

PRE – NUPTIAL AGREEMENT: - FROM RELIGIOUS SANCTITY TO CONTRACT

A pre-nuptial agreement or prenup, as it is commonly called, is a contract entered into by people who are planning to get married. Its content can vary widely, but commonly includes provisions for the division of property and assets should the couple divorce and any rights to spousal support during or after the dissolution of marriage.

While this concept is more prevalent in Western countries it is still not very popular in India because marriage as an institution is considered a pious and sacred bond and getting into an agreement prior to marriage does not go well with the Indian society. Also, opting for such agreements invites social stigma that the couple shares low commitment, and anticipation of divorce even before marriage is both, bad omen and unromantic. Nevertheless, the global publicity about celebrity prenuptial agreements is encouraging people to consider the idea in India. It is therefore essential to understand that while prenuptial agreements might be a valuable way for parties to express their intention concerning the nature of their financial relationship; it is not possible to assure or even to expect that such agreed terms will be upheld in an Indian court in its entirety. But then, is it not a necessity in post modern society where marriage as an institution has received a major jolt in the light of acceptance of living relationship by a section of Society and also by judiciary?

There appears to be no concluding case law in India on the topic of prenups or postnups and it will not be incorrect to say that Apex court of law is yet to give its final word on it. Let us make an effort to understand the views of various High Courts as far as the legal standing of prenups is concerned. The Hon'ble High Court of Calcutta in the case of Tekait Mon Mohini Jemadai vs. Basanta Kumar Singh had held that though marriage under the Hindu Law is a contract, it is also a sacrament, it is more religious than secular in character; the union is indissoluble, for it is a "union of flesh with flesh, bone with bone." The Hon'ble Court went to the extent of stating in details that 'prenup is opposed to public policy'. According to the Hon'ble Court, such contract seems to be not only inconsistent with the theory of the relation between husband and wife according to the Hindu Law, but against public policy. Similar view was also taken by the Hon'ble High Court of Orissa and High Court of Madras. Hon'ble High Court of Orissa in the case of Sirbataha Barik v. Musamat Padma held that prenup is opposed to Hindu law and also opposed to public policy and thus, it is not a valid contract. Similarly, the Hon'ble High Court of Madras in the case of A.E. Thirumal Naidu v. Rajammal held that under the pre-nuptial agreement between husband and wife to live separately from each other was invalid even if there is an agreement to that effect because as per the Hon'ble Court, it is forbidden under the Hindu law. The Hon'ble Court went to the extent of declaring prenup as opposed to public as held by Calcutta High Court and Orissa High Court. However, in certain aspects of personal law and in some cases Hon'ble Court has taken a lenient view whereby the Hon'ble court has not dismissed prenup totally

and thus, the Hon'ble Court of Calcutta in the case of Sm. Sandhya Chatterjee vs. Salil Chandra Chatterjee has held " it is just and desirable that they should live separately and comply with terms of agreement entered into between them – that will be beneficial to their interest as also their son living with mother – agreement not opposed to public policy and enforceable." However, the Hon'ble Court in this case was dealing with the agreement entered into by the married couple and not strictly speaking between the couple before entering into marriage. However, in one of the cases dealing with Income Tax, the Hon'ble High Court of Calcutta had the occasion to deal with the prenup and in that case, the Hon'ble Court allowed the appeal on the basis of prenup and thus, held the prenup to be valid and legal. In this particular case between Commissioner of Income Tax v. Mansukhrai More, the Income Tax Tribunal upheld the assessee's contention and directed exclusion of income from assessee's property's total income on the ground that it was transfer of property not out of love or natural affection but in fulfillment of obligations undertaken under pre-nuptial agreement and it conveyed property in trust for benefit of minor children. The Hon'ble High court held that "Tribunal was justified in accepting existence and genuineness of pre-nuptial agreement". In another case, Hon'ble High Court of Jammu & Kashmir had an occasion to deal with prenup in the case of Mohd. Khan v. Mst. Shahmali. In this particular case, pre-nuptial agreement was executed between the groom and bride's father. In this case, the first appeal court held that "the agreement was not in any way opposed to the Muslim Law and was not in any way unconscionable. The violation of the condition by husband entitled the wife to seek divorce from the husband." In this particular case, the issue that came up for hearing was that 'if in the pre-nuptial agreement the son-in-law binds himself to pay a specified sum as token money, spent by his father in law on the marriage on his running away from the house and deserting his wife, then on the happening of this contingency, if the father calls to pay the specified money, then in that case it would not constitute a doctrine opposed to Muslim law'. The Hon'ble Court upheld that position of Appeal Court and further held that "an anti-nuptial agreement by a Muslim husband that he would pay separate maintenance to his wife in case of disagreement, and that the wife would have power to get herself divorced, in case of the failure of husband to pay the amount was not opposed to the public policy and was enforceable under the Muslim law."

However, as stated before, the issues are still not clear and the issues need further churning before we reach to some conclusion. Thus, it will not be entirely incorrect to say that the court has not yet finalized its opinion as far as prenup is concerned and the issue is still wide open. Critically, the Supreme Court of India which is vested with extremely broad power to do justice between the parties and which has been quite active in matters concerning the grounds for divorce has taken no final stand on the matter of prenuptial agreements. However, it is to be noted that Laws like Protection of Woman from Domestic Violence Act and its interpretation by the Court across India has

given an acceptance to the fact of 'living relationships' of couples without marriage and relationship which is 'akin to marriage'. With Courts granting reliefs in the cases of living relationships and to relationship without marriage the concept of prenups has acquired an altogether new dimension. How do you deal with a couple, with regard to their rights and liabilities, who are residing together on the basis of prenuptial agreement?

As every concept has its own pros and cons this concept too have some advantages as well. The prenuptial agreement is characterized by great flexibility and can be tailor-made to the specific needs of the couple. It is of great interest to note that sometime back there was a news item, stating that the Karnataka state women's varsity Vice-Chancellor, Dr. Syeda Akhtar has called upon Muslim girls to sign prenuptial agreements. Dr. Akhtar said this (prenuptial agreement) is the crucial first step which will guarantee a Muslim woman's rights throughout her marriage. So, a prenuptial agreement can be an important document to enable a woman to assert her rights and ensure that she is not done out of her just dues. A prenup can be successful ONLY if both the couple are scrupulously honest about their assets. Hiding information about assets can defeat the purpose of a prenup – a harmonious division of assets upon a divorce.

There are many other benefits of a prenup: it can protect a person from his/her partner's debt loads; prevent one's business/estate from getting divided; ensure spousal support in terms of monthly maintenance or alimony; guarantee remarriage rights and take care of child support and custody issues. All it requires is free consent and an honest declaration of individual assets and liabilities. But the crux of the matter lies elsewhere. Unlike most countries where a valid prenup is legal and binding when a couple separates, the Indian legal system does not fully recognize this pre-marital agreement. In fact, the concept is gaining some acceptance, especially in urban area, over the past few years but till date, it is not a completely legally valid pact as per the laws of our country.

Although all matrimonial laws in India have provisions for a wife's maintenance and alimony (under the Hindu Marriage Act, however, either party can claim it), the amount payable always depends on the partners' income, property and other circumstances. So it might have helped the couples who are fighting legal battle, had they declared their assets in the very beginning, reviewed their financial positions and agreed to a mutually acceptable division of wealth. This is the primary reason behind drawing up a prenup – so that a person may have a fair idea about what to give and what to receive if marriage goes kaput. In spite of lacking legal sanctity under Indian marital laws, a prenup can still

be treated as a valid contract if a person and his/ her spouse consent to go by its terms and conditions. But then it will be more like divorce based on consent.

Another positive side of prenuptial agreement is that it may at least check some false prosecutions by unscrupulous Women, who are misusing Section 498A of IPC or Domestic Violence Act for blackmail and Extortion of money. That means, if both the parties are genuine, transparent and do not have any pre-planned ill mind, they will accept the same before marriage itself. The Prenuptials agreement stands a good chance of enforcement in India if the prenuptial agreement is certified by the court and this is probably possible under the "Special Marriage Act" where in the magistrate goes through all the documents and then declares the marriage based on those documents to be valid. It is therefore essential to understand that while prenuptial agreements might be a valuable way for parties in India to express their intention concerning the nature of their financial relationship; it is not possible to assure or even to expect that such agreed terms will be upheld in an Indian court.

Though divorce is quite common in India now, it is still not considered a possibility before the marriage and hence there is no thought of a pre-nuptial agreement. There is no talk of a pre-nuptial agreement at all as a way of a by-plan as far as the legislation is concerned. There may be a few people talking about the pre-nuptial agreement, but India is far from including it in it's law and legislation plans. Even though we still have a long way to go before pre-nuptial agreements are implemented in India it is a way by which couples can protect their assets in case of a divorce. A pre-nuptial agreement helps resolve and simplify a lot of financial and property issues. Since the division of assets are already done before the marriage, implementing what has been decided before the marriage makes life simpler. It just comes down to dividing the assets as mutually decided by the couple and will save nasty arguments later. But a person could get a pre-nuptial agreement drafted abroad, marry in India according to Indian tradition but the agreement will be valid in that particular country only and not in india.

While the debate about its legal validity and advantages continues, it is better to look at the emotional and social feasibility of a pre-nup, which is often seen as a mark of mistrust or lack of commitment among couples even before marriage. One can't change the society overnight but prenups are certainly getting popular in India, especially in the metro cities where about 10-15 per cent couples opt for some kind of pre-marriage Agreement as it gives them great peace of mind and makes them feel strong enough to handle all unforeseen circumstances. Although a very practical agreement, there are many who do not see the need for such a document. It, essentially, is an acceptance of the fact that marriage may not last. In other words, a person is giving up on his/her marriage before one even gets started. In fact, the couple, who are madly in love and

who will soon vow that they will be together 'always', are expected to negotiate their own divorce settlement.

In conclusion it is perhaps wiser to go in for a prenuptial agreement that clearly states on a fair division of property, personal possessions and financial assets than fight over one's favourite piece of furniture and crystal ware, later in the marriage. A well-drafted prenup can facilitate fairness, certainty and transparency in the treatment of marital or non-marital assets at a time when mutual anger may lead to misguided decisions. The law makers and the law regulators have to rise to the occasion and take in their stride the changing scenario. But then the issue arises as to how to handle the sacred 'bandhan' of seven lives sprinkled with 'Teej' and 'Karva Chauth'!