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MARRIAGE WITH CLAUSES

BY PRIYANKA KHAWALE

ABSTRACT

In India, marriages come wrapped in rituals, family expectations and many more aspects which remain undisclosed. Marriage is termed as a holy sacrament with an unspoken belief that discussing an end before the beginning is considered inauspicious. Two adults who have the right to choose their spouses should also have a reasonable say in how their own property is treated. Why shouldn't someone entering marriage with savings, or inherited assets deserve clarity from day one rather than spending years of litigation after separation to establish what was theirs.

And now with the increasing marital disputes and divorces, Indian legal system is pushed to question: *Should prenuptial agreements be made mandatory in India?*

INTRODUCTION TO PRENUP

A prenuptial agreement or a prenup means a written contract between two people who are yet to be married, outlining terms and conditions including assets, liabilities and maintenance which would apply in case the marriage breaks down or ends up in divorce. Although the idea is a precedent of Western jurisdiction, it's not hypothetical for India. Goa already runs such a matrimonial-property regime under Uniform Civil Code which proves that Indian family law can hold more than one financial framework for marriage at once.

REASONS FOR MANDATORY PRENUP

- Backlog in Courts- Indian courts are infamous for decades of backlogs. A simple mandatory prenup would speed up the proceedings of divorce by eliminating lengthy battles as the courts would only have to verify the enforceability and not litigate from scratch.
- Financial transparency- Rise of dual income households, prenups not only safeguard their hard-earned personal wealth but also force the couple to declare their assets,

liabilities and inheritance before marriage. This would solve a major problem of either of the spouse entering the marriage financially blind to any debts or other financial surprises.

- **Protection of Weaker Spouse-** In a patriarchal set up of the Indian society, its likely for the bride to suffer the loss not only in financial terms but also in other aspects. Prenup made mandatory with reference to Section 23 of the Indian Contract Act, 1872 can guarantee protection to the weaker spouse upfront rather than leaving it to judge's discretion after marriage has already broken down.
- **Protection of child's mental health-** Mandatory clause for mediation in terms of child custody will save the judiciary the time to excessive litigation as well as any child in custody dispute wouldn't have to witness a bitter argument. A prenup can shield the child from the post-traumatic stress disorder post-divorce while safeguarding the best of the interests of the child's mental well-being.
- **Frivolous litigation-** Section 144 of the Bhartiya Nagarik Suraksha Sanhita, 2023 (BNSS) (previously ruled under Section 125 of the Code of Criminal Procedure) governs maintenance of wives, children and parents as well as Section 25 of the Hindu Marriage Act, 1955 governs permanent alimony and maintenance, these exclusive statutory rights are observed to exploited through frivolous and vindictive claims. A prenup prevents either party from exaggerated alimony demands or lawsuits.
- **Normalizing prenup** removes the taboo of discussing finances as well as treat marriage as a sacrament also as practical partnership.

CHALLENGES FOR PRENUP

- The Hon'ble Supreme Court has termed marriage as sacrosanct. Marriage under Hindu personal law is considered as a holy union not just of two individuals but of two families. Mandating a prenup which is likely a divorce insurance policy undermines the cultural and emotional foundation of Indian marriages.
- Prenups are not legally mandated rather if interpreted can be questionable under Section 23 of Indian Contract Act, 1872 as an anticipation of breakdown of marriage before even marriage has commenced is an object opposing public policy.
- Majority of women in India sacrifice their careers for homemaking and childcare, they perform all the unpaid domestic work. If a prenup mandates that "each party keeps what is in their name," a woman who has sacrificed her career just to raise children and

manage a household could be locked up into an unfair agreement leaving her with zero scope of career growth or financial aid.

- With the deep-rooted patriarchal structure and pressure of the prohibited yet prevalent dowry system, a bride could be easily manipulated into signing such one-sided unfair agreement with the consent being illusory. Especially in the case where a vast population lacks financial literacy and basic legal awareness, making them vulnerable to exploitation through prenups.
- The presence of existing alimony or maintenance provisions under various laws and legislation. Introduction of settlement clauses within a prenup would be equivalent to overriding the special provisions of alimony or maintenance. The quantum of predicted amount in case of circumstances mentioned would violate the exclusive rights given to the wives in order to avail any maintenance.