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Pre-Nuptial Agreements: Legal Validity and Enforcement

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ABSTRACT

The legal enforceability of pre-nuptial agreements in India, underwent a significant transformation following multiple judgements given by the apex court. While this decision clarified the standing of such agreements, it inadvertently created the potential for frivolous litigation during divorce proceedings; particularly concerning dowry disputes and asset division.

This research paper addresses the complexities surrounding the legal enforceability of marital agreements in India and it also attempts to navigate through the evolving landscape of these agreements in the wake of international practices and their associated benefits.

The Supreme Court's ruling clarified that the judiciary has adopted the ideology of marriage being a sacrosanct union. However, the unintended consequence is an increased likelihood of misuse and frivolous litigation necessitates a careful re-evaluation of the existing legal framework. This research paper aims to strike a balance between safeguarding individual rights and preventing the potential for legal exploitation.

Drawing insights from international jurisdictions with well-established practices in this regard, the paper analyses various approaches, their advantages, and drawbacks. It seeks to propose potential reforms and guidelines applicable within the Indian context to mitigate the risk of frivolous litigation while upholding the principles of fairness and equity in marital disputes.

In summary, this research delves into the evolving landscape of marital agreements in India post the Tek ait Man Mohini Emadi V Besanta Kumar Singh decision. It aims to provide a comprehensive understanding of the challenges and opportunities presented by these agreements, informed by international practices, and offers nuanced recommendations to optimize their role within the Indian legal framework.

Keywords: Family Law, Nature of Marriage, Pre-Nuptial Agreements

INTRODUCTION

Prenuptial agreements are defined as an agreement made between two people before marrying that establishes rights to property and support in the event of divorce or death[1]. This practice of differentiating the property of the husband and wife is a practice seen from the ancient times of Egypt[2]. Such long standing custom lost its footing in countries that are deeply rooted in religious beliefs and customs. Therefore, countries like India and UK do not expressly recognize the usage of prenuptial agreements as the supreme courts of the respective nations consider the concept of marriage to be a sacrosanct union and hence should not be subject to any kind of civil contracts as such usage shall change the nature of the bond shared by the married couples.

However, with the evolving world, the concept of marriage that the courts have tried to protect was used to gain an unfair advantage over the married individual as the married couple when faced with divorce face the barrel of frivolous litigation to protect their respective properties with remedy that can potentially resolve the dispute amicably.

To understand the raising issue aforementioned and the reasons behind the stance taken by the apex courts of India and UK, one has delve deep into the concept of marriage in correlation to the tradition, values and morales that developed from the ancient time and then examine the legal framework that has potentially caused such issue and finally understand the reason behind the stance taken by the apex courts of India and UK while considering possible solutions at the current juncture and the future of such litigation.

1. THE CONCEPT OF MARRIAGE IN INDIA

Marriage has been an important social institution from time immemorial as it allows individuals to form a family with social sanction. With the evolution of distinct religions, the practice gained a religious inclusion along with certain prohibitions with regards to who can marry whom, essential ceremonies to be performed, types of marriages that are recognised by the religion and various other essential elements of marriage, came under the purview of the religion. This is reflected in various sacred religious documents like Vedas, quran and bible with each religion prescribing its own methods of performing the marriage and prescribing various prohibitions, obligations and duties to the married couple. The Indian society consists of various forms of religion and various subsects evolving from each religion. Therefore, the meaning of what a marriage should constitute shall differ according to the customs, traditions, necessary ceremonies with distinct reasoning for its performance and the nature of the relationship between the spouses. However, the common string between all the religions and the subsects of such religions with regards to marriage is the consideration of marriage as a sacrosanct union between two individuals whose union are guided by the respective religious beliefs, customs and practices.

However, it is the duty of judiciary to decide the nature of marriage despite the fact that the concept of marriage is an institution guided by the religious principles. The argument secularism is adopted through the Indian constitution is often cited whenever the judiciary or legislature intervenes in immoral religious activities but such argument lacks any locus standi as the state has not adopted pure secularist principles but rather adopted principles of secularism that allows citizens to profess their religion as stated by the constitution while also allowing the judiciary to intervene to stop or consider the necessity of any religious practice. Therefore, the need of judicial intervention to interpret the religious beliefs and weigh them against the safety and welfare of the society became necessary. Such interpretation was made by the apex court in the following cases wherein the judiciary and legislation expressly prohibited certain practices like triple talaq[3], sati[4], entry into tower of silence for Parsi women who married a non-Parsi individual[5] and many other practices that were abolished through judicial intervention, followed legislative decisions. This was done to ensure that no one attempts enforce or preach immoral or illegal activities in an attempt to evade the consequences of the actions.

In light of the above explanation, the judiciary defines the institution of marriage as “Marriage means the state of being united to a person of the opposite sex as husband or wife in a legal, consensual, and contractual relationship recognized and sanctioned by and dissolvable only by law.”[6]

1.1 LEGAL FRAMEWORK CONCERNING PRENUPTIAL AGREEMENTS

A prenuptial agreement is a contract entered by the spouses which is not regulated by any personal laws and therefore is subjected to the provisions of Indian contract act, 1872. The provisions of the Indian contract act prohibit any contract that can be construed to be against the public policy of the nation. The supreme court and the high courts have held the prenuptial agreements to be void as it was held to be against the public policy and also reiterated that marriage is not a contract but a sacred bond. This stance taken by the judiciary stood tall for a long period of time. However, the judicial interpretation started to move along the lines of dictating which prenuptial agreements can held valid. In the case Sayad Abbas Ali V Nazemunnessa Begum, the Calcutta high court upheld the prenuptial agreement dictating the maintenance given to the wife post-divorce as the court opined it not to be against the public policy. The Bombay high court gave a contradicting opinion in the case Bai Fatma V Alimahomed Aiyeb wherein the court declared the prenuptial agreement that prescribed the maintenance given to wife in case separation to be against the public policy as it not only encouraged separation but also tried to lay down a contract between the spouses.

These conflicting opinions put forth by the high courts was clarified through the judgements of ONGC Ltd V Saw Pipes Ltd, Ratanchand Harichand V Askar Nawaz Jung the judiciary clarified what constitutes public policy and also stated judges should take decisions on this issue not as a legal luminary but as an "experienced and enlightened" member of the community.[7] The interpretation provided by the judiciary implies that the public policy of a society is dynamic as it changes with time, therefore the judiciary too should bear in mind the facts and circumstances of each case before upholding or declaring a prenuptial agreement to be valid.

The supreme court while considering the essentiality of prenuptial agreements in the case Tekait Man Mohinin Jemadai V Basanta Kumar Singh declared that the prenuptial agreements shall not have evidential value in the court of law as the nature of marriage in India is more on the lines of sacrosanct bond then that of parties to contract. Therefore, recognizing the prenuptial contracts shall change the nature of such bond to a civil natured contract. Despite the fact that the prenuptial agreements lack evidential value, the court can take cognizance of the contract, if the party proves that such contract was entered with full knowledge of the consequences, free consent, no restrictive obligation set on the spouse and the terms of the prenuptial agreement should not place the spouse in a disadvantageous position.

In conclusion, the existing framework though offering a temporary solution lacks a definitive end with regards to the enforceability of prenuptial agreements. This bleak situation is not addressed by the legislature or the executive wings of the government and thereby allowing the existence of frivolous litigation that can potentially arise from asset division post-divorce. The Indian legislature cannot turn a blind citing the reason of prenuptial agreements being against the public policy as such a stance will only cause unnecessary hardship to the married couples who want to protect their financial interests.

2. CONCEPT OF MARRIAGE IN UK

The concept marriage has taken multiple turns throughout the history of UK and at each turn the definition and the purpose of marriage was different[8]. hence, it is essential to consider the evolution of the marriage throughout the course of UK's history to understand the nature of marriage that is in existence today.

Initially marriages were done for strategical purposes to prosper trade relations, foster peace treaties and survival of the clans[9]. The bond established through such marriages were considered important but not sacrosanct as the purpose of marriage is not to celebrate the union of two individual but it was rather

considered as a strategical tool to pacify conflicts and the core element, being survival of the clans. This definition of marriage slowly changed with the advent of an influential Christian mission sent by Pope Gregory I. The mission sent by the pope converted the Emperor of Britain to Christianity and once the emperor converted to Christianity, his beliefs were spread throughout the country. This led to adoption of religious principles imparted by the bible in the day-to-day life of the citizens of Britain and among the many principles that were adopted, the concept of marriage as preached by the bible was also adopted as it preached that marriage is not mere strategical tool but it has more depth and importance. According to the bible, marriage is preached to be,

> "Haven't you read," he replied, "that at the beginning the Creator 'made them male and female,' and said, 'For this reason a man will leave his father and mother and be united to his wife, and the two will become one flesh'? So, they are no longer two, but one flesh. Therefore, what God has joined together, let no one separate." [10]

This definition of marriage laid down by the bible shows that the purpose of taking part in the social institution of marriage is to take part in a sacrosanct union between individuals. This definition gained more recognition with the raise of Christianity in the British empire to the point where it became a social custom to regard marriage as the most sacrosanct institution that every man and woman should take part in.

This definition was later on altered with the legislations to include various dimensions that were deemed necessary by the legislature. For example, the marriage act of 1753 prescribed that the marriages should be conducted by a minister in a parish church or chapel of church and only such marriages shall be recognised by the law[11] and such alterations took place to the extent of creating a marital concept called civil partnership to enable same sex marriages. At present, marriage is defined as the voluntary union for life of one man and one woman, to the exclusion of others[12] but the judicial interpretation of marriage refers it to be a state of being united as spouses in a consensual and contractual relationship recognised by law.

2.1. LEGAL FRAMEWORK CONCERNING PRENUPTIAL AGREEMENTS

There are no express laws that dictate the formation of prenuptial agreements and it is not regulated or acknowledged by the religious texts that are held sacred by the citizens of UK. Hence, there was no express basis to validate or invalidate the prenuptial agreements as the legislature did not make any laws to regulate such agreements. Therefore, the apex court used the contract law to regulate such agreements as the nature of the agreements is more in the lines of a contract than of a religious oriented practice.

The bible being the sacred text used for interpreting the personal laws enacted by the legislature dictates that the nature of marriage is of a sacred one than that of a civil contract. The court relying on this interpretation heavily criticised the prenuptial agreements entered by the spouses as they are against the public policy. Apex court reiterated this view in multiple cases[13] and held marital obligations and duties cannot be affected by any civil contracts.

The apex court changed its stance in its landmark judgement of Radmacher V Grantanio wherein the court acknowledging the growing need for prenuptial agreements for safeguarding the financial interests of the spouses, upheld the prenuptial agreements. The court laid down the following essentials for a prenuptial contract to be valid: -

a. Entered with free consent
b. Entered with informed consent

c. Unless the circumstances make's it unfair (eventually or at present)

However, the apex court decided that the validity of a prenuptial agreement should be decided case by case, i.e., the court should exercise its discretion to consider whether the prenuptial agreement satisfies the conditions laid down in the case.

The legal stance taken by the apex court offered a temporary solution and the permanent solution is not yet seen. This motivated the law commission of UK to formulate a report arguing the need for creating a legislation to legally recognize and differentiate valid and invalid prenuptial agreements[14]. The report was submitted in the year 2014 and it was subjected to the political and public comments. In the year 2022-23 parliamentary session, a bill was introduced to give effect to the contents of the law commission report of 2014 but the bill was not passed in the course of the session and is still pending.

In conclusion, the UK legal framework consists of a temporary solution worked out by the judiciary while a permanent solution proposed by the legislature and the executive will be given effect in the near future, making the necessary framework required for the enforcement of prenuptial agreements a reality. This will offer recourse to all the couples who want to protect their financial assets or avoid tiresome litigation arising from divorce proceedings.

3. ALTERNATE SOLUTION

Since, there aren't any quick and effective remedies that are readily available for the affected parties, they can take precautionary steps to aid the speedy trial and render a swift resolution. The couple while entering the marital relationship can declare their individual assets in a document and sign it in the presence of a witness[15]. The document that has been drafted as aforementioned shall have persuasive value if only one of the parties of the petition accepts the validity of the document and the document will possess evidential value, if both the parties accept the validity of the document. The affidavit does not originally come within the meaning of evidence[16] but the supreme court has allowed the usage of affidavit as evidence only when the court considers it to be essential for rendering complete justice. The family courts have accepted to use their discretionary powers to scrutinize the affidavit and accept it as evidence only when both the parties acknowledge the legitimacy of the affidavit and when the court is able to form the opinion that the affidavit was made with proper consent.

The legal framework offered by the UK too offers a similar solution but has different legal implications. The UK legal system considers the affidavit to be valid and the liability of disproving it lies on the opposing counsel. Therefore, the affidavit signed in the presence of solicitor or public notary can be used as an alternative remedy for prenup.

This solution is however a temporary fix as it cannot eradicate the happening of frivolous litigation but can only minimize the such instances and also the admissibility of the affidavit needs to be proved to be true beyond reasonable doubt, before the concerned court for the proposed solution to work. These shortcomings prove that this is not a permanent solution but is merely a precautionary measure that can be taken to protect the financial interests of the parties. The final solution can only be brought by the legislature as the judiciary cannot read words into a legislation where there aren't any.

4. CONCLUSION

The judiciary of the both countries have acknowledged the changing needs of the citizens and decided to acknowledge prenuptial agreements subject to the criteria laid down by the judgements of the cases Tekait Man Mohinin Jemadai V Basanta Kumar Singh and Radmacher V Grantanio. This shows that

the judiciary of the respective nations has decided to strike a balance between the nature of marriage proposed by the sacred texts and the need of the citizens.

The legal framework existing in India has not proposed any bill to legally recognize the prenuptial agreement while the UK legislature has proposed the bill which is pending before the parliament. This shows that the Indian legislature has failed to acknowledge the plight of the individuals undergoing the divorce proceedings and there is no concrete solution that can end the problem in the near future.

To conclude, both the Indian and the UK legal system at the current juncture has neither imposed a blanket ban on prenuptial agreements nor have they come up with a final solution to end the legal ambiguity surrounding the prenuptial agreements. Given the different rates of progress seen in the legal systems of the countries, it is wise to for Indian legislature to wait and observe the impact of prenuptial agreements legalisation as this will provide valuable insights for the legislature.

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