

'PRE-NUPTIAL AGREEMENTS IN INDIA'

1. Introduction

- 1.1** Premarital Agreement (also known as prenuptial agreements or “prenups”) “is a contract between two individuals entered into before marriage. It outlines the state of finances and personal liabilities in the event of failure or disintegration of marriage.” The agreement defines the rights, duties, and responsibilities that flow from the marital relationship and that otherwise would be regulated in accordance with the relevant laws.
- 1.2** Prenuptial Agreement, have been in existence in Europe and Far Eastern Countries in some form or the other. Essentially, such agreements were practiced in royal or affluent families to protect their wealth.
- 1.3** A few countries such as Canada, France, Italy and Germany have matrimonial regimes in place of pre-nuptial agreements, these are also known as marital property systems. These are systems of property ownership between spouses providing for creation or absence of a marital estate, and if created, what properties are included in that estate, how and by whom that is managed, and how it will be divided and inherited when the marriage ends.
- 1.4** Countries, such as the **Netherlands, Italy, Brazil, Germany, Switzerland, South Africa** recognise and generally enforce pre-nuptial agreements. Five countries viz. **Netherlands, Luxembourg , France, Portugal** and **Austria** have signed the “*Hague Convention on the Law Applicable To Matrimonial Property Regimes, 1978*”. These govern all property relations between spouses regardless of where their assets are located. In **U.S.**, States enforce pre-nuptial agreements under the Uniform Premarital Agreement Act.
- 1.5** Prenuptial agreements, known as "binding financial agreements," became enforceable in **Australia** with the enactment of the Family Law Amendment Act, 2000. In **New Zealand**, prenuptial agreements have been permitted since the enactment of the Matrimonial Property Act, 1976. Few other countries where prenups are in vogue are **Canada, China, Israel, Greece, Japan, Thailand, Turkey** and **Taiwan**.

1.6 The content of a prenuptial agreement can vary widely and could be customised according to the will of the couple, but commonly, includes provisions for division of property and spousal support in the event of divorce or breakup of marriage. If a pre-nuptial agreement is sought to be executed by the parties to the marriage, its contents should not be opposed to public policy, should not violate the principles of natural justice, should not be fraudulent in letter and spirit and equally recognise rights of both the parties. Furthermore, it is anticipated that the parties will be required to demonstrate that the agreement was entered into freely and voluntarily without any force, coercion or having an ulterior motive, and both parties had acted upon competent legal advice and that full disclosure was made of all the relevant, financial standing and other attendant circumstances.

1.7 Possibly, if these main ingredients stand incorporated in the said pre-nuptial agreement and if the same is tested in a court of law, it can stand judicial scrutiny depending on the facts and circumstances of the case in hand. This prerogative shall depend entirely at the court's discretion.

2. Indian Context

2.1 Such agreements are not common in India, as these are not in conformity with Indian customs and views about marriage. The global publicity about prenuptial agreements is encouraging people in India to consider the idea. The concept is, however, alien to the Indian Legal System.

2.2 Marriage is a socially recognized and legally protected voluntary and exclusive contract for lifelong union of two persons of opposite sex. In recent years, however societies across the world, have witnessed formidable changes in the foundation of the institution of family. From being considered as an eternal and permanent union, divine sacrament, marriage etc. has in many cases, come to be regarded as an arrangement for "social convenience".

2.3 It would be fair to assume that many prospective marriage partners would like to enter pre-nuptial agreement for settling their property rights and the financial well being after dissolution of marriage. Couples today also want to avoid financial entanglement and trauma that follows a divorce as well as the tedious legal procedure which makes them inclined to favorably consider such agreements before marriage. In different systems, the nature and extent of legal recognition

and protection of marriage and other marriage related issues, differs. Family relations like marriage, divorce, maintenance, custody, adoption are governed by different family laws around the world and, therefore, leave a lot of grey areas.

2.4 Marriages in India are not considered as contracts but fall under domain of personal laws. The definition of marriage varies according to different personal laws enlisted under various religions like Hinduism, Islam, and Christianity and so on. The definition of Marriage under Hindu Law is sacramental and indissoluble with religious sanction while under the Muslim Law, it is purely a “Civil Contract”. But in *Bhagwati Saran Singh vs. Parmeshwari Nandar Singh* (ILR 1942 All 518), the Allahabad High Court held that, “*Hindu marriage is also a civil contract entered into between two persons, in addition to being a sacrament.*” The Parsi Law despite solemnization, also regards marriage to be a civil contract. The Divorce Act, 1869 under Section 40 states that ante-nuptial and post-nuptial agreements subject to the decree of the court. From this, it can be stated that personal laws do not necessarily reject the existence of contractual character of marriage.

2.5 In India, Pre-nuptial Agreements would fall into the category of a contract and for it to be legally binding, it has to satisfy the conditions of a valid contract under the Indian Contract Act, 1872. Indian Contract Act is a general law of contract and it does not prevail over any specific laws.

2.6 A prenuptial agreement would stand a better chance if marriage is solemnized under Special Marriage Act, 1954. If copy of the notarized and registered prenuptial agreement alongwith other relevant documents is produced before the magistrate at the time of applying for marriage under Special Marriage Act, 1954 and if the magistrate accepts the agreement and solemnizes the marriage, it will have much better value.

2.7 In recent years, English courts have given prenuptial agreements greater weight in a number of cases and have begun to treat them with significant consideration. This was, after the UK’s Supreme Court decision in *Radmacher v Granatino [2010]* wherein the Court upheld the prenuptial agreement the couple entered into prior to the marriage, “*...due respect for adult autonomy suggests that, subject of course to proper safeguards, a carefully fashioned contract*

should be available as an alternative to the stress, anxiety and expense of a submission to the width of the judicial discretion...”

2.8 The Court of Appeal of Singapore in the landmark case of *Kwong Sin Hwa vs Lau Lee Yen, 1993 1 SLR 457* concluded: “... *the law does not forbid them to agree as to how they should live and conduct themselves as husband and wife, when and where they would commence to live as husband and wife, when they would consummate their marriage, when they would have a child or children and how many children they would have. Such agreements made between husband and wife are not illegal or immoral or against public policy.*”

2.9 The Ministry of Women and Child Development has, in its draft National Policy for Women 2016, proposed a review of all personal laws so as to remedy their inherent gender bias. Legalizing prenups for the security of divorced women could be an important part of Matrimonial laws. Divorce cases in India often run into several years of courtroom battles over property, assets and maintenance and women often end up losing out on their rightful share. If the terms of property division and maintenance are clearly spelt out in a legally valid prenup, it would ensure that women get the assets and support they are entitled to without going through lengthy litigation.

2.10 Prenups can also be seen as an important instrument in protecting the interests of women who are in live-in relationships or marriage. By signing a prenup, a woman would be able to get financial support without going through the tedious and expensive process of divorce which may act as a drain on her resources and she may not end up with anything. It would encourage them to assert their proprietary rights, helping them in sustaining themselves rather than being left at the mercy of their ex-spouse.

3. Objective:

The National Consultation is being organised to closely scrutinize issues and problems of the applicability of pre-nuptial agreements in India and to come up with suggestions how they would really make it easier for women to get maintenance or property rights in case of divorce the Consultation will look at various legal provisions and related issues.

4. Stakeholders:

The proposed Consultation will be amalgamation of diverse and relevant voices from across the country ranging from State and Central Government, to lawyers, activists, academicians, civil society organizations, sociologists, psychologists, financial analysts and experts in the field.

5. Desired outcomes:

- a) To collate pragmatic suggestions and recommendations on the proposed subject for realizing the viability of prenups in the Indian context
- b) To outline the modalities for introducing prenuptial agreements into the existing legal system as an option for couples
- c) To deliberate on whether to amend existing laws or to enact a new legislation to provide for such prenuptial agreements