

Pre-Nuptial Agreements in India: Analysing Their Legal Validity

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INTRODUCTION:

A Family Court in Delhi recently remarked that pre-nuptial agreements should be mandatory.¹ Pre-nuptial Agreements are now gaining popularity amongst Indian youth seeking marriage.² It is a form of security through a pre-nuptial/*antenuptial* agreement. This could be due to changing notions of marriage amongst youth who no longer consider it a sacrament as originally intended, but rather as a partnership between two individuals.

Despite the rising popularity of such agreements amongst the people of marriage age³, the law about pre-nuptial agreements remains uncertain. The recent judicial opinions however seem to be changing, whether or not it will lead to a substantial change in the law remains to be seen.

In this paper, the authors shall attempt to address prenuptial agreements specifically in Hindu marriages, the judicial stance, and the changes in perspectives related to pre-nuptial agreements. The paper shall also look at the public policy argument forwarded against pre-nuptial agreements, and present rebuttals to such an argument.

PRE-NUPTIAL AGREEMENTS: AN OVERVIEW

Hindu Marriages are considered to be sacraments therefore any contractual agreements seem to be in complete violation of the basic tenet of a Hindu marriage. Marriage is no longer a divine union of souls⁴ as earlier perceived; it is now a social, economic, and legal partnership of two equals, which is merely validated by the state. The world has changed, women are now more empowered⁵, and how men perceive their roles in the family has also changed. New age relationships have emerged to be more of partnerships than the traditional roles of provider and homemaker.

Therefore, the question of dissolution of marriage becomes a realistic eventuality that needs to be accounted for before the marriage. Rates of divorce are steadily increasing due to the changing notions around marriage.⁶ Divorces are rarely harmonious procedures, there are difficult questions that arise from a divorce, not only emotionally but also related to the division of assets and liabilities. Divorce has been gaining ground in India, and the state-imposed formula would not work in most cases.⁷ Especially since

¹ HMA No. 181/2023

² Barkha Kumari, Indians are enquiring about pre-nuptial agreements, Deccan Herald, Available at: <https://www.deccanherald.com/india/karnataka/bengaluru/indians-are-enquiring-about-pre-marital-agreements-1052498.html>

³ Barkha Kumari, Indians are enquiring about pre-nuptial agreements, Deccan Herald, Available at: <https://www.deccanherald.com/india/karnataka/bengaluru/indians-are-enquiring-about-pre-marital-agreements-1052498.html>

⁴ Mulla, Hindu Law, Lexis Nexis, 24th edition, July 2021

⁵ Indrani Basu, what do modern independent women look for in a marriage, Economic Times, Available at: https://www.huffpost.com/archive/in/entry/what-do-modern-financially-independent-indian-women-look-for-in_n_9401650

⁶ Ibid.

⁷ Allison A. Marston, *Planning for Love: The Politics of Prenuptial Agreements*, 49 STANFORD LAW REV. 887 (1997).

the state-imposed formula is generally leaning towards a no-fault, low-alimony divorce.⁸ In most divorce cases, the two major contested assets are the division of assets and child custody. In such a scenario, an agreement by both parties regarding the division of assets and child custody could end protracted battles between both parties and end litigation.

Pre-nuptial agreements are defined in the *Black's law dictionary* as agreements made before marriage to resolve issues of support and property division if the marriage ends in divorce or by the death of the spouse.⁹

Pre-nuptial contracts can be categorized into two types, one which governs the division of assets and liabilities during the subsistence of a marriage and one which governs the division of assets and liabilities in the eventuality of the breakdown of a marriage.

In the first case, the complications would arise from the sentimental nature of the marital relationship and would generally be unenforceable by courts. In the second case, a pre-nuptial agreement governs the division of assets and liabilities in the event of a breakdown of marriage, it can be treated as a contract between two individuals. Therefore, despite the nature of the subject matter involved, the pre-nuptial agreements are in essence a contract to determine the devolution of assets in a partnership and thus susceptible only to the grounds of voidability through the Indian Contract Act, of 1872.¹⁰ The Prenuptial agreements have been rejected on the grounds of being against public policy. This argument shall be dealt with at a later stage of the paper.

Pre-nuptial agreements are not invalid for all religions, Christian personal laws have provisions for pre-nuptial agreements.¹¹ Muslim Marriages, being contractual also can have provisions about the arrangement of custody of children and division of assets and liabilities arising out of the marriage.¹² Further, the concept of Dower is akin to a form of pre-marital contract.¹³ Therefore, Hindu Marriages are specifically considered sacraments and therefore no contract can be made regarding it.

PART 2: HINDU MARRIAGE – SACRAMENT

The Hindu marriage being a sacrament argument is itself a flawed premise. Hindu marriage is not merely a sacrament, it is a sacrament as well as a contract.¹⁴ In a Hindu Marriage, the law legislates that there should be certain religious ceremonies, but the law itself also dictates that there should be valid consent.¹⁵ Consent is an essential part of a Contract¹⁶, it has no bearing on the sacrament. The moment a part of the contract is brought into the picture within the Hindu marriage customs, all others can be considered in the same vein. Further, if this argument is stretched, in any Hindu Marriage, the parties make 'reciprocal promises' to each other (*vachans*) in front of witnesses.¹⁷ These promises are related to the conduct of their married life. This can be considered to be a form of contractual obligation since reciprocal promises

⁸ Heather Mahar, *WHY ARE THERE SO FEW PRENUPTIAL AGREEMENTS?*, Discussion Paper No. 436, Available at: http://www.law.harvard.edu/programs/olin_center/papers/pdf/436.pdf

⁹ Garner B.A. (2004), *Black's Law Dictionary*, (8th edition).

¹⁰ Section 23, Indian Contract Act, 1872

¹¹ Section 40, Indian Divorce Act, 1869

¹² Amrita Ghosh and Pratyusha Kar, *Pre-nuptial agreements in India: an analysis of law and society*, NUJS Law Review, 12 NUJS L. Rev. 2 (2019)

¹³ *Ibid.*

¹⁴ MULLA, *HINDU LAWS*, Lexis Nexis, 24th edition, 2021

¹⁵ Section 5, Hindu Marriage Act, 1955

¹⁶ Section 10, Indian Contract Act, 1872

¹⁷ Section 7, Hindu Marriage Act, 1955

form the spine of contractual obligations. So, in effect, a Hindu Marriage is both a sacrament and a contract.

This view has also been espoused by the Allahabad High Court in the case of *Bhagwati Saran Singh v Parmeshwari Nadar Singh*.¹⁸ Further in *Purushottam Das v Purushottam Das*¹⁹, a Hindu Marriage was said to be a contract entered into by the parents of the two parties. In *Muthusami v Masilamani*²⁰ it was said that Hindu Marriage was undoubtedly a contract, with rights duties, and considerations involved for both parties. In *Dhanjit Vadra v Beena Vadra*²¹, the concept of Divorce by Mutual Consent under section 13B of the Hindu Marriage Act, 1955 was considered, and it was said that since there was such a concept, it, therefore, meant that there were certain contractual elements involved which could be terminated by mutual consent. This consolidates the Author's contention that Hindu Marriages are not merely sacraments.

The sacramental part might control the emotional and religious aspects of it, but the moment legislation like consent of parties, restitution of conjugal rights, divorce by mutual consent, and court-ordered judicial separation entered into the picture, that moment it moved away from being purely a sacrament to being a mixture of sacrament, some elements of contract and even some elements of criminal law.

There is one other aspect that needs to be discussed here, the moral compass, the notion that pre-nuptial agreements will certainly lead to an increase in divorce rates. There is however no empirical evidence to back this argument, and further, the notion itself needs to be challenged. Pre-nuptial agreements are based on practicality rather than sentiment, which itself does not make it morally perverse to even consider. India has had a long-standing moral high ground associated with the institution of marriage, and even though that moral perspective is fast changing, the institution of marriage is still considered to be within that realm of personal law, which ideally lies beyond court interference. However, when man-made laws can be sought to govern some aspects of a marriage then they can also be brought to govern an explicit contract. In such a scenario, the morality argument would be dependent on public morality and the evolving nature of such morality. Considering the above opinions, the concept of Hindu Marriage simply being a sacrament feels limiting, however, there being no overarching legislation Therefore, there being no law to govern pre-nuptial agreements, within the boundaries of personal law, the law of contract becomes the sole governing law.

PART 3: PRE-NUPTIAL AGREEMENTS AND JUDICIAL APPROACH PRE-NUPTIAL AGREEMENTS HELD VALID

It is not that pre-nuptial agreements have never been considered in India, there have been cases where pre-nuptial agreements have been held to be valid. However, the form of the pre-nuptial contract in these earlier cases seems to be the marriage of the daughter in exchange for property. The first such case was *Vishwanathan v Saminathan*²² where the parents of the girl agreed to receive money for marrying their daughter to the groom. This was approved in the case of *Vaithyanathan v Ganga Razu*.²³ Further, *Pran Mohan Das v Hari Mohan Das*²⁴ the court that a pre-marital agreement between two men, for one man to

¹⁸ 1942 ILR All. 518

¹⁹ 21 Bom. 23

²⁰ 5 IND. CAS. 42

²¹ AIR 1990 Delhi 146

²² (1893) I.L.R. 17 M.9

²³ (1889) I.L.R. 13 M. 83

²⁴ AIR 1925 Cal 856

marry the daughter of the second man on the promise to transfer some property to him was valid and not opposed to public policy. Even though in these cases, the agreement is not between the parties to the marriage, the agreement is for the marriage, as a pre-condition, and therefore in the category of pre-nuptial agreement as per the court documents. These cases were approved solely for the reason that they were between the parents of the bride/groom and not by the bride or groom themselves. Such contracts were called marriage brokerage contracts and were enforceable. Here the question arises as to whether marriage brokerage contracts are different from pre-nuptial agreements and if so, what is the degree of difference. There were other cases in which for example, In *Gobinda Rani Dasi v Radha Ballabh Das*²⁵ wherein it was explicitly said that there was nothing in Hindu Law or public policy that would make an antenuptial contract unenforceable.

Further in the case of *Bai Appibai v Khimji Cooverji*²⁶ the pre-nuptial agreement between the husband and the wife was considered to be valid, and the wife's request for separate maintenance and residence as per the pre-nuptial agreement was agreed with by the court. It was not considered to be against public policy. Similarly in the case of *Sunita Deshprabhu v Sita Devendra Deshprabhu*,²⁷ Sita Deshprabhu and her husband entered into a pre-nuptial agreement regarding the division of assets, and even though the case itself was not regarding the validity of the pre-nuptial agreement, it was held in this case that the pre-nuptial agreement would be considered for determining the intent of the parties regarding the division of assets.

Further, a Bombay Family Court recently referred to pre-nuptial agreement between parties as determining their intent, the document was referred to by the court as a piece of evidence.²⁸ In none of these judgments, the validity of the pre-nuptial agreement has been determined which leaves behind a legal vacuum.

PRE-NUPTIAL AGREEMENTS HELD INVALID

There have been cases that have dismissed pre-nuptial agreements on the grounds of public policy. The first of such agreements is *Sheonarain v Paigi*²⁹ In this case the husband and the wife's family had a pre-nuptial agreement that he would live with her in her maternal home, which he subsequently violated and started to live with another woman, he then filed for restitution of conjugal rights. The wife pleaded that as per the agreement he had to come live with her, but the court dismissed her argument as absurd. This decision was quoted in the case of *Tekait Mon Mohini Jemadai v Basanta Kumar Singh*³⁰ the parents and the husband signed a pre-nuptial agreement. The agreement pertained to the husband living with the wife in the wife's maternal home and abiding by the mother-in-law's instructions. The Court held that the pre-nuptial agreement was against public policy as it could lead to future separation of the husband and wife because the husband's rights in the marriage were being compromised. A very similar case in which a contract of such nature was dismissed for being opposed to public policy was *Kalavagunta Venkata Kristnayya v Kalavagunta Lakshmi Narayana*.³¹

²⁵ 71 IND CAS 118

²⁶ AIR 1936 Bombay 138

²⁷ (2016) 10 BOM CK 0046

²⁸ Amisha Srivastava, Prenuptial Agreements Not Enforceable In India But Can Be Considered To Determine Parties' Intent: Mumbai Court, Available at: <https://www.livelaw.in/news-updates/prenuptial-agreement-in-india-marriage-divorce-239698?infinite-scroll=1>

²⁹ (1885) ILR 8 All 78

³⁰ (1901) ILR 28 CAL 751

³¹ (1908) 18 MLJ 403

Further in *Krishna Aiyar v Balammal*,³² the agreement between the husband and wife which had a clause for future separation for the husband and wife was considered to be void because it was against public policy. The issue was that the post-nuptial agreement in this case considered that there was an eventuality of divorce between the parties. This particular argument is considered to be against public policy. The question this case raises is that is divorce so unforeseen a circumstance that it should be considered to be against public policy. This was also followed in *Thirumal Naidu v Rajammal alias Rajalakshmi*³³ and then in *Sirbataha Barik v musamat padma*.³⁴ In both these cases too, the ground of rejection of pre-nuptial agreement was said to be public policy.

It is considering the modern state of marriages, where divorce is no longer a taboo and the divorce rates have been rising.³⁵ The holy connotations of marriage can't be considered antithetical to divorce. It should rather be considered to be an aid in case a marriage deteriorates. Here in India, the pre-nuptial agreements are rejected because they will cause an increase in divorce rates, an assumption that has not been conclusively proved and which has no empirical standing. Therefore, the only source left is to explore the public policy argument itself.

PART 4: BREAKING DOWN THE PUBLIC POLICY ARGUMENT

At this stage, it becomes necessary to explore what public policy is and why it is considered to be against public policy. As stated earlier, the concept of public policy arises from the Indian Contract Act, of 1872. The Indian Contract Act therefore becomes the beacon of legislation for pre-nuptial agreements, but such agreements under the Indian Contract Act have been rejected as being against public policy.³⁶ The question of what public policy is best answered using the courts' judgments, the first of which would be the English judgment of *Egerton v Brownlow* where the court said, public policy is vague and unsatisfactory, in common words something which is political expedience, or which is good for the community.³⁷ In *Kolaparti Venkataredi v Kolaparti Peda Venkatachalam*,³⁸ it was held that public policy could never be precisely defined and whatever tended to injustice of operation, restraining liberty and commerce and natural or legal, whatever was against justice or good morals was against public policy. This was further espoused in the case of *Thomson CSF v National Airport Authority of India*³⁹ that public policy in its broadest sense meant that the courts would in the public interest refuse to enforce the contract. Further, the two touchstones of public policy have been defined as the advancement of public good and the prevention of public mischief.⁴⁰ This view was endorsed by the Supreme Court which said that any agreement that has the tendency to injure public interest or is opposed to public welfare is against public policy.⁴¹

The question, therefore, arises as to what public interest is being protected by the courts, surely the courts would recognize that the forced subsistence of a marriage where the two parties are not willing to live

³² (1911) ILR 34 MAD 398

³³ AIR 1968 MAD 201

³⁴ AIR 1969 ORI 112

³⁵ Amrita Ghosh and Pratyusha Kar, Pre-Nuptial Agreements in India: An Analysis of Law and Society, NUJS Law Review, Vol 12, 2, (2019).

³⁶ Section 23, Indian Contract Act, 1872

³⁷ *Gherulal Parekh v Mahadeodas Mahiya*, AIR 1959 SC 781

³⁸ AIR 1964 AP 465

³⁹ AIR 1993 DELHI 252

⁴⁰ *Ratanchand Hirachand v Askar Nawaz Jung*, AIR 1976 AP 112

⁴¹ *Ratanchand Hirachand v Askar Nawaz Jung*, (1991) 3 SCC 67

with each other can't be fruitful for society, the author would like to argue that it is more of the interest of the parties that are being protected by the courts. A pre-marital contract means a waiver of the rights which are accorded by the state.⁴² For example, the maintenance of a woman in the event of a divorce, which also has strong judicial precedent⁴³, would be waived in case of a pre-nuptial agreement. In such a scenario, many women could potentially suffer because of the signing of the contract, because they are socio-economically weaker in the Indian context. A pre-nuptial agreement further would mean the rights of the children involved could be jeopardized. Children who are neither party to the contract nor did they exist at the time of the making of the contract. Such a contract could potentially violate the cardinal principle of family law, which keeps the best interests of the child at heart while deciding upon disputes of the parents for custody.⁴⁴ A contract in favour of the contrary party as decided by the court could mean potential legal conundrums.

However, this argument comes with its rebuttal, it could also mean gender equality between parties. Pre-Marital contracts could bring about mutual trust since they would be based on gender equality within the marriage, and therefore increase the chances of a successful marriage. Such a contract would be especially welcome in India even from the monetary perspective, where on one hand the great burden of dowry still exists in rural areas,⁴⁵ and on the other hand, in the cities, the men often are taken to the cleaners in false cases of dowry harassment.⁴⁶ This could be a way to get rid of both kinds of evils while also establishing equality for the partners and removing one big aspect of marital discord which is the separation of finances. Public policy argument therefore has to consider all the arguments being presented above. The courts simply mentioning pre-marital agreements being against public policy no longer serves the entire purpose, the grounds of such observation need to be clarified. Public policy is a large and vague term, it can mean anything depending upon the legal subject matter being referred to, therefore public policy has been described as an "untrustworthy guide"⁴⁷, an "unruly horse".⁴⁸ Further in *P Rathinam v Union of India*⁴⁹ public policy has been called as capable of modification and expansion. In such a scenario, two questions arise, what in pre-nuptial agreements are against public policy, and whether public policy should be considered to be a guide at all, considering its tenuous position? Because public policy has been proven to be fluctuating, varying with the socio-economic context, and morality of the people, and has been considered to be capable of expansion, perhaps the time to consider it worthy of taking note that public perception has changed and therefore as per the changing moral aspirations of people it would be prudent to consider the validity of pre-nuptial agreement.

CONCLUSION

Considering all of the above arguments it is time to consider the judgment of the Delhi Family Court, that it is high time that the pre-nuptial agreements are made mandatory, in a better light. The judgment seems to be a judicial push that is coming from lower courts dealing with family matters, towards more amicable

⁴² Gail Frommer Brod, Pre-Marital agreements and Gender Justice, Yale Journal of law and feminism, Volume 6, pp 229

⁴³ Shah Bano Begum v Mohd, Ahmed Khan, 1985 AIR 945

⁴⁴ Section 7, Guardians and Wards Act, 1890

⁴⁵ Gaurav Chiplunkar, Marriage markets and rising dowry in India, Available at:

<http://piketty.pse.ens.fr/files/ChiplunkarWeaver2017.pdf>

⁴⁶ Livelaw Network, False 498A Cases are on the rise, Available at: <https://www.livelaw.in/false-498a-cases-are-on-the-rise/>

⁴⁷ Gherulal v Mahadeodas, AIR 1959 SC 781

⁴⁸ John Shand, Unblinkering the Unruly Horse: Public Policy in the Law of Contract, The Cambridge Law Journal, Vol. 30, No. 1, 1972(A) (Apr. 1972), pp. 144-167

⁴⁹ 1994 AIR 1844

divorces. Even the judgment refers to marriages going haywire and therefore the pre-nuptial agreement is required to be mandatory. However, this judgment and the recent Bombay court judgment referred to above seem to be isolated efforts of the judiciary, there is no consensus amongst courts towards accepting the pre-marital contracts, even as modes of consideration of the evidence. Further, this observation of the family court raises more questions than it answers. The question would also depend on what the agreement referred to, a pre-nuptial agreement about assets, the question regarding children, or an agreement regarding living conditions within the marriage, the validity of the agreement will depend on the nature of the agreement, further, the question of mandatory nature will only arise when the pre-nuptial agreements are accorded any status within the law.

The court therefore is putting forward a poignant point, that it is time to consider that pre-nuptial agreements are the need of the hour in Hindu marriages, but the point remains that they need to be studied deeply before any legislative changes can be made to recognize them.