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ALTAR TO ALTERCATION

A peek into the complexity of prenuptial agreements in India, and why Goa is the only outlier

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A startup founder in Delhi, while he was preparing for his wedding, consulted a lawyer about the management of his assets. What he wanted was a prenuptial agreement, what he ended up getting was a memorandum of understanding (MoU).

For, in India, where many believe marriages are made in heaven, man-made prenups have limited value.

"A lot of high net worth individuals, even women, have been coming to us for an MoU before getting married," says Sarah Kapadia, Partner at law firm Vesta Legal. "I want to reiterate that prenups are not legally enforceable."

So, what is the MoU for? "These clients want an MoU to create an understanding on everything such as what happens after a certain number of years of marriage, what happens to the children, who gets custody, what kind of education the children will receive," says Kapadia.

In October last year, a family court in Mumbai granted divorce to a couple while holding that their prenuptial agreement was unenforceable. The court, however, said the agreement will still have a persuasive value, meaning the court will take it into consideration but not be guided by it. The court considered the agreement to understand the intent of the parties before marriage and their anticipation of potential issues and mutual willingness to separate, should problems arise.

"In India, the law concerning prenuptial agreements is still controversial and not fully evolved. There is no law permitting such agreements and there is no law prohibiting them, that is, there is a complete legislative void," says Shivani Lohiya, an advocate.

In the absence of legislation, the law on this subject is mostly from judicial pronouncements and governed by the Indian Contract Act, 1872.

"Even in cases where the requirements under the Indian Contract Act, 1972 are met, prenuptial agreements are not binding but viewed as a document indicative of the intent of the Parties," Lohiya says.

The only state in India where prenuptial agreements are recognised as being enforceable is Goa. Persons "domiciled in Goa" are governed by the Portuguese Civil Code, 1867, which is a Uniform Civil Code for the state and pertains to marriage, divorce, protection of children, and succession, and is non-discriminatory in terms of religion, ethnicity, or gender.

Tying the knot

In Goa, marriage is regarded as a perpetual contract between two opposite gender persons solemnised before the Civil Registration Services. However, prenuptials are recognised and permitted.

The Civil Code has different matrimonial property regimes: Communion of assets acquired prior to and after marriage, separation of assets acquired prior to marriage and communion of those acquired after marriage, complete separation of assets where each spouse maintains ownership of what belongs to them, communion of assets acquired before or after marriage by succession, gratuitous title, or under a previous exclusive right.

The parties are free to choose any other regime and sign a prenuptial agreement specifying the regime. If no regime is opted

for, or if there is no contract, it is presumed that the parties acquire joint ownership of all assets. The wife is entitled to half of it and it cannot be disposed of without consent.

In other parts of India, in the absence of a Uniform Civil Code, most marriages are solemnised under the personal law of the parties or, alternatively, in accordance with India's secular marriage law, or civil law. The parties' rights in relation to divorce, guardianship, and alimony are largely governed by the same law.

Under the Hindu Marriage Act, 1955, which applies to Hindus, Buddhists, Jains and Sikhs, marriage is regarded as a "sacred alliance" that cannot be broken or dissolved as a civil contract, except as per the strict provisions of personal laws, and that presents a problem for enforcement of prenuptial agreements.

The Indian Christian Marriages Act, 1872 also regards marriages as a sacrament.

Muslim Law is not codified in India and uncodified Sharia law governs the rules of marriage and divorce largely as per customary rituals, which are different for Sunnis and Shias. Muslim marriages are considered to be pious civil contracts under a binding agreement known as *Nikahnama*, which includes mahr, an amount offered as consideration to the bride at the time of marriage.

"This can be viewed in the same light as a prenuptial agreement. Along with the *Nikahnama*, the parties can execute a contract contemplating the distribution of assets and property in the event of "talaq" and "second marriage of husband". Agreements made at the time of or before or after marriage are binding unless they are illegal or opposed to Muslim law," says Lohiya.

Marriage under the Special Marriage Act, 1954 is a civil contract, as no ceremonies are to be conducted under it.

Untying the knot

In India, divorce can be granted on mutual consent, or amicable settlement. In the absence of consent, divorce under all Indian personal laws and secular law is based on guilt or fault theory, which narrows down the scope of the grounds on which divorce may be sought.

Most petitions allege cruelty. It is often argued that this leads to worsening of relations. Importantly, divorce on the ground of an irretrievable breakdown of marriage can be granted only by the Supreme Court of India.

The concept of joint matrimonial property, or settlement of matrimonial properties, including the matrimonial home, is largely absent in Indian personal laws (except in Goa).

"Marriage by itself does not put an obligation on a person to distribute their assets, it only creates an obligation to maintain the spouse," says Ankur Mahindro, Managing Partner at law firm Kred Jure.

Destination weddings

There is a trend of people going abroad to get married. Can destination weddings have an enforceable prenup?

"Prenuptial agreements are frowned upon by the courts in India for being opposed to public policy. Thus, even if a prenup is executed in a foreign country, it would be considered void in India, and thus not legally enforceable. However, such couples may use the prenuptial agreement in the country where it was executed," says Mahindro.

Apart from registering their properties in names of family members, some gift their shares in family-owned companies to family members or establish trusts or companies whereby the legal title to the assets is not held by one of the parties. However, this does not preclude the courts from taking the holdings into account as a financial resource. As a result, no asset can be out of reach for a contesting spouse.

The courts are not empowered to distribute assets acquired during marriage or in any other manner. However, when maintenance and alimony is claimed by a non-earning spouse, the courts require a full and fair disclosure of the assets, on the basis of which they calculate the maintenance, or alimony.

Prenup prejudice

People in India are largely sceptical about or opposed to prenuptials and regard marriages as pious, holy, and sacred.

"We are however seeing a shift towards acceptance in recent years. Prenuptial agreements have started becoming popular in the upper classes in Delhi and Mumbai," says Lohiya.

In a Hindu law case of 2016, after the death of the husband, the wife produced a prenuptial specifying a regime for separation of assets. The court did take the agreement into consideration.

In another case, one of Muslim Law, an agreement providing for the payment of maintenance was upheld, as it was not seen opposed to public policy.

Cases where prenups came a cropper...

- A prenuptial agreement contemplating that the husband will never move the wife from her parent's residence was held to be opposed to public policy [Tekait Mon Mohini Jemadai v Basanta Kumar Singh, ILR (1901) 28 Cal 751] [Hindu Law].

- A similar agreement was ignored in *Sribataha Barik v Musamat Padma*, AIR 1969 Ori 112 [Hindu Law].

- An agreement between husband and wife contemplating the possibility of living apart on a future date was held to be opposed to public policy and therefore not enforceable [Krishna Aiyar v Balammal, ILR (1911) 34 Mad 398] [Hindu Law].

- A similar agreement was ignored in *A E Thirumal Naidu v Rajammal alias Rajalakshmi*, 1967 SCC OnLine Mad 3 [Hindu Law].

- An agreement that the husband would stay with his wife in his mother-in-law's house and will always stay with his wife, failing which the wife's mother would be at liberty to marry her off to someone else

was held to be contrary to public policy [Khatun Bibi v. Rajjhab, 1926 SCC OnLine All 134] [Muslim Law]

- An agreement between the husband and wife that the husband shall not ill-treat his wife, failing which she will be entitled to reside elsewhere and claim maintenance and rent, was not upheld on the ground that under Muslim Law a divorced wife is not entitled to maintenance or rent after the Iddat period [Ahmad Kasim Molla v. Khatun Bibi, ILR (1932) 59 Cal 833] [Muslim Law]

...and where prenups worked

- Where after the death of the husband, the wife produced a prenuptial agreement specifying a regime of separation of assets, the Court took the prenuptial agreement into consideration for deciding the issue of separation of assets among the wife, children, and other family members [Sunita Devendra Deshpabhu and Ors v Sita Devendra Deshpabhu and Ors, 2016 SCC OnLine Bom 9296] [Hindu Law]

- An antenuptial agreement by a Muslim husband in a Kabin-

nama that the wife would be given separate maintenance in case of disagreement and that in case of failure to pay maintenance for a certain period the wife should have the power to divorce herself was held not to be opposed to public policy and is enforceable. It was held further that in exercising her power under the agreement the wife must establish that the conditions entitling her to exercise the power must have been fulfilled [Buffatan Bibi v Sk Abdul Salim, AIR 1950 Cal 304]

- An agreement providing for payment of maintenance in the event of future discord between husband and wife was upheld as it was not opposed to public policy [Muhammad Muin-Ud-Din v Musamat Jamal Fatima, ILR (1921) 43 All 650] [Muslim Law]

- A 'kabinnama', as per which in the case the husband brings his former married wives to stay with him without the consent of the present wife, the present wife would be at liberty to divorce, was upheld as it was not opposed to public policy. Further, it was held that the right of a Muslim man to have as many as four wives at a time was not being militated in any manner [Saifuddin Sekh v Mst Soneka Bibi, 1954 SCC OnLine Gau 47] [Muslim Law]

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