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**Whether Pre-Nuptial agreement is good or bad**

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*A woman who really loves her man will not mind a prenuptial agreement.*

**Dr. HOSEA M. MOGANO**

**ABSTRACT:**

Before we go into details with this topic we first have to understand what actually is nuptial agreement, this is basically a type of agreement in which the party or two people basically a male-female or male-male or female-female enter into the contract to get the basic rights which they will get after once they are married to the other person like- right to property of another party, financial and monetary benefits, partnership in business (if any is there),<sup>1</sup> This is not very common still in India as we are a developing nation, in India marriage is considered as a holy ritual conducted between a male and female it is not a contract. In many countries, prenuptial agreement is also known as 'prenup' and it is very rarely known all over the country. In the western country, the marriage between the two people is considered as a contract and all is followed like one. As it is not very well known in our country having good knowledge about everything is good so that it can be used in a good way by that person.

This agreement basically when signed treats the party involved in it as a married one and also allow them the same rights or guarantees them the same type of rights which are given to both parties when they are married.<sup>2</sup> This basically protects the rights of the parties, sometime this type of agreement is signed after the marriage is done then it is considered a postnuptial agreement between the parties, this mainly guarantees the parties involved that they will get the rights or share in the assets of the other person whether they are married after signing the contract or after marriage is done if they are divorced also then too they will get the rights guaranteed in this contract or agreement.

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<sup>1</sup> Harsha Chandrashekar, Live In Relationships And Nuptial Agreement: A Critical Analysis, legalserviceindia, (Jan. 12, 2024, 9:29 PM), <https://www.legalserviceindia.com/legal/article-8655-live-in-relationships-and-nuptial-agreement-a-critical-analysis.html>.

<sup>2</sup> THE INDIAN CONTRACT ACT, 1872, No. 9, Acts of Parliament, 1872 (India).

In different religions it is known by different names in Judaism it is known as 'Ketubah' which is an integral part of the Jewish marriage it is signed before the marriage and it is read out loudly to others at the time of the marriage ceremony is conducted it contains the act that husband needs to follow after marriage that he must provide basic need of life to his wife and along with it he must provide spousal support (partition of property allowed to wife) if husband dies after marriage or if marriage is terminated.<sup>3</sup> In Islam it is known as 'taqliq' in this woman can make this agreement before signing the marriage certificate in order to safeguard her welfare or life, she can also amend this agreement even after the marriage.

### **Legal Enforceability:**

As there are no special provisions regarding this type of agreement in India, as per the studies some of the lawyers in India think that this type of prenup agreement doesn't have legal status in India but if this type of agreement is signed it needs to be made reasonable and it should not violate preexisting laws of the Hindu Marriage Act, the court in India ask the appearing party to sign a memorandum of settlement during the divorce procedure or mediation procedure. But due no laws are there for the protect of this type of agreement in India just because this type of agreement cannot be enforced by the judge in the court.<sup>4</sup>

If we see for agreement enforceability this agreement can be protected under the Indian Contract Act 1872. Section 10 of this act states that the agreement which is made and signed with the free consent of the parties will be considered a contract and will also be treated and protected if breached, but according to section 23 of this act same agreement or contract will be considered as void if it is made against the public policy or they are immoral as per the society's rules and norms.<sup>5</sup>

Except for all the states of India Goa is the only state where this prenuptial agreement is legally enforceable as it follows the rules of the Portuguese Civil Code of 1867.<sup>6</sup> This agreement is

<sup>3</sup> beinecke.library.yale.edu, [https://beinecke.library.yale.edu/collections/highlights/art-ketubah-decorated-jewish-marriage-contracts#:~:text=The%20ketubah%20\(plural%20ketubot\)%20is,case%20of%20divorce%20or%20widowhood,](https://beinecke.library.yale.edu/collections/highlights/art-ketubah-decorated-jewish-marriage-contracts#:~:text=The%20ketubah%20(plural%20ketubot)%20is,case%20of%20divorce%20or%20widowhood,) (last visited Oct. 6, 2008).

<sup>4</sup> Amisha Shrivastava, Prenuptial Agreements Not Enforceable In India But Can Be Considered To Determine Parties' Intent: Mumbai Court, *livelaw*, (Jan. 12, 2024, 9:29 PM), <https://www.livelaw.in/news-updates/prenuptial-agreement-in-india-marriage-divorce-239698>

<sup>5</sup> THE INDIAN CONTRACT ACT, 1872, Sec. 10, 23, No. 9, Acts of Parliament, 1872 (India).

<sup>6</sup> Bhaswat Prakash, Prenuptial Agreement and our Legal System, *legalserviceindia*, (Jan. 12, 2024, 9:29 PM), <https://www.legalserviceindia.com/legal/article-5291-prenuptial-agreement-and-our-legal-system.html>

signed by the parties at the time of marriage to mainly decide which property should be divided and by how much if this agreement is not signed by the parties then the property of the person will be equally divided between the two of them if the divorce take place between them at any stage of life.<sup>7</sup>

### **Formation of this agreement:**

This agreement is formed by a method of prenuptial mediation which basically means involving any third legally qualified to provide the correct measures and procedure by which this type of agreement can be formed and signed between the parties. The aim of the mediator is basically to provide a solution to the parties involved in any of the problems and also provide them the ways to reach the solution.<sup>8</sup> This is formed when an open discussion is started between two of the parties of the contract or couple about all kinds of marital issues and what they expect from each other like who will work after having the children and when will take care of them when they are born, how they will make their house and spend the income earned from their jobs or business and they also discuss about the pre-marital discussion that how the property will be divided between them and in how much amount it is done if the marriage does not survive and is terminated due to any reasons.<sup>9</sup> When all the points are studied properly and discussed by both of the parties of the contract then they draft a deal memo or prenuptial agreement between them for all of the above reasons, they then check and review their agreement by their respective attorneys for checking of all the legal provisions so that any of the rule does not violate any of the society's rules and norms or policy of the government. After all the details are verified and are appropriate for both of the parties sign the contract and then it becomes enforceable by law and it will be protected by the rules of the Indian Contract Act 1872.

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<sup>7</sup> Bhaswat Prakash, Prenuptial Agreement and our Legal System, legalserviceindia, (Jan. 12, 2024, 9:29 PM), <https://www.legalserviceindia.com/legal/article-5291-prenuptial-agreement-and-our-legal-system.html#:~:text=A%20Prenuptial%20Agreement%20is%20to,state%20the%20Regime%20of%20Ownership>.

<sup>8</sup> Kumar, V. (2018). QUEST FOR PRENUPTIAL AGREEMENT IN INSTITUTION OF MARRIAGE: A SOCIO-LEGAL APPROACH. *Journal of the Indian Law Institute*, 60(4), 406–426. <https://www.jstor.org/stable/26826987>

<sup>9</sup> Kumar, V. (2018). QUEST FOR PRENUPTIAL AGREEMENT IN INSTITUTION OF MARRIAGE: A SOCIO-LEGAL APPROACH. *Journal of the Indian Law Institute*, 60(4), 406–426. <https://www.jstor.org/stable/26826987>

**Objective:**

The aim of this type of agreement is basically it prevent both parties from struggling in the court process for alimony awarded to the party for their survival, as all the things are already decided during the formation of this agreement in the proper division of the property is also written as in which amount the property should be divided after divorce. This is not possible during the court process as the court can allot any amount it can more or less to the person and it is a very tiring process also in which both the party will go to any measure to get a greater amount of alimony, they will disrespect each other in front of the court.<sup>10</sup> So to skip this type of headache after the marriage ends and the person applies for alimony and due to this signed agreement, the party will get the proper portion of the property.

The main importance of this agreement is that all the maintenance and alimony laws of our country are mostly in favor of females only because of this nobody focuses on the financial condition of the man. Due to these laws, the court mostly gives the judgment in favor of the female party. But this agreement saves both the party from such a situation as they both know very well about the financial condition of each other by seeing that they divide the property and write that clause in the agreement so that the parties get the required amount of the alimony after the divorce, this also protects the party from any kind of evil intention of the other spouse.<sup>11</sup>

**Types of this agreement:**

There are many types of this type of agreement but a few of them are mentioned below-

1. **Traditional Prenuptial agreement** is formed basically before the marriage between the couple for the division of the property, and assets if their marriage does not survive.<sup>12</sup>

<sup>10</sup> indiafilings, <https://www.indiafilings.com/learn/prenuptial-agreements-in-india/#:~:text=The%20objective%20of%20a%20prenup%20agreement&text=In%20the%20cases%20of%20divorce,or%20paying%20more%20as%20alimony.>, (last visited Jan. 6, 2024).

<sup>11</sup> IN THE SUPREME COURT OF INDIA CRIMINAL APPELLATE JURISDICTION CRIMINAL APPEAL NO. 730 OF 2020 (Arising out of SLP (Crl.) No. 9503 of 2018) RAJNESH ...APPELLANT Versus NEHA & Anr. ...RESPONDENT.

<sup>12</sup> JEREMY D. MORLEY, PRENUPTIAL AGREEMENTS AROUND THE WORLD, international-divorce, (Jan. 12, 2024, 9:29 PM), <https://www.international-divorce.com/prenuptial-agreements-around-the-world-2>

2. **The postnuptial agreement** is the same as the traditional agreement but this is formed after the couple is married, this agreement is formed on the basis of the same points.<sup>13</sup>
3. **A cohabitation agreement** is a type of legal agreement formed for those types of couples who don't want to get married but want to establish a legal framework for the protection of their rights. This will direct how the property, financial assets, and child custody will be divided between them if they are separated from each other.<sup>14</sup>
4. **A prenuptial agreement for business owners** is specially designed for the party of the contract who is a businessman, it will basically tell how the assets of the business, real estate property, investments, and stock purchases will be divided between the parties if marriage does not survive.<sup>15</sup>
5. **A prenuptial agreement for a second marriage** in this type of agreement firstly protects the rights of children from the first marriage on assets and the agreement can be formed on the rest of the remains assets of the party and will be divided if the second marriage also does not survive.<sup>16</sup>

#### **Advantages of this agreement:**

Some of the points on advantages of this agreement are given below-

- This basically eases the process of divorce for both of the parties.
- This helps to secure the financial status of the party if the party dies at any point after signing the contract too.
- This also secures the future of the children if their parents decide to separate from each other by divorce or mutual separation.
- This contract prevents the partition of the business of the party.
- This contract helps to secure the basis of marital rights of both of the parties.

#### **Disadvantages of this agreement:**

Some of the points and disadvantages of this agreement are given below-

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<sup>13</sup> JULIA KAGAN, What Is a Postnuptial Agreement? How It Works and What's Included, investopedia, (Jan. 12, 2024, 9:29 PM), [https://www.investopedia.com/terms/p/postnuptial\\_agreement.asp](https://www.investopedia.com/terms/p/postnuptial_agreement.asp)

<sup>14</sup> *Id.*, at 1164.

<sup>15</sup> *Id.*, at 1164.

<sup>16</sup> *Id.*, at 1164.

- As there are no legal provisions related to this type of agreement in our country so if any party or couple forms this type of contract then they are being judged by the society around them.
- This somehow also sets an example that this marriage is not going to last forever that's why the parties are making this contract to secure their future if any such act happens to them.
- This agreement formation also shows that money is more important for them rather than their relationship.
- In place of focusing on making the contract, the party must think out the ways that how they can strengthen their relationship so that it can last forever.

### CONCLUSION:

According to the above facts and laws currently, there are no special provisions for the protection of this type of agreement in India except in Goa, this is good at some point in life as the party is thinking about their future and how will they survive and live their life if the marriage ends if is also bad at some points that form the views of the society that simply indicates the evil intention of taking the property of the partner that's why the person is forming this type of contract. According to society both parties should work and discover more ways how they can strengthen their relationship so that it can last longer. But many in the future some laws or statutes will govern such type of agreement for the protection of the rights of the parties involved in a marriage ritual so that their future can be secured if they end their marriage, in case they are married to some wrong or evil intention person, or both are parties are not fit for each other or they do not support each other by this they can live their life happily.

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