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## VALIDITY OF PRENUPTIAL AGREEMENTS IN INDIA

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### Abstract:-

*"Individuals know better than others (including the government) what is in their best interests." - Prof. Brian Bix, (a renowned legal scholar and commentator on legal philosophy<sup>1</sup>.)*

In most jurisdictions, prenuptial agreements are greatly considered as viable methods of establishing marital rights and responsibilities of partners in marriage and in divorce. In India, such agreement, however, is not certain in legal terms since the state has not been keen on recognising such agreements. The Indian approach can be explained as being special: even though such tools as the Nikahnama are regarded to be essential elements of Muslim marriages, as the votes are a bit relevant to the end of Christian marriage it has been the case that the enforceability of the premarital agreement has been left at the discretion of courts regarding other religious groups. Besides, the modern discussions about the prenuptial agreements in India are usually influenced by the social attitudes which have the tendency to silence those who have a direct impact. This paper aims at returning the focus to the main stakeholders, who are married couples and people who think about marriage, discussing the possible benefits of prenuptial agreements in India and proposing possible models that would help spouses to control their marital relationships.

**Keywords:-** prenuptial agreement, personal laws, premarital agreement.

### Introduction

The use of prenuptial agreements is becoming more and more popular among the younger couples as they see it as a way of protecting personal interests and developing clarity to apply in case of marital break up. Even though increased divorce rates have been central in popularising such contracts, the development of the perception of marriage and the increased economic autonomy of women has also led to their further popularisation. In India, on the other hand, the law that applies to prenuptial agreements is not well developed, which makes the process even more uncertain in comparison to numerous jurisdictions in the West.<sup>2</sup> Although the potential benefits of these agreements are quite pronounced, their enforceability still remains a grey area due to the lack of laws and inconsistent judicial interpretation, and their legal validity is still debated.

This essay aims at discussing the ambiguity of premarital contracts in India and proposing some of the potential contractual terms that may be included in such contracts. The argument recognizes the difficulty of the plurality of personal laws that regulate marriage and divorce, as well as has recourse to the common law principles that have emerged by the ruling of the High Courts and the Supreme Court. The research will examine several judicial decisions in order to determine the trends in prenuptial agreements treatment and evaluate the way in which the courts have dealt with the issue of prenuptial agreement enforceability. The paper finishes off with a positive prospective, which is the laying of a groundwork in the future whereby prenuptial agreements will be successfully applied in the Indian legal framework.

### An Overview of Prenuptial Agreements in India

The swift transformation of Indian society has given rise to several distinctive social challenges, although many of which have been addressed through an expansive interpretation of constitutional guarantees in the post-Emergency period itself. This approach has also played a key role in enhancing the transparency, accessibility, and participatory nature of the judicial process.<sup>3</sup> The judiciary has made significant advancement through its judicial activism through a number of cases such as Shayara Bano case<sup>4</sup>, Navtej Singh Johar case<sup>5</sup> and Sabrimala case<sup>6</sup>. In

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<sup>1</sup> Brian Bix, Private Ordering and Family Law, 23 JAM ACAD Matrimonial Law 251 (2010).

<sup>2</sup> Michelle Greenberg, *Civil Enforceability of Religious Prenuptial Agreements*; available at <https://heinonline.org/HOL/LandingPage?handle=hein.journals/collsp32&div=22&id=&page=> (visited on 05/04/2025)

<sup>3</sup> SP Sathe, *Judicial Activism In India (Oip): Transgressing Borders and Enforcing Limits 2/E (Law in India)* (Oxford University Press; 2nd edition, Delhi, 2003).

<sup>4</sup> (2017) 9 SCC 1

<sup>5</sup> (2018) 10 SCC 1

<sup>6</sup> 2016 SCCOnline SC 1783.

many instances, this has eventually inspired legislators to frame the required legislations. There has been numerous instances of Judicial Activism wherein it has led to birth of a number of legislations such as:-

1. The Protection of Women from Domestic Violence Act (2005).
2. The judicial interpretation of Muslim Woman (Protection of Rights on Divorce) Act, 1986
3. The Sexual Harassment of Women at Workplace (Prevention, Prohibition, and Redressal) Act, 2013.

These legislative enactments, coupled with the emergence of new economic opportunities, has contributed to the empowerment of Indian woman. Increasing numbers of women are now economically independent; as a result, they are empowered with the capacity to walk out of a poor marriage<sup>7</sup>. The rising modernity has likely made women more inclined to resist the abuse in a marriage, as indicated by an increase in the number of women desiring a marriage structure in which tasks of a housewife and provider are shared among both<sup>8</sup>. Modernization, the educational and financial empowerment of women, and shifting attitudes relating to marriage have all contributed to the decline of divorce's stigma<sup>9</sup>. This empowerment of women, along with the establishment of Mahila Panchayats<sup>10</sup> has afforded women an opportunity to express their marital-life related issues. This has resulted in a sharp rise in the divorce rates, from one per thousand ten years ago to approximately thirteen per thousand now. Notably, divorce proceedings are initiated at a higher rate by women from socio-economic classes who appear to have better access to legal remedy and justice than others. According to Hasina Khan, founder of Bebaak Collective, a Muslim women's organisation, the state's failure to empower Muslim women has contributed to the low divorce rate among Muslim women<sup>11</sup>.

While much of the discourse around prenuptial agreements in India has centered on women's empowerment, men too may view such agreements as instruments of security and fairness. In contemporary matrimonial disputes, men are often apprehensive about prolonged litigation concerning maintenance, alimony, and property division. Many men perceive the current legal framework as disproportionately burdening them with financial obligations, sometimes without due consideration of their individual circumstances, income disparities, or the role of shared responsibility in the marriage. In this regard, the prenuptial agreement can give men a feeling of certainty as the financial responsibility is not taken up by the court alone but it is pre-destined.

Moreover, when men marry with great pre-existing holdings, family enterprises or age old property, then prenuptial contracts is a safeguard measure. They assist in protecting the financial interests of not only the man, but also the interest of his extended family, particularly in the societies where family-owned property is the main strength of economic stability. These agreements can help minimize uncertainty and enmity by defining the rights of ownership, expectations of inheritance and post-marital financial settlement in the event of marital breakdown. Therefore, as a male point of view, prenuptial agreements do not simply serve a financial protection purpose but also serve a purpose of saving face and preventing conflictual situations.

Divorce tends to subject couples to prolonged legal battles over property distribution, alimony and child custody, which consumes both time and money due to the emotional and financial costs involved. Divorce is a reality that has been adopted in modern society, although not expected when the two people were married, at times divorce is considered a less risky option to remain in an abusive relationship. In that regard, prenuptial agreements can play a beneficial role as they can explicitly define the rights and duties of married people not only in marriage but also in the case of its termination.<sup>12</sup>

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<sup>7</sup> "Tracing Traditional Transformations Part III: Advancements in Women's Rights Post-Independence in India" <https://legalative.wordpress.com/2024/05/19/tracing-traditional-transformations-part-iii-advancements-in-womens-rights-post-independence-in-india/> (last visited Sept. 17, 2025).

<sup>8</sup> Reeta Sonawat, *Understanding Families in India: A Reflection of Societal Changes*, 17(2) *TEORIA E PESQUISA* (2001).

<sup>9</sup> Anand Giridharadas, With India's New Affluence Comes the Divorce Generation, *N. Y. Times*, Feb 19, 2008, available at <http://www.nytimes.com/2008/02/19/world/asia/19iht-divorce.110178712.html> (Last visited on June 10, 2025).

<sup>10</sup> George, S.D., *Networking for Change: The Panchayat Mahila Shakti Abhiyan*, Women Leadership (Decentralised Governance and Development, Springer, Singapore 2024).

<sup>11</sup> Interview with Hasina Khan, "State has Completely Hijacked the Issues of Muslim Women ..." *The Leaflet* (15 Mar. 2025) <https://theleaflet.in/interviews/the-leaflet-interview/state-has-completely-hijacked-the-issues-of-muslim-women-and-polarised-it-interview-with-feminist-activist-hasina-khan-of-bebaak-collective/> (last visited 4/4/2025)

<sup>12</sup> Vijender Kumar, Matrimonial Property Law in India: Need of the Hour, 57 *JILI* (2015) 500

## The Public Policy View of Prenuptial Agreements:

Although Indian personal laws do not expressly recognise prenuptial agreements, their presence in cultural and religious practices cannot be denied.<sup>13</sup> In some pre independence cases like Haminudissa Begum case it was not recognized but the fact that it was considered accords presence of this concept even during 19<sup>th</sup> century. However during pre-independence era itself, in cases such as Banne Saheb v. Abida Begum<sup>14</sup>, it was accorded validity.

Under section 40<sup>15</sup>, which deals with Christian marriages, courts are permitted to examine the existence of a prenuptial agreement and take its terms into account when deciding matters of property division during divorce proceedings. Conversely, prenuptial agreements have been further opposed in the introduction into Hindu marriages more so since the Hindu law has been known to view marriage as a sacrament and not a contract. Provided no particular express contractual provisions exist in the personal laws, these types of agreements that are contractual in nature, may be construed under the Indian Contract Act, 1872.<sup>16</sup> However, Indian courts have frequently refused to apply them, on the grounds of public policy.

It should not be perceived, however, that prenuptial agreements do not align with religious principles. The Jewish law, such as that of a marriage contract, the Ketubah, which binds the groom to a financial upkeep to the bride in case of divorce or death. On the same note, Muslim marriage is also viewed as a civil contract and prenuptial conditions are quite welcome provided they adhere to the Shariah stipulations. An example is the Mahr Mu'ajjal the sum that is to be paid to the wife either at separation or at the death of the husband. These illustrations show that prenuptial agreements instead of compromising the religious values can work well in a multi-cultural and legal setting.<sup>17</sup>

## Judicial Perspectives on Prenuptial Agreements:

In an effort to discern possible patterns in the court's interpretations, we examine the significant cases pertaining to the law relating to two main religious communities viz., Hindu personal law, followed by Mohammedan personal law.

### 1. Prenuptial agreements in Hindu marriages:

Judicial opinions on prenuptial agreements in Hindu marriages have been far from uniform, and courts have had to address multiple challenges while interpreting such contracts. A few notable rulings highlight how the judiciary has navigated questions of validity and enforceability.

In *Sheonarain v. Paigi*<sup>18</sup>, the High Court dismissed the wife's claim that her husband had breached the terms of their prenuptial agreement which is an agreement upon which she had consented to the marriage and therefore was barred from seeking restitution of conjugal rights.

In *Tekait Mon Mohini Jemadai v. Basanta Kumar Singh*<sup>19</sup>, the Calcutta High Court declared void a clause in a prenuptial agreement that prevented the husband from taking his wife away from her mother's residence and bound him to act under the directions of his mother-in-law. The Court argued that these restrictions limited the independence of the husband and thus they were against the public policy. On the same note the Allahabad High Court struck down an agreement that would see the husband permanently live with the family of his wife once again on the grounds of limitations on individual freedom and public policy issues.

On the other hand, in *Bai Appibai v. Khimji Cooverji*<sup>20</sup>, a more subtle tact was taken by the Bombay High Court. It also maintained that an agreement that the couple would reside in Bombay after marriage was not unreasonable because it did not impose a lifelong obligation on them. Another contract between the two parties was also taken into account by the Court as the husband assured his wife of giving her ornaments as a promise to get married. Although not enforceable since it was unclear, it was not regarded as contrary to the public policy. Notably, the

<sup>13</sup> Hamidunnessa Biwi v. Zohiruddin Sheikh, (1890) 17 Cal 670

<sup>14</sup> AIR 1922 Oudh 251

<sup>15</sup> The Divorce Act, 1869

<sup>16</sup> S. 10 and S.23 of The Indian Contract Act, 1872.

<sup>17</sup> "Right to Mahr and Maintenance under Islamic Law," *E-Justice India* <https://www.ejusticeindia.com/right-to-mahr-and-maintenance-under-islamic-law/> (last visited April 4, 2025).

<sup>18</sup> *Sheonarain v. Paigi*, (1885) ILR 8 All 78

<sup>19</sup> *Tekait Mon Mohini Jemadai v. Basanta Kumar Singh*, (1901) ILR 28 Cal 751.

<sup>20</sup> *Bai Appibai v. Khimji Cooverji*, AIR 1936 Bom 138

Court confirmed that a prenuptial agreement signed prior to marriage could be valid and enforceable and the marriage per se was enough consideration.

## 2. Prenuptial Agreements in Muslim Marriages

As Muslim marriage (Nikah) is considered a civil agreement, the courts in India have addressed prenuptial agreements of Muslim couples by implementing the principles of contract law by balancing it with the Islamic law and the policy. The case law survey shows the way the attitudes of the courts have changed in this respect.

In *Bai Fatma v. Ali Mahomed Aiyab*<sup>21</sup>, t In the Bombay High Court, a contract was being considered where the husband was to make payments as maintenance in case of a divorce in the future. The Court invalidated the arrangement claiming that any arrangement that encouraged divorce was against the policy of the people. The judgment referenced contemporary English law, which also disfavoured such agreements at the time. Interestingly, the later English decision in *Radmacher v. Granatino*<sup>22</sup> marked a shift by recognising prenuptial agreements on the ground of individual autonomy and financial self-determination of spouses.

In *Ahmad Kasim Molla v. Khatun Bibi*<sup>23</sup>, the Calcutta High Court considered a Kabinnama in which the husband undertook to provide his wife with an allowance and house rent if he mistreated her. After being subjected to cruelty, the wife left him, and the husband later issued a Talaknama that never reached her. The Court held that a wife's awareness of divorce was essential for the Iddat period to commence, and since no evidence proved her knowledge of the Talaknama, she was entitled to interim maintenance. However, the Court ultimately ruled that she could only claim maintenance during Iddat, as the Kabinnama did not stipulate post-divorce allowance. Justice Costello acknowledged shortcomings in the reasoning but emphasised that he had adhered to strict legal interpretation rather than ethical considerations.

In *Muhammad Muin-Ud-Din v. Musammat Jamal Fatima*<sup>24</sup>, the Allahabad High Court upheld the enforceability of a prenuptial clause obligating the husband to pay maintenance in addition to dower in cases of marital discord.

In *Buffatan Bibi v. Sheikh Abdul Salim*<sup>25</sup>, the Calcutta High Court upheld a wife's right to separate residence and divorce based on terms in the Kabinnama, where the husband had authorised her to dissolve the marriage if he failed to provide maintenance for six consecutive months. The Court recognised such delegation of authority to the wife as valid under Mohammedan law.

A particularly striking case is *Mohd. Khan v. Mst. Shahmali*<sup>26</sup>, decided by the Jammu & Kashmir High Court. Here, the husband had agreed to live as a khana-damad in his father-in-law's home and promised monetary payment if he left. His prolonged absence and failure to fulfil marital obligations raised the issue of whether the agreement was void for being against Muslim law or public policy. The Court noted that the khana-damad practice was much adopted in Kashmir and was a voluntary practice, which usually meant that the family of the bride covered wedding expenses. It held that demanding payments under such an arrangement was not in opposition to the public policy. Based on the case law like the Muin-Ud-Din case and Buffatan Bibi case, the Court also added that divorce based on such an agreement did not clash with the Islamic law.<sup>27</sup>

Collectively, these cases represent a reserved yet apparent court trend of enforcing prenuptial agreements in Muslim marriages, as long as they do not violate key tenets of Islamic law or larger concept of social policy.

### Considering the Nikahnama a Tool for the Benefit of Muslim Women

In many Muslim communities, the **Nikahnama**<sup>28</sup> has long served not just as a religious formality but as a de facto contract spelling out rights and obligations between spouses. Within Islamic legal thought, the principle of

<sup>21</sup> *Bai Fatma v. Ali Mahomed Aiyab*, (1912) 14 BomLR 1178

<sup>22</sup> [2010] 3 WLR 1367

<sup>23</sup> *Ahmad Kasim Molla v. Khatun Bibi*, AIR 1933 Cal 27

<sup>24</sup> *Muhammad Muin-Ud-Din v. Musammat Jamal Fatima*, (1921) ILR 43 All 650

<sup>25</sup> *Buffatan Bibi v. Sheikh Abdul Salim*, AIR 1950 Cal 304

<sup>26</sup> *Mohd. Khan v. Mst. Shahmali*, AIR 1972 J&K 8

<sup>27</sup> *Mozelle Robin Solomon v. Lt. Col. R.J. Solomon*, 1979(81) BOMLR 578

<sup>28</sup> "A nikahnama with no 'gender bias'," *Hindustan Times* (Lucknow), 17 Mar. 2008

[https://www.hindustantimes.com/lucknow/a-nikahnama-with-no-gender-bias/story-eENiDeFyOR3KWm7AdiPkaO\\_amp.html](https://www.hindustantimes.com/lucknow/a-nikahnama-with-no-gender-bias/story-eENiDeFyOR3KWm7AdiPkaO_amp.html) (last visited April 17, 2025).

*kafa'ah*<sup>29</sup> (compatibility/equivalence) demands that spouses be reasonably matched in attributes such as religious commitment, social reputation, and lineage so that neither party is placed at an obvious disadvantage. While marriage is often seen as binding two families, not just individuals, this concept empowers the bride's family to insist on certain equality norms. More recently, there have been efforts to update *Nikahnamas* to better reflect gender equity, including versions which explicitly try to remove bias by ensuring mutual rights and duties are spelled out without favouring one gender.

In addition, jurist Ameer Ali had identified additional terms<sup>30</sup> that would be legally enforceable in the context of a marriage contract between a Muslim husband and wife, governing the words of their marriage.<sup>31</sup> Other clauses that, if included in a *Nikahnama*, may be advantageous to a Muslim bride are listed below.

1. A clause specifically stating that 'no polygamy' should be indulged into by the spouse.
2. A prenuptial or matrimonial agreement may expressly state that the wife is not required to undergo *Nikah Halala* in the event of a divorce.
3. Clause specifying regular maintenance payments, covering not only essential needs such as food, clothing, and shelter but also additional aspects of wellbeing, such as healthcare, education, and mobility.
4. The agreement may also provide clarity on the amount and mode of maintenance payable to the wife during and after the *Iddat* period, which follows the dissolution of marriage.
5. It can include a provision that will forbid the practice of *Nikah Mut'ah* (temporary marriage) and the marital union is contracted with the view to permanence and stability.
6. The accord can also authorize the wife with a delegated power to pronounce divorce under particular conditions which is known in Islamic jurisprudence as *Talaq-e-Tafweez*.
7. the contract can have a clause concerning the irreconcilable ruin of the matrimonial bond to be a sound basis of divorce.

#### **Prenuptial Agreements in Other Communities in India:**

To properly understand the legal validity of prenuptial agreements within the Indian context, it is essential to examine certain judicial decisions and statutory frameworks, particularly *Mozelle Robin Solomon v. Lt. Col. R.J. Solomon*<sup>32</sup>, the Indian Divorce Act of 1869 and the Goa civil code. In *Mozelle Robin Solomon*, Bombay high court looked at the essence of Jewish marriage and divorce, and it was decided that a Jewish marriage is a contractual and not a sacramental marriage. Logically, same as Muslim marriages in India are considered civil contracts and therefore allowing the option of prenuptial arrangements, the same applies to Jewish marriages, although, again, these arrangements should be within the general tenets of the overall policy.

With respect to Christian marriages, the position is comparatively clearer. Indian courts have already acknowledged that prenuptial agreements executed between Christian spouses may be taken into account while adjudicating issues of property division under the Indian Divorce Act, 1869.

Goa represents a distinctive legal position within India, as it continues to follow the Portuguese Civil Code of 1867 under its Uniform Civil Code. In contrast to the rest of the country, personal laws do not regulate matters of marital property in the state. Instead, the Civil Code expressly authorises spouses to enter into prenuptial agreements to determine how property will be managed and divided.<sup>33</sup> Where no such agreement exists, the law defaults to the

<sup>29</sup> *Kafa'ah (Compatibility) in Islamic Marriage*, Al-Islam.org <https://al-islam.org/marriage-according-five-schools-islamic-law-muhammad-jawad-mughniyya/al-kafaah-equality> (last visited April 17, 2025).

<sup>30</sup> With respect to the conditions a Muslim wife may incorporate into a matrimonial contract, Ameer Ali proposes that clauses could be framed requiring the spouses to reside at a designated place and restricting the husband from removing the wife from the marital home without her consent. He further observes that such agreements may also include provisions obligating the husband to provide a fixed amount of maintenance to his wife, as well as to extend support for children born to the wife from an earlier marriage

<sup>31</sup> Md. Zafar Mahfooz Nomani, *Impact of Indian Secular Laws on Islamic Law of Marriages in Regard to Marital and Conjugal Rights, Dower and Maintenance: A Reformatory Perspective* in *ISSUES IN WOMEN'S RIGHTS: A PRACTITIONER'S RESOURCE BOOK 270* (KM Baharul Islam, 1st ed., 2014).

<sup>32</sup> (1979)81BOMLR578

<sup>33</sup> *Jose Paulo Coutinho v. Maria Luiza Valentina Pereira*, 2022 SCC OnLine SC 1190

principle of “communion of property,” which ensures that both partners enjoy equal rights over the assets they bring into the marriage as well as those acquired during its subsistence. The Supreme Court, in *Damodar Ramnath Alve v. Shri Gokuldas Ramnath Alve*<sup>34</sup>, highlighted that this arrangement strengthens the family institution by safeguarding the rights of dependents, particularly children and widows.

### Conclusion

Despite the high potential of prenuptial agreements in meeting the special needs of the Indian couples, the lack of proper legislative guidance still acts as a constraint in the effective application of the agreement in the management of marriage relationships. A lot of opposition to prenuptial agreements can be attributed to the views that are outdated and a failure of constructive dialogue by the State, which does not allow the couple to make their own decision as regards marriage terms. As it has been demonstrated in this paper, most of the arguments that are often advanced against prenuptial agreements are invalid and can be effectively disapproved. In addition, these agreements do not fundamentally contradict the Indian law and can be written in a way that is consistent with the existing law. The fact that they are widely accepted in various other jurisdictions is also an indication of their feasibility. It would be a forward-thinking move to introduce clear stipulations in the personal law system in India to establish the limits and usage of prenuptial agreements. Hopefully, the legislature and the executive will realise this increasing need, and proceed in not only giving them legal sanctions, but also coming up with model templates that the Indian couples can use or modify when writing their own contracts.

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#### Scholars, Jurists, and Organizations

1. Ameer Ali (Jurist)
2. Hasina Khan (Founder of Bebaak Collective)
3. Prof. Brian Bix (Legal scholar and commentator)

<sup>34</sup> *Damodar Ramnath Alve v. Shri Gokuldas Ramnath Alve*, 1997 (4) BomCR 653.