

ANTE-NUPTIAL CONVENTIONS UNDER THE PORTUGUESE CIVIL CODE IN FORCE IN THE STATE OF GOA: CAN IT BE A MODEL FOR THE UNIFORM CIVIL CODE?

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Introduction

In India, the perception of marriage is not only that it is a union of parties to a marriage but it is also a union of families. However, when the marriage breaks down the parties are forced to seek divorce. Divorce proceedings are not just the dissolution of marriage and separation of parties but it also includes numerous other issues, which are required to be resolved. These issues include separation of assets, alimony, maintenance, custody of children, et cetera.

In India, the disposal of matrimonial causes takes years. Also, the quantum or amount of maintenance and alimony to be granted is left to the sole discretion of the judges. As it is almost impossible to lay down a perfect arithmetical formula, the judges often grant maintenance or alimony depending on their own judgment and discretion, which is often unjust and disproportionate. It is often the case that the person who is financially strong gets a favourable decree. More often than not, the woman is left to fend for herself.

One way to protect and secure the interest of the spouses, especially the woman, is to grant them certain pre-determined options at or during the marriage, in order the spouse has certainty about their individual share or the right in the family property on dissolution of marriage. On this note, I have examined the concept of pre-nuptial agreements as stipulated in the Portuguese Civil Code, 1967 (hereinafter referred to as the "PCC"), which is in force in Goa, India.

This research is undertaken to examine law relating ante-nuptial agreement as prevalent in Goa, and whether the same can be made a model for inclusion in the much-awaited Uniform Civil Code (hereinafter referred to as "UCC"), which India is looking forward to enact as contemplated under Article 44 of Indian Constitution. Researcher in the process has briefly identified the relevant provisions in Hindu, Muslim and Christian personal laws that contemplates the rights of the parties when their marriage is dissolved and their inherent defects.

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Research Question:The main research question that is to be considered in this article is whether the anti-nuptial conventions as contained in the PCC prevalent in Goa, India be adopted as a model for enactment of UCC throughout the territory of India?

LITERATURE REVIEW

Civil Code in Goa: - Senior Advocate M. S. Usgaocar has authoritatively translated the PCC in English. This book has been considered by the Courts to be the authoritative translation of the Portuguese Code.

Portuguese Civil Code, 1867:-Adv. (Dr.) F. E. Noronha in his book the has not only translated the PCC in English language but has also emphasised on the interpretation of the code as well as on the precedents which have developed over the years.

Having said the above, other than the translation of PCC, there is no existing literature/research undertaken on the ante-nuptial agreements under the PCC. In terms of relevance of the instant research in the contemporary India is concerned and the research gap mentioned above, this research work is novel in that regard.

METHOD

The present research study will be mainly doctrinal and analytical in nature. The research is also comparative in nature. The sources of research consist of books, religious texts, statutes and statutory instruments, Indian and foreign judgments, articles, reports, online databases and other web pages.

DISCUSSION

Relevant provisions of laws governing the Hindus, Muslims and Christians pertaining to the rights of parties in the Matrimonial Properties:-

According to Hindu Personal Law, marriage confers a legal status of 'husband' and 'wife'. Under the Hindu Law, for a valid marriage, the parties are required to have the capacity to marry, and they must undergo the necessary ceremonies of marriage for it to be valid. Hence, marriage between Hindus is a 'sacrament' and not a 'contract'. Another reason why a Hindu marriage is considered a sacrament is because historically, divorce or dissolution of marriage was not recognized under the Hindu law, and only in 1955, when Hindu Marriage Act, 1955 was enacted, the divorce got statutory recognised in Hindu law.

Under the Hindu Law, the parties/spouses do not acquire any rights in the family properties or the properties of the other spouse. As such, on dissolution of marriage, either spouse can claim only permanent alimony and maintenance from the other spouse. Also, Section 27 of the Hindu Marriage Act, 1955 stipulates that the court may provision in the decree pertaining to the properties "presented, at or about the time of marriage", "which

may belong jointly to both husband and the wife". However, it does not contemplate about the individual properties held by the parties or joint properties acquired by them "before or after the marriage", which can be inferred that the court lacks jurisdictions to decide upon the share of the parties in such properties, which were acquired or held by them "before or after the marriage".

With regards to Muslim marriage, it is considered contract as held in *Abdul Kadir vs Salima* (1886 SCC OnLine All 3). However, if the marriage is dissolved, the wife is entitled to a Mahr or dower or any part thereof. The Muslim Law or the Shariat law, which is applicable to Muslims in India, does not contemplate of having any ante-nuptial agreement, save and except Mahr.

As per Christian personal law, marriage is taken as a sacrament as the marriage must be solemnized as per the ceremonies, rites and customs of the church. Divorce is dealt by the Divorce Act of 1869. The Christian personal law does not contemplate of having an ante-nuptial agreement. Also, the said Divorce Act, 1869 states that on divorce, the wife can claim only alimony and expenses incurred in the said proceedings from the husband. Also, that the alimony can be claimed only by the wife, and not by the husband.

Family Law in Goa, India:-

Interestingly, the various personal laws prevalent in India are not applicable to the natives of Goa, India, as the state has its own civil code. The state was ruled by the Portuguese for over 450 years. The Portuguese enacted the Portuguese Civil Code, 1867, Portuguese Code of Civil Procedure, 1939, Law of Divorce (Decree dated Dec. 17, 1910), Goa Code of Civil Registration, to name a few. Goa was liberated by the Indian Army on 19th December 1961, and soon thereafter, the Parliament of India passed the Goa (Administration) Act, 1962, which made all the laws in force in Goa, immediately before the appointed date i.e., Dec. 20, 1961, to continue until they were repealed. As a consequent, Goa retained the Portuguese laws, and the personal laws that were applicable to other parts of India, were not made extended to this tiny state.

This PCC of 1867 initially did not contain any provisions for divorce, as the Portuguese, who were mostly Christians, did not recognise divorce. Thereafter, in 1910, when Portugal became a secular republic state, the Law of Divorce was introduced through a Decree dated 17th December 1910. The said Decree dated 17th December 1910 was made effectuated in Portuguese-India from 26th May 1961.

Law pertaining to Ante-Nuptial Contracts in Goa:-

In consonance with the theme of the instant research paper, the Researcher is focusing mainly on the provisions pertaining to agreements or conventions between the parties with

respect to their assets, commonly known as ante-nuptial agreements or pre-nuptial agreements.

Before we go through the provision which deals with the ante-nuptial agreements or conventions, it is very important to note that under the PCC, a marriage is recognised as a contract that is solemnized between two individuals of different sexes. As marriage in Goa is a civil contract, it is permissible to incorporate certain terms or conditions prior to the solemnisation of the marriage. These terms and conditions will govern the individual share of the parties or/and apportionment of properties, whether self-acquired properties or otherwise, in the event the marriage is dissolved.

Section-V of the said Portuguese Code stipulate that the "Contract between Spouses in Respect of their Assets." It stipulates four (4) kinds of pre-determined Ante Nuptial regimes or agreements, from which the parties must choose from. These four regimes are: - 1) Communion of assets; 2) Communion of acquired assets; 3) Separation of Assets; and, 4) Dowry regime. The spouses have the option to choose amongst these four regimes by recording in a public deed. These regimes are to be decided by the parties before their marriage. After solemnisation, the spouses cannot revoke or change or modify the ante-nuptial contract or conventions by making or executing a new contract. If the parties try to modify the regime by inserting terms in the public deed, then such terms shall be deemed not written, and can be legally ignored. The four regimes are discussed as follows: -

1. Communion of Assets (Communiao Dos Bens)

Under this regime, there is communion of all the properties, whether present and future, between the spouses. If the marriage takes place under this regime, then all their assets are in a communion and each spouse has half share of the total. To put it differently, the properties of the parties, present or future, are merged together, and each party, get fifty percent shareholding in all their properties, and further, each party to the marriage union gets a right to one half of income of the other party. (Zelia M. Xavier Fernandes E. Gonsalves vs. Joana Rodrigues and Ors, AIR 2012 SC 988:(2012) 3 SCC 188)

This regime is a common one undertaken by almost of the population. This regime is also the default regime. That is, if the spouses fail to execute any ante-nuptial contract, then the parties will be governed by the regime of 'communion of Assets'. Also, in the absence of any contract to the contrary, there is a presumption in law that the marriage was deemed to have been made as per the regime of communion of assets.

On solemnisation of marriage between the spouses, the ownership and the possession of the matrimonial properties is vested in both the parties during the entire course of the marriage.

Even though the spouses enjoy equal rights in "the ownership and possession" of the properties, the administration and control of the assets of the communion lies with the husband. However, neither spouse can alienate the immovable properties without the consent or agreement of the other spouse. The Bombay High Court at Goa in *Smt. Joana Francisca Errie&Ors vs. Mr. Albano Vespaniziano Jose Vaz&Ors* [2015(1) Goa L. R. 293 (Bom)] has held that the "consent of the other spouse" is mandatory, and in absence of such consent or agreement, transfer can be rendered null and void. With regards to the movable properties, the husband may freely alienate or dispose of such properties. However, if he disposes of the property without taking the consent of his wife, then the amount or value of the immovable property shall be carried to his moiety. 'Moiety' as held in *Dattaprasad Kamat and Ors. vs. Assistant Commissioner of Income Tax and Ors.*, (MANU/MH/3522/2023) refers to "half-undivided and indivisible right that each spouse enjoys in the common matrimonial estate as a result of the registration of their marriage."

This communion of properties between the parties will last till their marriage is dissolved, annulled or there is separation of the parties. In case either of the party die, the surviving party shall continue to be in possession and, administer the matrimonial properties until the properties are partitioned. If the marriage is dissolved or separation takes place, the matrimonial properties get equally divided between spouses, and each spouse shall contribute towards their dues to the common estate. It is worth while to note that on death of either party, the half right of the dead party in the matrimonial properties does not devolve to the surviving party but the said half right devolves by succession to their heirs, who are known as legatees under the PCC.

2. Separation of Assets (Da Separação De Bens)

Under this type of regime, the parties contract their marriage, wherein the parties retain their respective ownership of properties belonging to them and have an exclusive right to deal and dispose of such properties. Here, the parties enjoy exclusive ownership of their own properties, irrespective whether such properties were acquired or purchased before the marriage or during the course or subsistence of the marriage. If the parties wish to have a complete separation of assets, then the parties must expressly declare to that effect. If there is not such said declaration, the regime of "communion of acquired assets" (discussed in the next section) will not be deemed to be excluded. In simple words, when the parties want a complete and total separation of assets i.e., separation of all the assets, whether acquired before solemnisation or during the subsistence of marriage, then they required to expressly state so. Otherwise, it will amount to a "communion of acquired assets" i.e., there would be a communion of only the assets which were acquired during

marriage.

3. Regime of Communion of Acquired Properties(Da Simples Comunhão De Adquiridos)

If the parties intend that there ought to be a communion of those future properties that will be acquired after the marriage, but the parties want the properties acquired, purchased, or held by them before the marriage to remain separate and exclusive, then the parties can marry by adopting the regime of "Communion of Acquired Assets".

When, the prospective spouses declare in their ante-nuptial convention or contract that they wish simple "communion of acquired assets", then the properties which were acquired, purchased or held by the parties at or before the marriage, shall be held and enjoyed as their exclusive assets. With regards to the properties that are acquired by the parties during the course of marriage, the said properties will be in communion.

The prospective spouses who wish to get married under this type of regime of simple separation of properties, must make an inventory of all the properties held by each of them at or before marriage. If the parties fail to do the said inventory, then such properties would be considered to have been acquired.

The said communion of the acquired properties shall end by divorce, death or by separation.

4. Dotal Regime (Do Regime Dotal)

Under this regime, the woman is endowed with assets by herself, her parents or others. There is, however, a requirement in law that all the persons who are interested or have endowed their properties to woman have to intervene or be party to the contract of marriage, either personally or through agents. The subject matter or properties of the endowment may include the movable and immovable properties held by the woman. The properties may also be such properties that she might acquire in future either by testamentary or interstate succession.

If the properties are existing ascertained properties, then it is the obligation and duty of the parties to specify such properties, either making it part of the same contract of marriage or in any separate document or public deed. This is required to be made before the marriage contract is entered into. If the properties are not determined or ascertained, the right and its source to such properties will be required to be stated in the said contract of marriage, and whenever the properties are ascertained, the same must be stated in the contract. If such statement is absent, then such properties will be taken as the properties belonging to the communion. Similarly, in case there are future properties which may become part of the said endowment in future, the same must be stated in the dotal contract

within 6 months of coming into possession of such properties. Again, if there is a default to do so, the said properties will be taken as properties belonging to the 'communion'.

Even if the properties endowed are movable, the same also needs to be stated in the Dotal Contract, and failing which, the said moveable assets will be considered properties of the 'communion'.

In case of movable properties, which forms a part of the said endowment, unless the marriage contract states otherwise, the husband is free to deal and alienate the said property. Here, the Researcher is of the view that it's a gender biased provision, which considers the wife inferior to the husband.

Any property that the wife might get or acquire post marriage and the same does not form part of the dotal property, shall be her exclusively her own property. However, any income generated or derived from the same shall be taken as common unless mentioned otherwise. Similarly, under this system, the properties of the held by the husband will be his exclusive and separate properties. Like the regime of 'communion of acquired assets', even in this system, inventory of all the properties must be done at or before the marriage.

In the event the marriage is dissolved or separated, the regime also comes to an end and the endowment/dotal properties along with the other properties which she would be legally entitled to, shall be refunded/returned to his wife or to her heirs. Such properties shall be of the wife and free from encumbrances or charges.

CONCLUSION:

The question that falls for determination is whether this system of ante-nuptial agreement be a model for inclusion in the anticipated UCC in India?

As can be seen from the above, that the parties or the spouses are free to choose from the available aforesaid regimes, with regards to mode of holding the assets, whether separately or common, and the manner in which they wish to retain those properties, when the marriage is ends by a divorce death or otherwise. This system gives certain assured rights to the spouses in the matrimonial property, which in turn gives certainty of the properties in the unfortunate event of dissolution, especially to the benefit and best interest of women.

As stated earlier, in Goa, marriage is a civil contract, and as such, the parties enjoy some liberty to carve out certain rights, interest, obligations and liabilities in the contract of marriage, as if, they were like terms and conditions in a normal contract. Also, in Goa, all marriages, except canonical marriage, are secular in nature. Since the marriage is a contract which is secular in nature, it is possible to have ante nuptial agreements or conventions in Goa.

Hence, for having provision for ante-nuptial agreements or contract in the contemplated UCC, it would be a pre-requisite and necessary that the marriage, as per the UCC is considered as a civil contract and which is of secular nature and not a sacrament.

Ante-nuptial agreements give the parties certain assurances about the properties they bring with them at or during the time of marriage. Also, at times, there could be certain apprehensions about motive of the other partner to contract marriage. It is possible that one party may enter into a marriage for a sole purpose of enriching himself or herself from the riches of the other party. In such circumstances, choosing a regime like separation of assets will effectively help in protecting the self-acquired properties or family properties of that spouse.

In India, women are often at the losing end in the matrimonial battles in courts. Having an ante-nuptial agreement of communion of assets will ensure that she has equal rights to the matrimonial properties, which will in turn give some stability to the wife's future. It will also recognise her contribution to the union, which may not always be in monetary terms. On the other hand, if the wife has properties of her own, she can preserve her self-acquired properties by entering into an agreement for the separation of properties or choosing the regime of "communion of acquired assets".

However, there are some archaic and discriminatory provisions in the said Portuguese Code, such as making husband the default administrator of the properties. Here, the wife is considered a weaker sex. Also, as per the law in Goa, once the regimes are decided and duly entered into, the parties cannot modify or change the same after the marriage. It may be possible that at the time of marriage, the circumstances were such that it compelled the parties to decide a particular regime. However, after the marriage, those circumstances may no longer exist. In such situations, the parties should be able to change or modify the regimes which were entered at the time of marriage. Also, this Portuguese law was enacted almost 160 years ago, which in my opinion was quite progressive at that relevant time. However, few changes are required to align it to meet the requirements of the present times and also to ease out the gender biases, which were prevalent when the law was enacted, which the Parliament should consider before including the anti-nuptial conventions in the contemplated UCC.

In my opinion, considering the socio-economic conditions in India, having a system where parties can enter into ante-nuptial agreements will go a long way in achieving gender equality and gender justice. Being a law practitioner in the Goa, I strongly agree that the party autonomy which is available in Goa has provided stability, security and fairness in distribution and recognition of rights in matrimonial properties. Therefore, the system of

having contract or conventions between parties in respect of their assets (ante-nuptial agreements) can and should be adopted and included in the contemplated UCC for India.

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