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# Status and Scope of Prenuptial Agreements in India with Special Reference to Personal Laws in Australia

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NEHA BHURANEY<sup>1</sup>

## ABSTRACT

*A pre-nuptial agreement or pre-nuptial is a type of a contract, which is entered to by the parties who are engaged to be married to decide the transfer of certain properties which they hold on their own or together and other liabilities that are attached which might be difficult to solve at the time of divorce, separation or breakdown of marriage. Previously it was only limited to western countries where divorce rate is much higher than that of India, but now it's slowly gaining momentum in India as well. The intent of this research is to peruse out the difficulties that arise in an Indian society with reference to acceptance of pre-nuptial agreements in a common platform. The intend of the research is to analyse in detail the approach of Indian societies towards pre-nuptial agreement through a data study focusing on the young people who are the intended parties of the pre-nuptial agreements and the families involved who become the reason for the unpopularity of these agreements. A part of this research will also highlight in detail the comparative analysis of Australia and its laws pertaining to how they look at the pre-nuptial agreements and how the courts enforce these agreements either with the help of the laws existing or through case by case basis. Along with an entire focus shall be to focus in detail the understanding of the public policy as to why they are failing in India and becoming an interfering nag into the approach to some laws who have not had an amendment in decades, one such problem also persists with pre-nuptial agreement. The last part of the research shall be to suggest a Pan India model of pre-nuptial agreements in persistence to existing laws in India*

**Keywords:** Prenuptial, Marriage, Personal Laws, Comparative, Australian Personal Laws.

## I. INTRODUCTION

In India there is a holy belief that when two people are united in marriage they are unite for life, strongly believing in “till death do us part”. Considered to be a grand event for the bride

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<sup>1</sup> Author is a Research Scholar at Gujarat National Law University, India.

and groom, wedding is viewed as a sacred prelude to a journey of joy, bliss and love, until it is brutally disrupted by uneventful halts like dissolution, divorce and breakdown. All the tenderly nursed dreams for future seem to get shattered, and left behind is bitterness, mainly over emotional and financial matters. It is in this context we must see how pre-nuptial agreements fit the bill.

These agreements are considered as a lifeboat for individual who consider going to court and fighting battle for finance and custody of children to be dirty. So, making up the mind in advance about certain things that might come in handy during marital life keeping in mind the existing laws is always considered good. This is the reason why prenuptial agreements are such a success in the dynamic of those relationship where both the persons have a lot to talk and decide before they get married.

There is a lot of scarcity of its talk and discussion in India. As it is already a known fact that marriage is big deal for every religion and for two families, but specifically taking about India, we do not use the word contract with marriage and talking about ending something before it starts is always a delicate subject for most families in India, but it's not nineteenth century anymore, its 21<sup>st</sup> century where there are a lot of changes in gender roles of both the genders and it is impacting how they live their life. Whether it is money values, or difference in standard of living. Therefore, something that could not be talked about then have now need to be discussed in the open, especially with the increase rate of divorces and their consistency of being dragged for years in courts which affects every person involved in it financially and emotionally.<sup>2</sup>

The research is new and innovative because there has not been , any extensive study quantitative or otherwise which were found by the researcher to support that validity of research and analysis has been going on for the said topic in India. The government and legislator insist that prenuptial agreements cannot be legalized because of marriage being sacrament but it not a matter of marriage of just Hindu, India is diversity of religion and a bigger picture has to be thought of here. There are ways without uniform civil court to initiate discussion for the validity of prenuptial agreements.<sup>3</sup> Right now, there is just a single way to validate any agreement which fall in this category and that is thorough Indian Contract Act, but it does not set up any rules and guidelines that need to be followed by the lawyers while making prenuptial agreements. So, researcher insist on discussing ideas to come up with a Pan India model for

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<sup>2</sup> <http://www.thequint.com/india/2016/04/12/exclusive-or-prenup-vital-to-safeguard-womens-interests-mwcd>

<sup>3</sup> Aarefa Johari, Is India really ready for prenuptial agreements, ask divorce lawyers, SCROLL. IN, (November 20, 2015), <https://scroll.in/article/770445/is-india-really-ready-for-prenuptial-agreements-ask-divorce-lawyers>

validating those prenuptial agreements which fall under the category of said rules.<sup>4</sup>

It's not something that is unheard of India has been falling behind in legalizing such agreements for the sake of the safety of the people entering into marriage with a peaceful mind that in case something untoward happens there is a clarity as to what the role of each is in case of divorces and other matrimonial divisions.

The biggest problem which is faced while talking about this thing is that since India is secular where every religion has its own way of handling matrimonial disputes and therefore introducing a topic which is too neutral for all the religions might be very critical and debatable.<sup>5</sup>

## **II. CONCEPT AND IMPORTANCE OF PRENUPTIAL AGREEMENTS**

One of the biggest roadblock to the existence of such agreements is how things are looked upon in the society whenever marriage is considered between two parties, there are so many arrangements made between the to be spouses for the betterment of their marriage life, but one of them is never an arrangement to remedying the situation in case something untoward like divorce happens between the two, because in our society we considered the thread that holds the two families and spouses together should not be broken but mended at all costs. And since we look at the public policy of India, its bit dicey when it comes to such things and anything new which is a bit sceptical in the eyes of society at large becomes against the public policy. Along with that Hindu marriage act is based on sentiment and not contract therefore our society is not adaptable to look at marriage as financial agreement between parties as well.<sup>6</sup>

Therefore with no recourse in the religious laws. It becomes necessary to look at these agreements as purely a contract between two parties which needs to satisfy all the necessities of a contract under section 10 of Indian contract act. With the increase of understanding in the marriage and a wave of more independence between the spouses in reflection to career goals, there has been gradual increase in the pre-nuptial agreements in India<sup>7</sup>, which is still very less in reference to western countries till now, <sup>8</sup>mostly the spouses who are concerned about their financial assets are moving towards the goal of prenuptial agreement and still only 10-15

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<sup>5</sup> American Academy of Matrimonial Lawyers, Prenuptial Agreements on the Rise finds Survey, (October 26, 2017), <http://aaml.org/about-the-academy/press/press-releases/prenuptial-agreements-rise-finds-survey>

<sup>6</sup> See Mela Garber, Why You May Need A Prenup, ANCHIN PRIVATE CLIENT, (Nov 9, 2017) [https://www.anchin.com/uploads/1413/doc/APC-News\\_042016\\_Prenup.pdf](https://www.anchin.com/uploads/1413/doc/APC-News_042016_Prenup.pdf)

<sup>7</sup> Prenuptial Agreements Are on the Rise, and More Women are Requesting Them, HUFFINGTON POST, October 22, 2013, [https://www.huffingtonpost.com/2013/10/22/prenups-\\_n\\_4145551.html](https://www.huffingtonpost.com/2013/10/22/prenups-_n_4145551.html)

<sup>8</sup> Why are prenuptial agreements becoming so popular? WINSTON SOLICITORS LLP, (September 17, 2015), <https://www.winstonsolicitors.co.uk/blog/why-are-prenuptial-agreements-becoming-so-popular.html>

percent of people are adopting the help of prenuptial agreements. as seen in india the court only takes up the existence and enforceability of prenuptial agreements if it is fully and freely consented between the parties without any untoward force or coercion and does not involve any provision which go directly against the existing family laws in India. Looking at it in the broad daylight there are many relevant advantages to such agreements between the spouses.<sup>9</sup>

1. This is one of the front-runners for a speedy settlement between spouses and expensive legal fees is avoidable of the settlement is not dragged upon.
2. Even though there are extensive laws assuring the maintenance of women, but in cases of death of the spouses a little more assurance can be provided with the help of such agreements.
3. Usually as noticed in India on of the parties (mostly women) give up their career for raising children, can feel stable and secure with such agreements being in place.<sup>10</sup>
4. Most of the time the court proceedings turn really ugly for the spouses to assert their side of things, this can be avoided to some extent with the permeance of pre-nuptial agreement between them.
5. There might be many active situations where huge debt is existing in the name of one of the spouses and due to the legality of marriage the burden also falls upon the other spouses as well, and at the time of divorce it might create hug hindrance, therefore existence of prenuptial agreement might be helpful to save the other spouse from the debts of one.<sup>11</sup>
6. The most important hindrance which is seen in pending divorce cases in India is that it drags for decades sometimes which effectively stops both the spouses to move forward in life but with the existence of solid prenuptial agreement such can be avoided with speedy legal process and remarriage and custody of children can be done effectively as well.
7. In Indian like any other country, it takes extreme strength and hard work to build up a business and sometimes in the necessities of extreme maintenance for the spouse, there are situations where the entire business is sold up for the payment of the same, with the mutually agreed prenuptial agreement such instances can be reduced to the minimum as other ways or sources could be pulled out for the payment of the maintenance of the asking spouse

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<sup>9</sup> Why prenuptial agreements are more popular today, TORRES LAW, P.C, (August 23, 2017), <http://www.tlghouston.com/blog/2017/08/why-prenuptial-agreements-are-more-popular-today.shtml>

<sup>10</sup> Aarefa Johari, Is India really ready for prenuptial agreements, ask divorce lawyers, SCROLL. IN, (November 20, 2015), <https://scroll.in/article/770445/is-india-really-ready-for-prenuptial-agreements-ask-divorce-lawyers>

<sup>11</sup> American Academy of Matrimonial Lawyers, Prenuptial Agreements on the Rise finds Survey, STATISTICAL SURVEYS (October 26, 2017), <http://aaml.org/about-the-academy/press/press-releases/prenuptial-agreements-rise-finds-survey>

8. With the exitance of custodial laws in India, prenuptial agreements shall also be helpful for smooth transition of the child's future in case of the separation parents without dragging the child in the tedious court procedure and traumatizing him or her any further than they already are due to the divorce proceedings.

In general, there are some provision of prenuptial agreements which remain the same through whether in consonance with western countries or an attempt one here in Indian territory:

Individually differentiated properties of the spouses: the division of the property is such that both the spouses get what they desire in their properties without delay and too much court hassles from either side.<sup>12</sup>

- a. **Alimony or maintenance:** the amount to be paid if there is any break of marriage.
- b. **Estate planning:** In cases where the ancestral property is involved in the matter of separation can easily be concluded between the spouses without hassles, since it's seen in mist pending cases in India that the ancestral property is caught in between the claim by either of the parties for maintenance which causes unwarranted delay in divorce proceedings which is not good for wither of the party to m0ve forward.<sup>13</sup>
- c. **Proper disclosure of the registered assets and the debt liability of both the parties:** it's important for both the spouse to be communicably clear about the assets they have and the liability may be incurred in future in the marriage, the prenuptial agreements here help to keep it clean and clear at the time of divorce proceedings which makes it clear and easy at the time of division of the property, assets and liabilities for the same.

As discussed previously that since prenuptial agreement are consider not under family laws but under normal Indian contract act and therefore in addition to making sure that section 10 of the said act is justified, it also has to be assured of the following as well:

- i. The prenuptial agreement has to be absolutely fair to both parties with any power tussle for property between the parties and should not be forced on wither of them.<sup>14</sup>
- ii. Just like any contract the presence of witness and attorney certification needs to be done there might be a specific clause indicated the theory of eclipse which

<sup>12</sup> See Mela Garber, Why You May Need A Prenup, ANCHIN PRIVATE CLIENT, (Sept 16<sup>th</sup> 2015 ) [https://www.anchin.com/uploads/1413/doc/APC-News\\_042016\\_Prenup.pdf](https://www.anchin.com/uploads/1413/doc/APC-News_042016_Prenup.pdf)

<sup>13</sup> Indrani Basu, What do Modern, Financially-Independent Indian Women look for in a Marriage?, HUFF POST (March 3, 2016), [https://www.huffingtonpost.in/2016/03/08/indian-women-marriage\\_n\\_9401650.html](https://www.huffingtonpost.in/2016/03/08/indian-women-marriage_n_9401650.html)

<sup>14</sup> Paul R. Amato, The Impact of Divorce on Men and Women in India and United States, 25 J. COMP. FAMILY STUDIES 207, 209

suggest that if any provision becomes infective due to operation of law, the others might still be in force.

- iii. A proper list of all the certified and uncertified assets and liabilities need to be made so that there is not miscommunication the part of any of the parties with respect to their division.
- iv. Before certifying anything, it should be double or triple checked for any mistakes or inconsistencies.
- v. It is important that all the clause made should be drafted keeping in mind the current and future scenario that might arise between the parties to as much detail as possible to avoid any inconsistencies at the time of enforcing the contracts.<sup>15</sup>
- vi. Once all the assets and liabilities are justifiably mentioned by both the parties, there should also be provision of discussion and settlement of them in case of breakdown of marriage and any other condition that might ensue in the future with regard to financial assets of the parties.

Many of the times question arise as to the extreme necessity of such agreements in India , when discussed in detail; and understood properly it can be witnessed that due to the existence of prenuptial agreements, it beneficial in the stance that it may reduce the false claims by women in refence to section 498-A of IPC which talk about domestic violence on the part of the spouse and the family at the time of tedious court proceedings of divorce to enforce their stance in the court about the integrity of the marriage on the part of the husband. through this agreement it becomes clear that while making this agreement both parties are clear to as to what they meant and there is no malice in either of their minds with what they want from the marriage. Even though it is yet to be seen by the current family court judges but these agreements are going to greatly help to reduce the burden of the judges in deciding the divorce case which extends far to creating backlog of the cases in the courts<sup>16</sup>.

As indicated earlier in the text that there exists family law that deals with the matrimonial relief and alimony issues of the spouses that need to be given at the time of breakdown of marriage, usually as seen in court the calculation of these maintenance amount is dependent on the income of the spouses and due to unclarity of the income sources of the spouses mostly it takes longer than usually to come up with an amount that can be readily or to be forcefully submitted

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<sup>15</sup> Reeta Sonawat, Understanding Families in India: A Reflection of Societal Changes, 17(2) *TEORIA E PESQUISA*

<sup>16</sup> Shephali Bhatt, Happily divorced: Indian women are breaking the stigma around separation like never before, *THE ECONOMIC TIMES PANACHE*, (January 27, 2021), <https://economictimes.indiatimes.com/magazines/panache/happily-divorced-indian-women-are-breaking-the-stigma-around-separation-like-never-before/articleshow/67704287.cms?from=mdr>.

by the spouses as an instance of maintenance to the other spouse. this is one of the few areas where prenuptial agreements could be extremely useful since there is already proper disclosure of all assets its easier for the spouse as to what to expect in giving and talking and it also becomes easier for the judges to calculate and enforce their maintenance for the spouse asking for the same,<sup>17</sup> the only thing that is crucial here is that under no circumstance can a prenuptial agreement completely deny the maintenance as it is crucial part of family laws in the country which cannot be taken away through any agreement, as such agreement will then be considered as void. Prenuptial agreements can be valid if the couple wants to go according to the terms and conditions. This will be helpful because it will reduce the time and workload of the judge and even of the couple.

Even with the increase of so many advantages for both of the parties, it is still considered that signing the prenuptial agreement is a sign that the spouses are not ready to put their 100% into the marriage that is why they are thinking of assuring a lifeboat in case the ship goes down, although in mist of the metropolitan countries the prenuptial agreement s are increasing day by day as couples agree for the same mere for their piece of mind and not looking forward to get divorced.

As every concept have pros and cons, the concept of the prenuptial agreement also have some pros. Many of the people do not see the need of this kind of agreements. It is a fact that marriages do not work for all. Hence, it is advised to have a prenuptial agreement for future convenience. It can only be successful if both the partners consented to the agreement. It is wiser to go in for a prenuptial agreement that clearly states fair division of property, personal possessions and financial assets than to fight over one's favourite piece of furniture and crystal ware, later in the marriage.

### **III. THE PUBLIC POLICY VIEW OF PRENUPTIAL AGREEMENTS IN INDIA**

Even though the Hindu society is a bit skeptical about the existence or acceptance of prenuptial agreement but it is not uncommon or unheard of by other communities in India. As for example according to section 40 of the Indian Divorce act 1869, which is specifically applicable for the dissolution of Christian marriages in India, gives references and directs the court to look over any existing Prenuptial agreements and too look over the terms and conditions of such agreement before enforcing the order of dissolution or maintenance to any of the spouses. It has easier for the other communities to be accretive of such agreements because according to

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<sup>17</sup> Sylvia Vatuk, The "women's court" in India: an alternative dispute resolution body for women in distress, 45(1) THE JOURNAL OF LEGAL PLURALISM AND UNOFFICIAL LAW

their belief the marriage between two parties is not just a sacrament but also a contract, which is troublesome in Hindu communities due to nonexistence of same belief in them...<sup>18</sup>

As the word it suggest that due to civil nature of these agreements, it's quite difficult to infuse it with same religious understanding as given to the sacrament of marriage in Hindu laws. this makes easier for the court to deny the enforcements of such contracts if challenged as most of the time these agreements have no legs to stand on, and the road to enforce it then becomes difficult as there are no guidelines to be provided by the courts or the legislature in case both parties do want to take advantage of the same and since the courts do not want to promote any form of separation of marriage therefore they have a stance to dictate that such agreement are against the public policy of the country and therefore unenforceable.<sup>19</sup>

Given the asserted fact that these agreements are considered as offensive due to religious understanding of the society, it should be stated that these agreements by themselves should not be taken as offensive to the sacrament of the marriage. Take for example while driving the care all by itself, why do we wear a seatbelt? It not that we are anticipating accident but instead to keep ourselves safe in case something untoward happens to the car, this is the same analogy to the understanding of prenuptial agreements which are merely there for the financial safety and security of both the spouse who can go into the marriage with clear mind and more trust in each other. In fact, it is interesting to note that the Ketubah marriage contract intrinsic to marriage under the Jewish religion, where written commitments are given by the groom before nuptials to provide economic safeguards to the wife in case of his death or divorce, is also a type of prenuptial agreement.<sup>26</sup> Further, prenuptial agreements are also commonplace to marriages under Islam, which regards marriage as a civil contract. Prenuptial contractual conditions related to Muslim marriage may include any condition that is allowed under Islamic law, provided that it is agreed upon by both parties.<sup>28</sup> Agreement to pay Mahr Mu'ajjal or Mu'akhhkar, which is to be paid to the wife after separation or death of the husband, is a well-known example of a term of Muslim prenuptial agreements.<sup>20</sup>

Keeping an open mind to the understanding of how prenuptial agreements work in our country it is actively clear that since the understanding of the agreements is viewed against the

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<sup>18</sup> Are prenuptial agreements valid and enforceable in India?, ET, (October 13, 2014), available at <https://economictimes.indiatimes.com/analysis/are-prenuptial-agreements-valid-and-enforceable-in-india/article-show/44782040.cms?from=mdr>

<sup>19</sup> Divyanashi Chandra, Band, Baajaa, 'bargain': Legal Status of Pre-nuptial Agreements in India, MANUPATRA, <<http://www.manupatrafast.com/articles/PopOpenArticle.aspx>

<sup>20</sup> vincent j. Cornell, voices of islam: voices of life: family, home, and society, vol. Iii, 66 (2007); brian h. Bix, mahr agreements: contracting in the shadow of family law (and religious law)—a comment on oman's article, 61(1) wake forest l. Rev. Common l. (2011).

understanding of the public policy of the country, therefore there are many judicial proceedings who have looked down on the enforcement of such agreements in general, and that needed to be discussed as well to give a proper understanding of the same before discussing the instances where the courts have given wide berth to the applicability of the provisions of the prenuptial agreements.

In the case of *Tekait Man Mohini Jemadi v. Basanta Kumar Singh*,<sup>21</sup> was the case of Calcutta high court wherein one of the clauses of the a prenuptial agreement mentioned that the husband was not allowed to take away the wife from her mother's house and at all times was supposed to agree to everything as retreated by his mother in law without disagreeing was found to be void by the courts in the instance of it being against the public policy of the country.. Similarly, a prenuptial agreement requiring the husband to perpetually reside in his wife's house was held to be against public policy by the Allahabad High Court since it was viewed to constitute a restriction on the liberty of the husband as looked upon in the religious text and the Hindu laws of the country as well.<sup>22</sup>

The court again and again has made very clear that any clause in the prenuptial agreements which limit the maintenance in advance to the divorce proceedings will be held against the public policy as well as it restricts the capability of the spouses to take recourse from other matrimonial laws as well. So also, a prenuptial agreement providing for payment of a fixed amount of money to the wife in case of her choosing to leave her husband for whatsoever reason was held to be against public policy by the Madras High Court in *Krishna Aiyar v. Balammal*.<sup>23</sup> Further, the Bombay High Court in *Bai Fatima v. Ali Mahomed Aiyab* held that a prenuptial agreement specifying maintenance for wife in the event of prospective separation, although entered into by a Mahomedan couple, was against public policy since the agreement encouraged separation in addition to providing for it. Public policy was also cited by the Jammu and Kashmir High Court in one instance to hold a prenuptial agreement providing that the husband would live like a servant in the house of his father-in-law to be unenforceable.<sup>24</sup>

In another instance, a prenuptial agreement providing for separate maintenance for a Mohammedan wife was held by the Calcutta High Court as not opposed to public policy. Similarly, a prenuptial agreement providing for maintenance for the wife in case of future separation was not hit by public policy as per the decision of the Allahabad High Court. An

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<sup>21</sup> *Tekait Man Mohini Jemadi v. Basanta Kumar Singh*, (1901) ILR 28 Cal 751.

<sup>22</sup> *Khatun Bibi v. Rajjab*, AIR 1926 All 615.

<sup>23</sup> *Krishna Aiyar v. Balammal*, (1911) ILR 34 Mad 398.

<sup>24</sup> *Mst. Jani v. Mohd. Khan*, AIR 1970 J&K 154.

agreement requiring payment of specified amount for leaving the house of the father-in-law and providing for operation of divorce in case of failure to pay the amount was also held to not be against public policy by the Jammu and Kashmir High Court.<sup>25</sup>

Given the view points of the judges on the breakability of Public policy it should be made a bit clear as to what the understanding of Public policy is. According to a very famous jurist of its time Lord Atkins suggested that the violation of public policy should be used as an excuse only when it is directly affecting the public at large and in no what should be uses to justify the idiosyncrasies if some judicial minds who just refuse to change their meaning to new ideas and changing society at large.<sup>26</sup>

In the notable case of *ONGC Ltd. v. Saw Pipes Ltd.*, the idea of supreme court was also not clear while define what Public policy means to them because the only way to look at the understanding of the public policy is on the basis of the circumstance that its put in and who is exactly handling those ideas of public policy, therefore whether talking about narrow or wider interpretation depends upon case to case.

. In reaching this conclusion, the Hon'ble Apex Court referred to the case of Central Inland Water Transport Corporation Limited v. Brojo Nath Ganguly,<sup>27</sup> where it was held that“(t)he concept of what is for the public good or in the public interest or what would be injurious or harmful to the public good or the public interest has varied from time to time”. Resultantly, the new concept of ‘public policy’ takes the place of old one and what was considered once against ‘public policy’ may be upheld by the court today and vice versa. Further, the Supreme Court also relied on the dictum Lord Davey in *Janson v. Driefontein Consolidated Gold Mines Ltd.*<sup>45</sup> stating that “(p)ublic policy is always an unsafe and treacherous ground for legal decision”

#### IV. STATUS OF PRENUPTIAL AGREEMENTS IN AUSTRALIA

Prenuptial agreements, known as "binding financial agreements," first became enforceable in Australia in 2000 with the enactment of the Family Law Amendment Act 2000. Part VIIIA of the Family Law Act sets forth particular provisions concerning the oversight to be given to such agreements by family law solicitors. For a binding financial agreement to be binding it must be in writing signed by both parties; be given (the original) to one party with a copy given to the other; specify the extent of any spousal maintenance provided; and state that both parties

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<sup>25</sup> Mohd Khan v. Shahmali, AIR 1972 J&K 8.

<sup>26</sup> Janson v. Driefontein Consolidated Gold Mines Ltd., (1902) AC 484, 500

<sup>27</sup> Central Inland Water Transport corporation Limited v. Brojo Nath Ganguly, (1986) IILJ 171 SC

have received specified independent legal advice and annex a certificate of an independent lawyer to that effect.

An agreement will not be binding if it was obtained by fraud, was made under duress, by mistake, by virtue of undue influence, if it is impracticable for all or part of the agreement to be carried out, if there has been a material change in the care of a child leading to hardship, if a party engaged in unconscionable conduct when making the agreement, such as where one spouse is at a disadvantage and the agreement runs contrary to good conscience.

The understating and the acceptance of such agreements have changed drastically in Australia due to many different reasons along with astute changes in the society. Some of these reasons include:

- The community at large have changed in understanding of how the marriages use to look like before and where the understanding of marriage has to go in contemporary stage.
- Just like the trend is in other western countries the breakdown of marriage is increasing day by day, and the trend which was there before is about the commitment to marriage is declining and with people insisting on well-groomed career both if the spouses have an extreme amount of financial assets to lose for which they require some or the other kind of security due to which the understanding of these agreements are now increasing.
- One of the major reasons why there is more insecurity among couples these days is because marriage is not the only option available to the party they can cohabit together in marriage like setup although not legally married and due to this the financial insecurity increases more since the future of the relationship is bit in the dark as the social acceptability as well as legal acceptability is completely absent and thus the necessary peace is attained by giving into agreement with each other in matter of financial assets.
- Since the divorce rate are increasing it is also asserted fact that the parties would want to move forward in life with another partner and for that to happen it is necessary that they are compel they tucked out from the previous relationship, and just like other countries sometime these divorce proceedings due to lot of uncertainty ends up being dragged for years with both the parties being stuck in the fight, therefore to give way for new life these agreements are entered upon by the parties to remove the hassle of being stuck for the financial division of assets.<sup>28</sup>

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<sup>28</sup> Ian Kennedy, "For richer for poorer- Prenuptial agreements in Australia", (Jan 10<sup>th</sup>,2018)

As witnessed throughout the period in Australia that the inconstancy of financial security was lesser in the married couples whom many of them have been going through a rough phase as compare to the cohabitating couples whether heterosexual or homosexual who themselves have related into a better position so that they feel at peace and secure about the division of finance in case of parting ways with each other. This specific anomaly was felt very deeply that the married couples did not have much to do when it came to self-regulation of their financial assets and therefore a wave of change was very badly required by the Australian legislature.

The Joint Select Committee on Certain Aspects of the Operation and Interpretation of the Family Law Act, in its November 1992 report to Commonwealth Parliament, considered the desirability of the wider use of pre-marital and marital contracts. Of the 62 submissions which it received dealing specifically with pre-marital agreements, only two were against such a mechanism and the JSC endorsed the concept of pre- and post-marital agreements being legally recognisable and enforceable documents.<sup>29</sup>

Those attitudes and needs reflected a demand for self-regulation arising from:

- Since the parties would not want to be dependent on each other when it comes to the arrangement of their financial assets whether they are just cohabitating or being married, it's hassle free if their property, income and financial resources both during and/or at the end of their relationship.
- These agreements before the initiation of marriage is a way of people to feel secure in case something untoward happens or if there is breakdown of the marriage in the future.
- It's easy to get into a relationship cohabit or married when things are crystal clear as to the situation of the assets and how everything is going to work out in case of separation, what assets might be distributed and what might be out of bounds for either of the spouses as belonging to the ancestral or personal financial assets or debts of any kind.
- In order to not give the monetary satisfaction to the litigators by unnecessarily extending the process of divorce or separation of its already known to the parties what to expect when these proceedings will finally be over for good.
- The ability to feel independent is very important when it comes to signing such agreements by the spouses because there might be a situation when certain property has

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[https://www.tved.net.au/index.cfm?SimpleDisplay=PaperDisplay.cfm&PaperDisplay=https://www.tved.net.au/PublicPapers/March\\_2004,\\_Lawyers\\_Last](https://www.tved.net.au/index.cfm?SimpleDisplay=PaperDisplay.cfm&PaperDisplay=https://www.tved.net.au/PublicPapers/March_2004,_Lawyers_Last)

<sup>29</sup> Ian Kennedy, "For richer for poorer- Prenuptial agreements in Australia", (Jan 10<sup>th</sup>, 2018) [https://www.tved.net.au/index.cfm?SimpleDisplay=PaperDisplay.cfm&PaperDisplay=https://www.tved.net.au/PublicPapers/March\\_2004,\\_Lawyers\\_](https://www.tved.net.au/index.cfm?SimpleDisplay=PaperDisplay.cfm&PaperDisplay=https://www.tved.net.au/PublicPapers/March_2004,_Lawyers_)

been passed on or acquired after the relationship agreement was signed and how it is going to affect the monetary and financial dependence of both the parties.

- In second or subsequent marriages for the protection of previously-owned assets for the benefit of the children of previous marriages.
- For the preservation of multi-generational farming properties or long-established family businesses.
- Where there was a vast disparity of wealth of the parties or the anticipated wealth of one of them by way of eventual inheritance (which has become particularly important in the post-White era).
- For parties from cultural backgrounds where marriage agreements are commonly-accepted practice.
- To avoid family disputes on the death of a party to a second or subsequent marriage (which for many couples is a particularly important consideration).

These are the important reason for which most Australian couples are inclined to enter into prenuptial agreements so that a proper clarity with this regard could be made between the parties and in case if divorce or separation there is hassle free proceedings which in not dragged on for year not allowing either of the parties to move on in life.

## **V. JURISDICTION OF THE COURT IN REFERENCE TO PRENUPTIAL AGREEMENTS IN AUSTRALIA**

Even though the entire idea of the proper set up prenuptial agreement is to remove the power discretion of the courts in matters of property division which shall itself be resolve through the wording of the agreement itself but still the family courts of Australia hold a lot amount of importance in no of areas of matrimonial settlements of property.

First of all, no provision in a financial agreement excludes or limits the power of a court to make an order in relation to the maintenance of a party if the court is satisfied that, when the agreement was made, the circumstances of that party were such that, taking into account the terms and effect of the agreement, the party would have been unable to support himself or herself without an income-tested pension, allowance or benefit. Prenuptial agreements are currently exempt from this revenue-saving provision but draft legislation has been prepared to close that loophole. Further, provisions relating to maintenance of a party or a child are void unless they specify<sup>30</sup>:

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<sup>30</sup> Jeremy D mroley,"Prenuptial agreements in Australia", (Aug 2013) <<https://www.international->

- The party or child for whom the provision is made; and
- The amount provided for, or the value of the relevant property attributable to, the maintenance of the party or child.

Secondly, any assets which do not come within the provisions of the agreement remain available for adjustment by the court between the parties in the exercise of the broad, discretion-based property division powers under s79 of the Family Law Act (which is a process very similar to s25 of the Matrimonial Causes Act). Many agreements are designed only to preserve pre-marriage or inherited assets and do not attempt to regulate the division of assets acquired in the course of the marriage by the parties through their mutual endeavours – and the court is left at large in determining the proper division of those assets.

## **VI. PRACTICAL CONSIDERATION OF PRENUPTIAL AGREEMENT IN AUSTRALIAN LEGISLATION**

The legislation is no more than a starting point. There are many practical considerations which affect the content and enforceability of an agreement, and indeed whether the parties will enter it at all.

### **(A) Emotional resistance**

Whether you consider Australia or any other country the time leading up to the marriage is very critical and nervous for both of the parties as there are a lot of jitters to the new beginning and what future might hold for all of them, and at this time thinking about an agreement even for the peace and security of the parties is a big step and a daunting one at that for both of the parties mostly the situation might be such that one party who might have more stake in the financial assets might want to enforce the prenuptial agreements and the other party might feel too emotional about it or even feel off since they might feel that the other to be spouse want to keep the security of the financial transaction over and above the emotional attachment that they share. Due to such differences between the parties some time the negotiations for the agreement becomes way too emotional for the parties to handle and even as a worst-case scenario if the negotiations are not up to the mark either of the parties might call off the wedding, which is a daunting consequence of such agreements as well.<sup>31</sup>

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divorce.com/prenuptial-agreements-in-australia>

<sup>31</sup> Dilshad Billimoria, Prenuptial agreements: building a safety net around assets, LIVEMINT, (Jan 2, 2016), <https://www.livemint.com/Money/ngLavHhlUeaCqDN2xoqa2K/Prenuptial-agreements-building-a-safety-net-around-assets.html>

**(B) Duress and unconscionability**

Courts are not welcoming of such agreement under which either of the part is forced are put into position where they have to give up their side of the deal to give power to the other parti therefore any agreement under duress is set aside by the courts as Void ab initio and against the public policy of the country as well.

It follows that care needs to be taken to ensure that both parties enter into the agreement freely and voluntarily and that there is no suggestion of undue pressure (for example, one party demanding that the other sign the agreement immediately prior to the marriage or else the wedding will not go ahead). There is no specified “cooling off” period but for safety there should be no suggestion of undue influence<sup>32</sup>.

**(C) Proportionality**

Human affairs are complex – and that complexity is compounded infinitely when draftsmen try to predict the future. A prenuptial agreement is probably one of the most important documents that a client will enter into and requires considerable thought, careful advice, often extended negotiation (with various drafts) and time. The stakes need to justify the expense involved to the parties. There are practitioners who offer a “one size fits all” pro forma agreement at modest cost but there are enormous risks in that approach and the negotiation and drafting of a proper agreement is a costly exercise.<sup>33</sup>

Agreements can be set aside for fraud (which is defined as including non-disclosure of a material matter). It follows that full and frank disclosure of all relevant matters – and in particular the financial circumstances of the parties – is fundamental if an agreement is to survive the challenge. It is usual to append schedules of the assets, resources and liabilities of each of the parties to the agreement – and for the agreement to provide what should happen in relation to those items in the event of the marriage breaking down.

**(D) Fairness**

The legislation does not specifically require that an agreement is fair. However, if it is challenged and is patently unfair to one of the parties, it is highly likely that the court will be keen to set it aside if at all possible and to that end has available to it all of the law of contract and equity. It is accordingly in the interests of both parties – and in particular the party most

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<sup>32</sup> Yangtao Huang et al, To pool or not to pool? Trends and predictors of banking arrangements within Australian couples, 14(4) PLoS One (2019), <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0214019#pone.0214019.ref001>

<sup>33</sup> Jeremy D mroley, “Prenuptial agreements in Australia”, <https://www.international-divorce.com/prenuptial-agreements-in-australia>

seeking to rely on the agreement that its terms are realistic and reasonable.

### **(E) Uncertainty**

None of us has a crystal ball. No one can predict what will happen in life – particularly to a young couple starting out in their first marriage. Apparently secure employment may evaporate; parties may suffer chronic ill health; established fortunes may disappear due to ill luck or poor judgment; apparent maintenance needs may be overtaken by an unexpected windfall; the arrival of children may bring about fundamental changes. As a result, prenuptial agreements are of comparatively little use to young couples with few assets – and where they are entered into, they are often expressed to operate only for a specified number of years or until the birth of the children (after which they are to be reviewed). However, they are of considerably greater practical benefit for couples entering into a second marriage – especially where they do not intend to have children – where the contingencies can be better identified and provided for.

Lifestyle issues

## **VII. STATUS OF PRENUPTIAL AGREEMENTS IN INDIA AND ITS RESISTANCE THEREOF:**

### **(A) Sanctity of Marriage:**

As indicated before that even though there are many communities in India that special prefer the advantage of the prenuptial agreement done by the parties to give them peace and security in their relationship, but since considering specifically the majority community of India being Hindu wherein no matter how modern the understanding of the marriage may get but according to the laws of Hindu marriage it is still considered as a sacrament and therefore introducing the concept of prenuptial contracts indicate a rave of change which might not be gulped down easily by most people in the society.<sup>34</sup> The incorporation of prenuptial agreements within the fabric of Indian marriages may further be challenged on the basis that prenuptial agreements can potentially encourage couples to envision the end of the marriage prior to being bound in the marital bond itself, which in turn, may potentially result in termination of marriages being viewed as the norm rather than the exception in India.<sup>35</sup> One may further argue that legalising prenuptial agreements can give rise to a view in the minds of married spouses that there is an

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<sup>34</sup> Moushumi Das Gupta, *Too early to give prenuptial agreement legal backing: Govt*, HINDUSTAN TIMES, (March 2, 2018), <https://www.hindustantimes.com/india-news/too-early-to-give-prenuptial-agreement-legalbacking-govt/story1AK9s4oUMRT6eGdKtDgbYM.html>

<sup>35</sup> Samarth Singh, *Indian stigma: The Prenuptial Agreement*, (April 14, 2015), <http://www.samarthsingh.com/in-dias-stigma-the-prenuptial-agreement>

easily accessible escape route in case anything were to go wrong. It may also be stated that this may ultimately induce them to choose separation or termination of marriage instead of attempting to work together to reduce the differences between them, thereby shifting the resolution of marital disputes out of the domestic sphere and into the public arena of courts.<sup>109</sup> The argument would thus, be that if a majority of couples begin taking the separation route due to the presence of pre-negotiated terms of marriage and separation, the institution of marriage itself may begin to lose its importance within society

### **(B) Misuse of emotional Empathy**

Prenuptial agreements may also face resistance in India due to their perceived capacity of being used to the disadvantage of the male spouse.<sup>118</sup> Those using this line of reasoning to argue against according legal validity to prenuptial agreements may stress that women or men who seek to use marriage as a means of acquiring wealth may induce their fiancés to enter terms in the prenuptial agreements providing for huge amounts of alimony and other financial benefits which would accrue to them upon divorce or separation on the belief that such separation would not take place at all.<sup>36</sup> In such cases, it may be stated that by the time the husband or wife discovers the schemes' of his or her spouse, it can become difficult for him or her to seek non-enforcement of the contract, since he had consented to the terms at the time of signing the contract.

### **(C) Weakness of women might be exploited without ironclad prenuptial agreements**

Those opposing legality of prenuptial agreements on this ground may also state that even if provisions in prenuptial agreements seeking to defeat the provisions of legislations meant for the benefit of women would be legally prohibited from being given effect, there would be nothing to prevent a husband from abusing his wife and silencing her voice by convincing her that she signed away her rights and protections under these legislations when she signed the prenuptial agreement.<sup>37</sup> Expecting wives to be aware of legal technicalities in this respect in all instances could be viewed as overly optimistic

### **(D) Clashes with public policy of the country:**

until and unless the legislators clarify the fog behind the understanding of what they mean by Public policy, a lot of changes which are required in the country may not take place at all due to some stringent minds that do not want to change at all, this fall very large on the changes

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<sup>36</sup> BJ Mann, *Does a Prenuptial Agreement Lead to Divorce?* LINKIDIN (March 15, 2016), <<https://www.linkedin.com/pulse/does-prenuptial-agreement-lead-divorce-bj-mann/>>

<sup>37</sup> Utpal Dholakia, *How Do Indian Women Fare In An Arranged Marriage?*, PSYCHOLOGY TODAY, (December 15, 2015), <https://www.psychologytoday.com/blog/the-science-behind-behavior/201512/>

which are required in the family laws whether its realization of the marriage laws or the introduction of prenuptial agreements, since the present situation is just that under no circumstances the prenuptial agreement will become part of the religion law and therefore the law makers of the country are going to keep taking advantage of it by stating it against the public policy of the country<sup>38</sup>, until and unless this solves the status of prenuptial agreements might be in the darkness or will be fairly done through Indian contract act only.

## VIII. CONCLUSION

It is true that marriage plays an important role within Indian society and there is a consequent fear that prenuptial agreements may taint the tightly held fabric of Indian families. However, we urge reconsideration of this position on the issue of prenuptial agreements, in light of the developments in the field of family law, both in India and abroad, some of which have been highlighted through the course of this paper. We submit that providing spouses with the autonomy to work on a consolidated outline, clearly denoting what they want from each other and the marriage, can not only help in ensuring that both have an equal footing in the relationship but also assist in protecting both spouses, particularly the female spouse in relevant cases, from being subjected to injustices which are generally prevalent within marital relations in India.

While the contractual nature of prenuptial agreements means that they can be considered through the lens of the provisions of the Indian Contract Act, 1872 to a certain extent, it is unfortunate that the existing coverage of Indian personal law concerning such agreements is largely insufficient. The question though remains as to whether in the absence of specific legal instruction regarding such agreements, it would be correct to consider marriage agreements like commercial agreements in the Indian context. Arguably such an orientation towards prenuptial agreements may not be ideal, given that prospective couples are likely to share loving relations wherein attitude for bargain is usually altruistic and magnanimous while entering into prenuptial agreements. Alternately, unlike commercial relationships future mapping in marital relationships is not easy; unexpected misfortunes, unexplored avenues, and emerging opportunities may force couples to revise their plans as after all they are “envisioning the end of a marriage not yet begun” and attempting to be planning to decide on a relation which has not yet materialised.<sup>39</sup>

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<sup>38</sup> Prenuptial Agreement Options, MCILVEEN FAMILY LAW FIRM, (Feb, 21, 2015), <https://www.mcilveenfamilylaw.com/prenuptial-agreement-options/>

<sup>39</sup> Margaret Ryznar and Anna Stepien-Sporek, To Have and to Hold, for Richer or Richer: Premarital Agreements in the Comparative Context, 13 CHAP I. REV 27 (2009-10).

Hence, commercial and marital agreements would require entirely different treatments. Consequently, we propose that there is a need for serious deliberation on the manner in which prenuptial agreements can be regulated and such regulations once formulated, should be incorporated within the Indian legal system instead of continuing to deal with such agreements in the currently judicial piecemeal manner.

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