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A STUDY ON PRENUPTIAL AGREEMENTS AS CONTRACTS IN INDIA AND USA

Sheetala Hegde¹

Abstract

This paper will explore the legality and validity of prenuptial agreements as contracts in India and USA. Prenuptial agreements are increasingly common around the world, but the Indian government has been reluctant to provide legal standing to them. The paper will investigate the legality and validity of prenuptial agreements as contracts in India and globally. It will explore the existing legal position, implications, and social and economic perspectives on prenuptial agreements. It explores the history of prenuptial agreements, including their origin and evolution over time. The paper analyzes the legal framework of prenuptial agreements, including their validity, enforceability, and limitations. It compares Prenups with Postnups and discusses potential changes or developments in the legal treatment of prenuptial agreements and their implications.

Keywords: Prenuptial agreement, Contracts, Enforceability, USA, India

Chapter I - Introduction

Marriage is a significant milestone in one's life, and the legal implications of a divorce can be far-reaching. Prenuptial agreements are a tool that can help couples establish their respective rights and responsibilities in the event of a divorce.²

The researcher has a keen interest in Family Law, specifically the ambiguities surrounding the legality and enforceability of prenuptial agreements in India. This has prompted them to conduct additional research and investigate the prenuptial agreement legal framework in the country.

Statement of Problem

Prenuptial agreements, also known as premarital agreements or prenups, are contracts entered

¹ The author is a student of law at KPMSOL NMIMS.

² Bryan Driscoll, J.D. (2022) Prenuptial agreement: What is a prenup & how do I get one?, Forbes. Forbes Magazine. Available at: <https://www.forbes.com/advisor/legal/divorce/prenuptial-agreement/> (Accessed: February 27, 2023).

into by individuals prior to their marriage. The primary purpose of a prenup is to determine the distribution of assets, property, and financial obligations in case of divorce or death of either spouse. Despite their widespread use, prenups are not legally enforceable in all countries, including India.³

This raises questions about the legality and validity of prenups as contracts in India and globally. Prenuptial agreements are becoming more common as more couples want to protect their assets and interests before getting married.

This paper tries to answer the question of whether or not prenuptial agreements are legal and enforceable as contracts in India and around the world including USA. Even though prenuptial agreements are legal in many places, their enforceability is often questioned on the grounds of fairness, public policy, and being unfair. Prenuptial agreements can be valid and enforceable depending on a number of things, such as where the agreement was made, what it says, and how it was signed. The agreement must be entered into voluntarily by both parties without coercion or undue influence. Both parties must provide a full and fair disclosure of their assets, liabilities, and income. The agreement must not be based on fraudulent misrepresentations or omissions. Both parties must enter into the agreement without duress, intimidation, or coercion. The agreement cannot be so one-sided or unfair that it shocks the conscience. The agreement cannot violate public policy or statutory law. Both parties should have the opportunity to consult with independent legal counsel before signing the agreement.

Chapter II – Historical Background

Origin and Evolution

Prenuptial agreements, also known as marriage contracts, date back more than 2,000 years to ancient Egypt. These written or verbal agreements established the property that each partner would bring to the marriage. Dowries are commonly believed to be the earliest examples of prenuptial agreements in European cultures.⁴

³ Kumari, B. (2021) Indians are enquiring about pre-marital agreements, Deccan Herald. DH News Service. Available at: <https://www.deccanherald.com/metrolife/metrolife-on-the-move/indians-are-enquiring-about-pre-marital-agreements-1052498.html> (Accessed: February 27, 2023).

⁴ The long and strange history of prenuptial agreements (2019) Keith B. Schulefand, Esq. Available at: <https://www.schulefandlawoffice.com/blog/2018/03/the-long-and-strange-history-of-prenuptial-agreements/>

Royal families were an early adopter of the contemporary conception of a prenuptial agreement. Edward IV and Eleanor Butler reportedly signed a prenuptial agreement around the middle of the 1400s. Prenuptial agreements continued to evolve throughout the 19th and 20th centuries.⁵ The New York State Married Women's Property Act, enacted in 1848, ensured that married women would inherit their husband's estates.

Prenuptial agreements of today are notarized contracts that stipulate the division of property in the event of a divorce. Although they can serve to protect women's finances in a divorce, they are typically designed to protect the best interests of both parties. Prenuptial agreements are more varied than ever in the twenty-first century, ranging from lengthy and detailed documents to simple one-page forms.

Since the early 1980s, when the Uniform Premarital Agreement Act (UPAA) was drafted in part in response to people getting married and intending to continue working outside of the home, prenuptial agreements have gained in popularity. Millennials favour prenuptial agreements as a means of protecting their assets before marriage.

In India, prenuptial agreements are not common and are not in line with Indian marriage customs and beliefs. However, due to the media coverage of celebrity prenuptial agreements, more wealthy individuals in India are becoming interested in the concept. There is no significant legal precedent or stance on prenuptial agreements in India, as the Supreme Court has not taken a position on the matter. While prenuptial agreements may allow parties to express their financial intentions, there is no guarantee that Indian courts will uphold such terms.⁵ Goa is the only state in India that recognizes prenuptial agreements due to its adherence to the Portuguese Civil Code of 1882. Prenuptial agreements can be enforced under the Special Marriage Act of 1954 if all documents are properly registered.

In India, where marriages are not contractual in nature, the legal enforceability of prenuptial agreements has always been questioned.⁶ The terms and conditions of prenuptial

(Accessed: February 27, 2023).

⁵ Lucy-Ann Buckley, *Autonomy and prenuptial agreements in Ireland: A relational analysis*, 38 *Legal Studies* 164–186 (2018).

⁶ *Prenuptial agreements in history* (1990) *The New York Times*. *The New York Times*. Available at: <https://www.nytimes.com/1990/04/22/nyregion/1-prenuptial-agreements-in-history-636790.html> (Accessed: February 27, 2023).

agreements can still be enforced so long as they do not conflict with the personal codes of Hindus (including Sikhs), Muslims, and Christians. A prenuptial agreement (prenup) is a western agreement that protects the assets of both parties. It is gaining popularity globally but remains unpopular in India due to the sacred status that Indian society accords to marriages.

Chapter III- Legal Provision

As aforementioned, a prenuptial agreement is a contract made before getting married that sets the rules for getting a divorce. It is a legally binding contract that can be enforced if it protects both parties and was made after both parties told the truth about all of their assets

The Uniform Premarital Agreement Act (UPAA)

Uniform Premarital Agreement Act governs prenuptial agreements in USA. It was written by the National Conference of Commissioners on Uniform State Laws in 1983 to make premarital agreements more uniform and predictable across state lines in a society where people move around more and more.

The UPAA was passed to make sure that a valid premarital agreement made in one state would be honoured by the courts of another state where a couple might get a divorce. In 2012, the Uniform Law Commission passed the updated and revised Uniform Premarital and Marital Agreements Act (UPMAA). This law put in place procedural and substantive protections for marriage contracts to make them the same as those for premarital contracts.

So far, 28 states and the District of Columbia have signed on to the UPAA/UPMAA: Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Maine, Montana, Nebraska, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Oregon, Rhode Island, South Dakota, Texas, Utah, Virginia, and Wisconsin. There are some differences between the laws that each state that has adopted the UPAA/UPMAA has made. However, this uniform framework of consistent laws has made it much easier for contract drafters to make premarital agreements that are

legal by codifying the requirements.⁷ The UPAA/UPMAA has not been passed in 22 states, but premarital agreements are still legal in these states: Alabama, Arkansas, Georgia, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Mississippi, Minnesota, Missouri, New Hampshire, New York, Ohio, Oklahoma, Pennsylvania, South Carolina, Tennessee, Vermont, Washington, West Virginia, and Wyoming.⁸

Provisions that encourage divorce or separation too much are against the public interest and can't be enforced. A prenuptial agreement could be cancelled out if there was evidence of technical mistakes, coercion, or unfair terms. In addition, certain states have complex prenuptial agreement requirements. In the event of a divorce or separation, a judge will look at a prenuptial agreement and decide if it is fair for both parties. In the event of a divorce, a prenuptial agreement can set rules and guidelines for how assets and debts will be split. Couples can include things like who is responsible for what and who isn't responsible for the debts of the other person. But each state makes it illegal for prenuptial agreements to include things that are against the law. If you do this, the whole document or parts of it will be void.⁹

In India, signing a prenuptial agreement does not make it legally binding. This is because there are different ideas about what marriage is. In India, marriages are done by personal laws, and the Hindu Marriage Act of 1955 says that marriage is not a contract. Even under Muslim and Christian law, marriage is a contract, but prenuptial agreements are not legal.¹⁰

The Goa Civil Code

In India, prenuptial agreements can only be enforced in Goa, which uses the Portuguese Civil Code of 1867. The Goa Civil Code, which is also called the Goa Family Law, is a set of civil laws that people in the Indian state of Goa have to follow. Portugal made it the law in 1867, and in 1869, it was also made law in its overseas provinces. When India and Goa joined together in 1961, the civil code was kept and is still used today.

⁷ Weaver, J. (2022) *When did prenups become so popular?*, *prenuppros*. Available at: <https://www.prenuppros.com/post/why-are-prenups-popular> (Accessed: February 27, 2023).

⁸ Rodgers, J. (2021) *A brief history: Prenuptial agreements*, *HelloPrenup*. Available at: <https://helloworldprenup.com/pre-nuptial-agreements/history-pre-nuptial-agreements/> (Accessed: February 27, 2023).

⁹ The Law Office of Jeremy D. Morley (no date) *The Law Office of Jeremy D. Morley*. Available at: <https://www.international-divorce.com/pre-nuptial-agreements.htm> (Accessed: February 27, 2023).

¹⁰ Pallathadka, H., *A paper on the suitability of prenuptial agreements in India*, *European Journal of Molecular and Clinical Medicine*, 5908-5913, 2020.

The Goa Civil Code says that marriages must be registered with a civil authority. This is to make sure that the wife is an equal inheritor and has the right to half of the "common assets," which include the things her husband inherited (absent a prenuptial agreement stating otherwise). The law also lets people make agreements before they get married that change or limit property ownership or rights. Because of how badly it was translated from Portuguese to English, even the Goans know very little about this law. The Goa Civil Code lets a couple make a prenuptial agreement that changes or limits their property rights or rights to property.¹¹ Goan law says that any property either spouse owned before or after they got married belongs to both of them. Inherited property must be split equally among children. Men who are Muslim and get married in Goa are not allowed to have more than one wife.

Chapter IV- Prenup Vs Postnup

Both prenuptial and postnuptial agreements are legal documents that say how assets and debts will be split if the couple gets divorced or splits up. When they are signed is the main difference between the two.

A prenup, which is short for "prenuptial agreement," is a contract that is signed before a couple gets married. It is a way for a couple to decide ahead of time how their assets and debts will be split if they get a divorce. Prenuptial agreements can cover a wide range of topics, such as how to divide property, who pays for what, and who gets what from an estate. Most of the time, people use prenuptial agreements to protect their own assets, like a family business, a house, or an inheritance.

A postnup, which is short for "post-nuptial agreement," is similar to a prenup, but it is signed after the wedding. Couples may choose to sign a postnup if they didn't sign a prenup before their wedding or if their financial situation has changed during their marriage.

Postnuptial agreements can also cover a wide range of issues, such as how to divide

¹¹ Naresh, S., *Prenuptial agreements in India: An analysis of law and society*, The Amikus Qriaie, 2022, <https://theamikusqriaie.com/pre-nuptial-agreements-in-india-an-analysis-of-law-and-society/>.

property, who pays for what, and who gets what from an inheritance.¹²

A cohabitation agreement is a contract between two unmarried people who live together or plan to live together. In Canada, prenuptial agreements and marriage contracts are the same things. Also, if you were in a common-law relationship and have a separation agreement, the law says that when you marry your partner, your agreement becomes a marriage contract.

Chapter V – Role of judiciary

The first case regarding prenuptial agreements in court was *Wellington v. Rugg*.

The *Wellington v. Rugg* case was a Massachusetts Supreme Judicial Court case from 1920. The court ruled that for an antenuptial agreement to be invalidated, the party seeking invalidation must show fraud. This ruling has remained undisturbed law in Massachusetts since then. The case involved Charles H. Wellington and Mary E. Lamprey, who entered into an antenuptial agreement before their marriage. The agreement provided that Wellington could dispose of all of his property, both real and personal, as he saw fit. The court found that mutual trust and confidence existed between the parties at the time of the making of the antenuptial agreement and of their marriage.

In subsequent cases such as *Rosenberg v. Lipnick* (1962) and *Jekshewitz v. Groswald* (1929), courts have applied the principles outlined in *Wellington v. Rugg* when determining whether prenuptial agreements are valid or not. In *Rosenberg v. Lipnick*, the court declined to apply these rules retroactively, upholding a prenuptial agreement against Charlotte Rosenberg based on *Wellington v. Rugg*. The ruling in *Wellington v. Rugg* has also been applied in cases involving insurance policies, such as *Lexington Insurance Company v. Rugg Knopp Inc* (1996), where it was determined that a party's failure to notify an insurer of a claim within a certain period could relieve the insurer from its obligation under the policy to indemnify for losses arising from negligent performance.

In India, there is no law about prenuptial or postnuptial agreements, and such agreements go against the way Indians usually get married. The Indian Supreme Court hasn't said anything about prenuptial agreements.

¹² Judiasih, S. D., Yuanitasari, D., Inayatillah, R., & Salim, E. F., *Postnuptial Agreement: A Comparison of Legal Systems in Indonesia and Other Countries*, 24(5) *Journal of Legal, Ethical, and Regulatory Issues*, 1, 1–7 (2021).

In a few divorce cases, courts have, however, taken into account prenuptial agreements. In *Pran Mohan Das v. Hari Mohan Das*¹³, a man agreed to marry a woman in return for a promise made by her father that he would gift a house to his daughter. The delivery of house was completed at that time and the couple acted as the home owners for some time, after which they sold off the house. The father sued them for this but the Calcutta high court pointed out that as there is the estoppel of past performance applicable here and more importantly as the nature of this agreement was not such that it could be held to be against public policy and thus the court said that the prenuptial agreement stands valid.

In *Tekait Mon Mohini Jemadai v. Basanta Kumar Singh*¹⁴ case of the Calcutta High Court, the husband had signed a prenuptial agreement that he, along with his parents, would live in the house of his mother-in-law forever but some differences arose between the two families after the couple had been married for 15 years and thereafter the husband moved out and demanded that his wife should also leave her house and should come to live with him. When Mon Mohini challenged this in court, the High court held that as this prenuptial agreement made an attempt to control the rights of the husband given to him by the Hindu law, this agreement was against the policy and thus was declared to be void.

In India, prenuptial agreements are still not very common because not enough people know about them or accept them. Goa has seen a rise in the number of couples asking about prenuptial agreements in recent years. This is because more people know that they are legal there.¹⁵

Chapter VI - Future Directions

In India, prenuptial agreements aren't very common, as they may be seen as a way to encourage divorce, which goes against "Indian traditions." But the attention paid to celebrity prenuptial agreements around the world is making more wealthy people in India think about the idea. Relationship counsellors and legal experts confirm that a small number

¹³ *Pran Mohan Das v. Hari Mohan Das*, AIR 1925 Cal 856.

¹⁴ *Tekait Mon Mohini Jemadai v. Basanta Kumar Singh*, (1901) ILR 28 Cal 751.

¹⁵ J. N. (2018) *Is goa civil code the answer to India's sexist laws?*, *Feminism in India*. Available at: <https://feminisminindia.com/2018/11/09/goa-civil-code/> (Accessed: February 27, 2023).

of Indians are asking about prenuptial agreements. The Portuguese Civil Code of 1867, not Indian family law, governs marriages in Goa making prenuptial agreements legal there.

Even when marriage is seen as a religious commitment in India, prenuptial agreements can still be valid contracts if both parties agree to them. A prenuptial agreement can help couples in many ways. They can help protect both parties from the other's debts and protect the interests of any children involved. Also, they can help both parties avoid expensive lawsuits and force couples to talk about money before they get married. In India, there are no alternatives to prenuptial agreements, but couples can take other steps like writing wills or setting up trust funds for their children.

Prenups have become increasingly popular in recent years, and this trend is likely to continue. As people marry later in life and accumulate more assets before marriage, they may see the value in protecting those assets in the event of divorce or separation. Additionally, as more high-profile couples use prenups, they may become more normalized and accepted. Prenuptial agreements have traditionally been used to protect assets, but they could also be used to address other issues, such as custody arrangements and spousal support. In the future, prenups may expand in scope to cover a wider range of issues. As these contracts become more popular, standardized forms may emerge to simplify the process of creating a prenup. This could make prenups more accessible and affordable for couples.

Chapter VII- Conclusion and Suggestions

Suggestions

Few suggestions for the implementation of prenuptial agreements in countries like India where they aren't legally enforceable are –

1. The government could introduce prenuptial agreements as a legal option in the country. This would give couples the option to decide on the distribution of their assets in the event of divorce or separation, rather than relying on default laws.

2. A prenuptial agreement can also be made through premarital mediation. In this process, a mediator helps the couple have an open conversation about all kinds of marriage issues, such as how they plan to work after they have kids and how they save and spend money, as well as the traditional premarital talks about how property will be split and who will pay alimony if the marriage ends. With the help of the mediator, the engaged couple makes all of the decisions about what would happen if they broke up or divorced. Then, they write up either a deal memo or a premarital agreement and have their lawyers look it over. Most of the time, mediation is less expensive than going to court because the couple makes all the decisions together instead of putting one side against the other.
3. The government could also increase public awareness about the importance of financial planning and protection in relationships. This could be done through education campaigns, seminars, or other outreach programs.

Conclusion

In conclusion, this study has shed light on the legality and validity of prenuptial agreements as contracts in India and globally. The analysis reveals that prenuptial agreements are becoming increasingly popular across the world, with many countries recognizing them as legally binding contracts. In India, prenuptial agreements are not yet recognized as enforceable contracts under Indian law. However, there is a growing trend of Indian courts considering prenuptial agreements in divorce proceedings, which may signal a shift towards greater recognition of their validity. Despite the differences in legal recognition of prenuptial agreements, there are some common elements that can increase their enforceability, such as full disclosure of assets and liabilities, the absence of coercion or undue influence, and the presence of independent legal advice for both parties. In light of these findings, it is recommended that individuals seeking to enter into prenuptial agreements should obtain professional legal advice and carefully consider the legal implications of such agreements in their specific jurisdictions.