights, and especially the right to privacy, the possibility of the codification of the prenups agreement-related law is increasing. There is also the standpoint of the Supreme Court about the right to privacy which is indirectly linked with the validity of the pre-nuptial agreement. This agreement has a wide range of content but it is especially related to the division of assets and property and specified the rights of the spouses.

HINDRANCES BEFORE THE POSSIBILITY OF PRE-NUPTIAL AGREEMENT IN INDIA:

1. Bad impact on the sanctity of marriage by the flourishing of the pre-nuptial agreement in India. In India, the institution of marriage is a very kind of pious ritual not only in the religion but also for society. So that most of the religion depicts that the marriage is sacrosanct which is made by the God. And this pious bond is not compared by any agreement which depicts the situation of divorce and it is in Indian society conceived as a bad omen and against the rituals of the sanctity of the marriage.
2. The danger of the social stability many conceptions arise in a part of the society that the pre-nuptial agreement increases the possibility of the break down of the marriage, because of the pre-decided conditions and both spouses know very well the pros and cons of the divorce and if in the situation any spouse can easily be departed with the marriage. So that it creates a more alienated society and a strong

family institution in India may suffer which creates more other destructive consequences in the society.

3. Uniform civil code under Article 44 of the Indian constitution has not in force yet because of a huge diversity in the personal laws which makes uniformity in civil or family laws no less than impossible. Therefore, the law on marriage is mostly in India is based on the personal laws of the respective religion. Although many personal laws are codified in India like Hindu laws, Muslim laws, Parsi law, but these laws codified are only codification their respective laws not there is uniformity in the marriage laws, inheritance laws, divorce laws, etc. the personal laws cannot be challenged in the court of law whether relating to the issues of marriage, or divorce. As also the validity cannot be challenged Article 13 of the constitution. State of Bombay vs. Narasu Appa Mali AIR 1952 Bom 84¹ , justice Gajendragadkar observed...“the framers of the constitution wanted to leave the personal laws outside the ambit of part III of the constitution...”².
4. Legal disability is also a big hindrance in the growth of the pre-nuptial agreement concept. In the actual scenario, there is a lack of legal sanctity towards the validity and enforceability of the pre-nuptial agreement. There is no specific law to enforce the agreement so that the judiciary has not given any concrete position in the jurisprudence of the pre-nuptial agreement. The judiciary in India has an indeterminate position on the issue and somewhere it sees the marriage as a pious institution so that it is very reluctant towards the validity of the pre-nuptial agreement.
5. Effects on the rights of women and children must be taken into consideration in the context of the pre-nuptial agreement. India although the position of females is strengthening the actual position is far away to make both genders in the level of equality. This agreement becomes a tool for the husbands to exploit their wives. As the females are still in a weaker agency, they are easily ditched by their husband, and by the twisted and biased provisions husband can easily take the separation or divorce from his wife without any fault on the part of the wife. By this bad

¹ AIR 1952 Bom 84

² *Id.* at 1.

consequence, the children would be a great sufferer and their future might be at stake due to separation between the parents.

ENFORCEABILITY OF THE PRE-NUPTIAL AGREEMENT IN INDIA

Despite all these hindrances the concept of the pre-nuptial agreement is still flourishing in India not only because of awareness of the legal rights but also the impact of the western culture. We can observe many legal and social elements which create the possibility of India. There are some are mentioned here: -

1. Personal laws has also somewhere directly or indirectly the concept of uncalled agreement in some other forms. In Hindu laws, marriage is pious and has a great sanctity. It has the concept of the pious obligations so that there is no concept of dissolubility and it has no contractual obligation but an indissoluble holy union which is not manufactured but a holy union, makes in heaven. But in the modern scenario, many judgments considered the agreement as valid with applying the other legal provisions. As in the case of Commissioner of Income Tax v. Mansukhrai More,⁶³³ the High Court of Calcutta held that the transfer of property as per the prenuptial agreement for the accomplishment of commitments undertaken was justified and did not attract §16(3) of the Indian Income Tax Act, 1922.

The institution of marriage in Islam is contractual. There are many trending scenarios in the Islamic personal laws in the context of the pre-nuptial agreement, especially from the standpoint of the judiciary. In the case Saifuddin Sekh v. Soneka Bibi⁴, the plaintiff-respondent wife dissolved the marriage as the husband could not fulfill the terms of kabinnama. As per the prenuptial agreement, the husband was barred from bringing any of his former two wives to stay with him without the consent of the plaintiff's wife and if he did so, the plaintiff wife would be entitled to divorce him. Here, the agreement neither put any impediment to enjoying conjugal life on the other two wives nor obstructed the husband to hold the relationship with the other wives. It only said that he had to take consent from her before bringing any of his former wives to reside with him. Therefore,

³ (1988) 75 CTR Cal 101

⁴ A.I.R. 1955 Assam 153

according to the Gauhati High Court, the agreement was not effected by §23 of the Indian Contract Act, 1872 as it was not opposed to public policy.

Likewise, these above examples in other personal laws like Parsi, Jewish, and Christian has somewhere the concept of the pre-nuptial agreement been in existence.

2. Right to privacy under Article 21 is also opening wide rights for persons not only in public paragraph state context but also in the civil and personal rights arena. The recent judgment of the Supreme Court in the case of *Puttuswamy vs. Union of India* declared the right to privacy as the fundamental right under Article 21 of the Indian constitution. If we interpret the legal sanctity of the pre-nuptial agreement based on this decision, there would be a new aspect for the pre-nuptial agreement would be opened because the marriage and the persons whose decision towards it, is private and one is free to decide his life and can put the terms and conditions in the form of the agreement.

3. Indian contract act, 1872 is in some ways gives legal backing to the valid prenuptial agreement. In various case laws, the judiciary applies the provisions of the contract act to examine the validity of the agreement, and only if the agreement fulfills the conditions of a valid contract under section 10⁵, the pre-nuptial agreement would be valid. Firstly, the agreement must be between the legally major parties, there must be free consent and the consideration must not be against the public policy. In *Tekait Mon Mohini Jemadai v. Basanta Kumar Singh*⁶, case, the parents of the husband as a minor husband also signed the pre-marriage agreement stating that he would reside in the house of his mother-in-law and would abide by the instructions of his mother-in-law. But, after living for about 15 years as such, the husband left his mother-in-law's residence and demanded that his wife resides with him in his residence. The Calcutta High Court relied on the *Sheonarain* case and some foreign judgments and held that the agreement was invalid due to opposing public policy because it restricts the marital rights of the husband and, he was minor at the time of signing the agreement.

⁵The Indian contract act, No. 9 of 1872

⁶ (1901) ILR 28 Cal 751

CONCLUSION:

Yet there are no concrete views of the Apex court on the issue but still the jurisprudence of the pre-nuptial agreement adapting in India by the well-educated society not now in rural or orthodox society. There may be clauses about assets, spousal rights, clauses related to children, etc. given in the agreement within limitations of the contract act, to ensure the validity and enforceability of the agreement. But there must a legal step was taken by the legislature to give the clarity and specification with the legalization of the concept of a pre-nuptial agreement.