
INDIA'S OFF AND ON RELATIONSHIP WITH PRENUPTIAL AGREEMENTS: JUDICIAL INTERPRETATION OF PRENUPTIAL AGREEMENTS ACROSS DIFFERENT COMMUNITIES

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ABSTRACT

The idea of marriage is very different in India across religions. This is because the idea of marriage as a social institution is always evolving. For centuries all over the world marriage has been about social standing and customs rather than love or free will. This idea of marriage has changed in our contemporary society. We have seen this change reflected in our laws but it is still impossible to ignore that our laws are heavily influenced by religious texts and customs in India. One such topic in which that remains a gray area in law are prenuptial agreements. While they have been adopted by numerous countries across the world, India presents a challenge due to its wide diversity of religions, customs and practices. It is up to the Courts in India whether or not to enforce these pre-nuptial agreements. Historically Courts have refused to accept these agreements due to it being against 'public policy', especially when it comes to Hindu Marriages which are seen as 'sacred'. Courts have been more accepting of pre-nuptial agreements with respect to other religious communities based on their religious texts and customs. However, we are currently witnessing a change in how these agreements are enforced by the Courts due to the change in public opinion and what constitutes as 'public policy'. This paper looks into how the Courts have interpreted and enforced prenuptial agreements across different religious communities and the evolving idea of "public policy" as it relates to pre-nuptial agreements.

Introduction

To the lay person marriage can be defined in many ways and differs from person to person and depends on the traditions and customs they follow. Hindu marriages have historically been seen as holy sacrament; this has been emphasized in numerous religious texts and judgements throughout the centuries. But in recent times it has also been referred to as a 'contract' in judgements by various High Courts across the country like in *Bhagwati Saran Singh V. Parmeshwari Nandan Singh*¹ and *Dhanjit Vadra v. Beena Vadra*².

Different religions have different definitions of marriage. As per Mohammedan law marriage is seen as a civil contract and not holy sacrament due to its resemblance to contractual agreements. Meanwhile, although Christian marriage has contractual aspects, courts have also upheld the sacramental nature of Christian marriage.

A prenuptial agreement is a contract entered into by a couple before they wed to set certain duties and rights in place as well as create guidelines regarding the ownership, and distribution of assets and liabilities in the event of dissolution of the marriage.

Traditionally, in Hindu marriages prenuptial agreements have not been held as valid as they went against the Section 23 of the Indian Contract Act 1872³ since they were against public policy. Additionally, courts ruled that any agreement that would encourage the future dissolution of a marriage was void. However, this view on prenuptial agreements has been changing throughout the years and various courts have upheld the validity of prenuptial and antenuptial agreements between couples.

When it comes to prenuptial agreements for other religious communities such as Muslims and Christians, courts are more liberal in their enforcement of a prenuptial agreement however there are certain limitations put in place so that any agreement does not violate personal laws or go against public policy.

Goa is unique due to its adoption of a uniform civil code based on the Portuguese Civil Code, 1867⁴. Prenuptial agreements are valid in Goa because personal laws do not apply and they are

¹ *Bhagwati Saran Singh v. Parmeshwari Nandan Singh*, (1942) All. 518.

² *Dhanjit Vadra v. Beena Vadra*, (1990) SCC OnLine Del 18.

³ § 23, *The Indian Contract Act*, No. 9 of 1872, India Code (1872).

⁴ *Código Civil Português* [Portuguese Civil Code], 1867 (Port.).

allowed under the Portuguese Civil Code.

Thus, it can be seen that throughout India there is no constant interpretation or enforcement of prenuptial agreements and that they differ based on various circumstances and are always evolving.

Hindu Marriages

Hindu marriage has always been seen as a holy sacrament between husband and wife. Unlike marriage in other religions, it is not seen as a social contract; rather, it is a sacred relationship. This has been held by the Madras High Court in *Krishna Aiyar v. Balammal*⁵. Pre-nuptial agreements are seen as undermining the sanctity of a marriage, and thus, they are not usually enforceable. Usually, it is frowned upon to discuss divorce or death before marriage. Courts have also held that prenuptial agreements are against public policy in various cases, but in more recent times, a more liberal attitude towards prenuptial agreements has been adopted by our courts.

Courts' Interpretation and Enforcement of Prenuptial Agreements in Hindu Marriages-

In some of the earliest cases regarding prenuptial agreements, the common consensus from High Courts around India was that prenuptial agreements were not valid because they went against public policy. Prenuptial agreements that aimed to take away or grant special privileges that were barred in the Hindu law, or any agreement that the courts thought would encourage the parties to dissolve the marriage, were held as invalid.

In 1901, the Calcutta High Court struck down the validity of a prenuptial agreement in *Tekait Man Mohini Jemadi v. Basanta Kumar Singh*⁶. In this case, the groom and his family signed an agreement when the groom was a minor, with a clause that stated that the groom would exclusively stay at the mother-in-law's house and that his own family would neither propose to nor were they competent to take him back. After 15 years, the husband decided to leave his mother-in-law's house and asked his wife to join him. The court held that a prenuptial agreement that forced a husband to live with his mother-in-law and abstained him from leaving was void and did not have validity in the eyes of the law. The Court cited that such a clause in

⁵ Krishna Aiyar v. Balammal, (1911) 34 Mad 398.

⁶ Mon Mohini Jemadai v. Basanta Kumar Singh, (1901) SCC OnLine Cal 60.

the prenuptial agreement would “practically lead to the separation of husband and wife in the future.” The Court referred to the case of *Paigi v. Sheonarain*⁷ to come to its conclusion.

The precedent laid down in *Mon Mohini* has been followed by various courts over time. Allahabad High Court in *Khatun Bibi v. Rajjab*⁸ struck down a prenuptial agreement that forced a husband to reside in his wife’s house perpetually, citing that it was a restriction to the liberty of the husband and thus violated public policy.

In *Krishna Aiyar v. Balammal*⁹ the Madras High Court held that a prenuptial agreement whereby a husband would pay a certain sum of money to the wife if she chose to leave him was void since it was against public policy and an agreement that would instigate any future separation would be invalid and conjugal rights could not be restored. The Madras High Court referred to the *Mon Mohini* case as well.

However, as time has gone on, courts have become more receptive to prenuptial agreements in Hindu marriages and have begun seeing them as enforceable.

An early example of this is in *Pran Mohan Das v. Hari Mohan Das*¹⁰. In this case, the husband entered into a marriage on the condition that his father-in-law would gift a house to his daughter. The father followed through on his promise and gifted the house through an unregistered gift deed. The couple resided in the house for a few years and then decided to sell it. The father then filed a suit to reclaim the property. The Court held this prenuptial agreement as valid since it did not constitute “marriage brokerage” and did not go against public policy.

*Appibai v. Khimji Cooverji*¹¹ is a landmark case as it did not follow the Court's ruling in the *Mon Mohini* case. In this case, a prenuptial agreement required the couple to stay in Mumbai after their marriage. Unlike the *Mon Mohini* case, the Bombay High Court upheld this prenuptial agreement between the couple as it did not place an unreasonable or restrictive burden on the couple to continue residing in Mumbai and, hence, in the Court's opinion, would not lead to the separation of the couple if enforced. Another prenuptial agreement between the couple was that if the wife married the husband, she would get ornaments. Although it was

⁷ *Paigi v. Sheonarain*, (1876) 23 W.R. 178.

⁸ *Khatun Bibi v. Rajjab*, (1926) SCC OnLine All 134.

⁹ *Krishna Aiyar v. Balammal*, (1911) 34 Mad 398.

¹⁰ *Pran Mohan Das v. Hari Mohan Das*, (1924) SCC OnLine Cal 94.

¹¹ *Appibai v. Khimji Cooverji*, (1934) SCC OnLine Bom 62.

held as unenforceable, the Court held that it did not violate public policy and was a “valid and good” agreement.

*Sunita Devendra Deshpabhu v. Sita Devendra Deshpabhu*¹² is another important judgement as the Bombay High Court took a prenuptial agreement into consideration while deciding the division of assets in a dispute.

Harish Kumar, a Family Court judge from the Patiala House Court, said in favour of prenuptial agreements that “The time has come to make compulsory a prenuptial agreement to be executed before the appointed authority after counselling of parties about the possible risk of marriage going haywire for a variety of reasons...”¹³

This shows society’s increasingly progressive outlook and acceptance of prenuptial agreements in Hindu marriages.

Muslim Marriages

Unlike Hindu marriages, Muslim marriage is not seen as a holy sacrament. In *Abdul Kadir v. Saliman and Others*,¹⁴ Justice Mahmood observed that “Marriage among Muslims is not a sacrament but essentially a civil contract.” In Urdu, prenuptial agreements are referred to as Nikah-Nama. It is an agreement signed by both husband and wife during the wedding, and it contains the rights, duties and obligations of the parties. This document must be signed in the presence of witnesses and must be publicly declared. An example of stipulations in a prenuptial agreement in Muslim marriages is the payment of Mahr to the wife by the husband of his family at the event of his death or divorce.

Courts’ interpretation and enforcement of prenuptial agreements in Muslim Marriages-

In the case of Muslim marriages, courts can hold an agreement as invalid if they think it violates public policy, encourages separation or restricts the liberty of any party. A strict interpretation of the prenuptial agreement is also followed by courts.

¹² *Sunita Devendra Deshpabhu v. Sitadevi Deshpabhu*, (2016) SCC OnLine Bom 9296.

¹³ *Time to make 'pre-nup pact' compulsory, says Delhi court.*, The Times of India, November 1, 2023.

¹⁴ *Abdul Kadir v. Salima*, (1886) 8 ALL, 149.

Similar to the Mon Mohini case, Allahabad High Court held in *Khatun Bibi v Rajjab*¹⁵ that any agreement that would restrict the liberty of any of the spouses was against public policy. In this case, the husband entered into a prenuptial agreement that he would reside in his mother-in-law's house and could not live anywhere else; if he did, the mother-in-law could remarry her daughter to someone else. In addition to this being against public policy, the court held that it went against Mohammedan law, and the same had been upheld in many judgements.

In general, courts in India are more open to prenuptial agreements when it comes to Muslim marriages. This can be seen as early as 1882 in *Hamidoolla v. Faizunnissa*¹⁶. In this case, the husband and wife signed a Kabinnama (marriage contract) that allowed her the power to divorce her husband. The wife filed for divorce, and the husband argued that such delegation of divorce power was invalid. The Court held that if the wife consented to getting married under a contract that allows her to get a divorce under specific conditions, such an agreement would be upheld.

In *Buffatan Bibi v. Sk. Abdul Salim*¹⁷, the husband had failed to comply with the terms of kabinnama and the wife had filed divorce proceedings due to this. According to the kabinnama the husband had agreed that his wife could live at her father's house if there was any conflict between them and the wife had the power to get a divorce if he she lived at her father's house for more then six months due to conflict. The Calcutta High Court upheld the kabinnama.

In *Mohammed Khan v. Mst. Shahmali*¹⁸, the couple signed a prenuptial agreement that the husband would live at his father-in-law's house with his wife and would have to pay a sum of money towards the marriage expenses. If he left the house, it would lead to divorce. This practice was known as Khana Damad. The husband ran away and did not return for 4 years. The Jammu and Kashmir High Court held that the practice of Khana Damad was not unusual, and the husband enjoyed various amenities. Thus, divorce in this case was upheld, and the agreement was held as valid.

In *Saifuddin Sekh v. Soneka Bibi*¹⁹, the wife divorced the husband as he could not fulfill the kabinnama. According to the kabinnama the husband could not bring his previous two wives

¹⁵ Khatun Bibi v. Rajjab, (1926) SCC OnLine All 134.

¹⁶ Hamidoolla v. Faizunnissa, (1882) 8 CAL327.

¹⁷ Buffatan Bibi v. Sheikh Abdul Salim, (1950) SCC OnLine Cal 28

¹⁸ Mohammed Khan v. Mst. Shahmali, (1972) J&K 8.

¹⁹ Bibi Saifuddin Sekh v. Mst. Soneka Bibi, (1954) SCC OnLine Gau 47.

to his current wife's house without her consent. If he did, she would have the power to divorce him. The husband still had the ability to be in contact with the previous wives. The Guahati High Court upheld the validity of the kabinnama as it was not against public policy.

Christian Marriages

In canon law marriage was deemed an act of God by which man and woman were made of one flesh. This idea regarding the sacramental and indissoluble nature of marriage came from St. Paul.

This idea of marriage has gone through numerous changes throughout the centuries, especially the idea of indissolubility of marriage. In *Saumya Ann Thomas v Union of India*²⁰ the Kerala High Court held that marriage has transformed from a divine institution to a social institution. The Court recognized the evolutionary nature of marriage.

The Indian Divorce Act of 1869²¹ and the Indian Christian Marriage Act of 1872²² serve as the main laws that govern Christian marriages in India. Although marriage is considered as a sacrament as held in *Kurian v. Alphonsa*²³ the Christian Marriage Act adopts a contractual view of Christian marriage

Courts' Interpretation and Enforcement of Prenuptial Agreements by the Judiciary

Section 40 of the Divorce Act, 1869²⁴, allows district courts to take into consideration the terms of any prenuptial agreements and enforce clauses related to settlement of property in the occurrence of divorce.

Jewish Marriages

There is a prominent community of Jews in India especially in Mumbai, Kerala and the North East of India. There are no customs or rituals set in stone and change from community to community. The sources of law for the Jewish community are Mosaic law and the Talamund

²⁰ *Saumya Ann Thomas v The Union of India*, (2010) KLT 1 869.

²¹ *The Indian Divorce Act*, No. 4 of 1869, India Code (1869).

²² *The Indian Christian Marriage Act*, No. 15 of 1872, India Code (1872).

²³ *Kurian v. Alphonsa*, (1986) SCC OnLine Ker 125.

²⁴ § 10, *The Indian Divorce Act*, No. 4 of 1869, India Code (1869).

(religious text). In *Mozelle Robin Solomon v. R.J. Solomon*,²⁵ it was held that Jewish marriage is of contractual nature and not a religious sacrament.

Ketubah is a marriage contract where the groom writes down certain commitments before the nuptials. The aim of this is to provide a financial safety net for his wife in the case of his death or dissolution of the marriage.

Courts' Interpretation and Enforcement of Prenuptial Agreements in Jewish Marriages-

In *Mozelle Joshua v. Sophie Arakie*²⁶, the Calcutta High Court held that while the ketubah does confer upon the wife certain rights when the marriage has dissolved, it does not confer on her any right against her dead husband's estate. It was held when it came to giving the wife the right to her husband's property an ordinary marriage settlement is executed and the ketubah is not given any real right.

Conclusion

Prenuptial agreements enforceability in India is still not uniform and simple, influenced by both concern for public policy and personal laws. The legal and religious interpretation of Christian, Muslim, and Hindu marriages differ, and this affects how legal systems interpret and uphold prenuptial agreements.

In recent times there has been a push to normalize prenuptial agreements, especially for the benefit of women in India. Maneka Gandhi communicated to Justice D.V. Sadananda Gowda, Minister for Law and Justice, the need for prenuptial agreements to be made compulsory for every couple and that the marriage would only be recognized in the eyes of the law if both parties had entered into the agreement.²⁷ This agreement could be regarded as a memorandum of understanding. The agreement would be signed in front of a witness and registered. Recently the Indian Ministry of Women and Child Development has also proposed measures to legally recognize prenuptial agreements formally.²⁸

²⁵ *Mozelle Robin Solomon v. Lt. Col. R.J. Solomon*, (1968) SCC OnLine Bom 120.

²⁶ *Joshua v. Arakie*, (1912) SCC OnLine Cal 218.

²⁷ Tinesh Bhasin, "Prenuptial agreements likely to be mandatory" *Business Standard*, Feb. 05, 2016.

²⁸ Raghav Ohri, "Prenuptial agreement now on government's radar" *The Economic Times*, Feb. 27, 2018.

This shows that Indian society is moving their traditional views on prenuptial agreements and that with this change in mindset could lead to a change in what is considered against public policy. The Apex Court in *ONGC Ltd v. Saw Pipes Ltd.*²⁹ held that there is no concrete definition of public policy and that it changes from time to time. Additionally, the Supreme Court has also relied on the judgement *Janson v. Driefontein Consolidated Gold Mines Ltd.*³⁰ in which Lord Davet stated that public policy was an “unsafe and treacherous ground for legal decision”.

Like the Kerela High Court noted in *Saumya Ann Thomas v Union of India*³¹ it is crucial to understand that the nature of marriage is evolving and it is not wise to stick strictly to ancient texts and laws. More emphasis should be placed on the nature of marriage in our contemporary society, instead of blindly obeying scriptures.

In today's time, prenuptial agreements offer numerous benefits. In the event of dissolution of a marriage, they provide financial clarity, protect assets, and avoid long drawn-out legal battles. They can be helpful when international laws may have an impact on the division of property or for resolving inheritance issues and guaranteeing the rights of children from previous marriages.

So as society changes, the legal system needs to strike a balance between preserving the integrity of marriage and respecting individual liberty. This balance can be reached with the use of a standardized and well-regulated prenuptial agreement process, which will help Indian couples gain legal certainty and ensure fairness for both parties.

²⁹ Oil & Natural Gas Corporation Ltd. v. Saw Pipes Ltd., (2003) 5 SCC 705

³⁰ Janson Appellant. And Driefontein Consolidates Mines, Limited Respondents, [1902] A.C. 484.

³¹ Saumya Ann Thomas v The Union of India, (2010) KLT 1 869.