
PRENUPTIAL AGREEMENT - CHANGE IS THE NEED OF SOCIETY

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ABSTRACT

One of the most peculiar features of marriage is not just emotion but also compatibility and financial stability. It does not matter how sustainable your present is, you can never expect the next move your life can make upon you. So, prevention is always better than cure, that is the reason Prenuptial Agreements exist to prepare you for the unexpected turbulences in life for instances like divorce and separation. This paper analyzes the history and evolution of prenuptials agreements. The validity of prenups in India has also been discussed using relevant case laws. Furthermore, Indian Contract Act 1872 and The Indian Divorce Act of 1869 have also been discussed to determine the scope of prenups in India. The paper highlights the dynamic nature of society and determines that how public interest changes with the passage of time. India is a diverse country with diverse religions having distinct perspectives on prenuptial agreements. The paper explores the concept of Prenup in Hindu law, Christian law and Muslim law highlighting their vivid legal approach within their jurisdiction. The reason to support prenups have been vividly explained with potential clauses that could be considered while framing a specific law for them.

I. INTRODUCTION

Prenuptial agreement refers to an agreement between the couples before they enter into a marriage. This agreement allows couple to decide the ownership and distribution of their assets and liabilities in case their marriage ends in the future. In a modern-day world where both husband and wife are financially independent and share financial assets and possessions with each other, prenuptial agreement can be the best solution to easily distribute the asset to each other if they get a divorce or separation. Marriage is often viewed as a lifelong commitment, but reality tells a different story: a significant number of marriages do not last until death do us apart.¹

It is true that the legality of prenups has been a matter of dispute in some countries where it is almost like a taboo, primarily in India as it often conflicts with the traditional law of the country as it is considered a sacred union. The prenups are often misunderstood by people which is the reason why it is not enforceable in some countries.

The prenups often create a tension between the couples as money and property comes between them creating a tension as well as lack of faith in marriage but if there is a good understanding between the partners then prenups can be an instrument to provide a clarity and security even if the marriage is no more in existence. In developed countries it is widely accepted concept for example in US, Canada, Australia, China and France. A survey conducted by Harris Poll in 2022 found that 15% of married or engaged respondents in the US had signed a prenup, up from just 3% in 2010. This trend indicates that the couples increasingly view these documents as practical tools rather than symbols of anticipated marital failure.² It is like hope for the best and prepare for the worst.

Important decisions of life cannot not be just taken based on emotion, that is why we have to be practical and logical. A well-drafted prenup can significantly reduce legal battles, costs, and the emotional toll of a divorce.³

¹ Kyle Adam, Public Opinion, Misconceptions, and Motivations, Law Depot (March 19, 2025), <https://www.lawdepot.com/resources/family-articles/prenup-survey/?loc=US>

² Kyle Adam, Public Opinion, Misconceptions, and Motivations, Law Depot (March 19, 2025), <https://www.lawdepot.com/resources/family-articles/prenup-survey/?loc=US>

³ Kim Beatson, Pros and Cons of a Prenuptial Agreement, Anthony Gold (September 8, 2023) <https://anthonygold.co.uk/insight/prenuptial-agreement-pros-and-cons/>

This paper aims to explore the brighter side of a prenuptial contract and how it is relevant and important in today's world in a country like India. The paper will also throw light on the stand of judiciary in this and will provide various case laws related to the concerned topic.

II. HISTORICAL BACKGROUND AND EVOLUTION

The objectives of prenuptial agreements have evolved throughout the history. Its roots date back to ancient times when marital contract governs property and financial right⁴. In ancient Egypt these agreements included the property that bride used to bring with her as a dowry and the money that the groom paid to marry the bride. This practice was common until the early 20th century⁵. However, prenups faced the challenges and criticism in the early 20th Century when the romantic ideals were prevalent among the youths and they viewed prenups incompatible and a threat to marriage unity. The prenups were just seen as a curiosity of high profile people for whom property and money always come first.

But this perception soon began to transform as in the mid- 20th Century Europe the legal revolution took place which recognized and accepted the prenuptial agreements. The courts took a stand for the autonomy of the individuals entering into a marriage and their Rights to their financial interest. This change was a result of growing literacy and awareness among the people about their own rights; this was the time when women raised voice against their suppression and gender equality became a concern. Women became financially independent and were considered equal as men in marriage, prenuptial agreements became a way to ensure that a woman could access a part of her husband's property if their marriage ended.

During the 1970s, the women's rights movements brought many changes that led to greater acceptance and more widespread use of prenuptials. The society became supportive of the women towards their decision to get a divorce as more women entered the workforce and gained property and assets of their own⁶. As people entered marriages with assets, the desire and anxiety to identify how that property should be divided if the marriage union breaks grew, and prenuptial agreements became more common in western part of the world.

⁴ Cassandra Daniels, Evolution of Prenuptial Agreements: How They've Changed Over the Decades, Daniels Law Firm, (November 10, 2023).

<https://www.thedanielslawfirm.com/prenuptial-agreements-how-they-have-changed/>

⁵ <https://brodiefriedman.com/history-prenups/>

⁶ <https://www.ebsco.com/research-starters/law/prenuptial-agreement>.

If we talk about the present day scenario, the people are more rationale and sensible, they do not get easily driven by the emotion and want a stable future and that is the reason why the prenups agreement are taken into consideration. The couple can already decide that how to allocate the resources equally and fairly with each other without getting into any unnecessary disputes.

III. STATUS OF PRENUPITAL AGREEMENT IN INDIA

Unlike western countries there is no legal framework for Prenuptial agreement in India. Though they are not considered illegal they are also not enforceable by law. In India Marriage is considered a sacrament. Our judicial system does not feel like the need for these agreements because India is a country where the bond of a marriage is treated like a religious bond rather than a legal bond.⁷ India is a land of diversity and each religion has its own notion of marriage.

In Hindu law marriage is considered as a sacred union of soul to soul and flesh to flesh. It is a religious injunction with the intention to fulfil religious duties and to achieve the higher ends of life.⁸ Therefore entering into prenuptial is considered that you will divorce your partner in future which violates the public policy.

The judiciary always interprets the laws in such a way that they are bound to public interest and policy.

The Indian Contract Act 1872

Prenuptial agreements, are not specifically governed under personal laws in India, but are regulated under section 23 of the Indian Contract Act 1872 according to which any contract or agreement against public policy is not enforceable. The supreme court and the high courts have often held the prenuptial agreements to be void as they were considered against the public policy and also recapitulated that marriage is not a contract but a sacred bond. In **Krishna Aiyar v. Balammal**⁹ the wife refused to live with the husband in the safe roof so her husband filed a for the restitution of conjugal rights which ultimately led to a compromised agreement

⁷ Nupur Manshani, LEGAL VALIDITY OF PRE-NUPTIAL AGREEMENTS IN INDIA , VOLUME 1 | ISSUE 2 (December 2020).

⁸ Shazia Saifi, Dr Alka Rani, Hindu Marriage: A Saga of Journey from Ancient to Modern India, Vol 11, Issue 2; 348-357, (June 2021).

⁹ Krishna Aiyar v. Balammal, ILR (1911) 34 Mad 398.

between both of them. According to the agreement the wife would return to her husband and in the future if she desires to live apart from her husband then he would pay her Rs. 350. But the wife did not return to her husband and the case was filed in the Madras High Court. The court held this agreement incapable and deemed it void as it violated the public policy

In the case of **Tekait Mon Mohini Jemadai v. Basanta Kumar Singh**¹⁰ the husband was controlled by the prenuptial agreement that he would not take his wife from her parental home and that he would follow all the instructions of her mother. The Calcutta High Court found this agreement to be void as it imposed unreasonable restrictions on his matrimonial rights under Hindu Law and was also against the public policy

This stance taken by the judiciary stood tall for a long period of time. However, with the development in the law now the prenuptials agreements can be held valid, based on circumstantial evidence.¹¹

The Indian Divorce Act, 1869

The Indian Divorce Act of 1869 deals with the divorce and matrimonial rights of the Christian in India. Though there is no legal framework and definition given for prenuptial contract in the Indian Divorce Act, the courts may consider them while deciding the settlement of the property upon the separation of the spouses. Section 40 of the Act provide a narrow scope for the clauses related to property and assets in such agreements.

Prenuptials under Muslim Law

In Muslim Law or Mohammadean law marriage is a civil contract. The Prenups in Muslim law are allowed to contain only those terms and conditions that are valid under the Islamic Law.¹² The consent of both the parties is must before entering into a prenuptial agreement. The well known example of prenup in Muslim Law is Mahr Mu'ajjal or Mu'akhkhar which is amount of money to be paid to the wife after separation or death of the husband.¹³ Prenuptials

¹⁰ Tekait Mon Mohini Jemadai v. Basanta Kumar Singh, 1901 SCC OnLine Cal 60.

¹¹ Ashish Rawat and Kinjal Ahuja, Manupatra, From Taboo to Trend: The Emergence of Prenuptial Agreements in India's Legal Framework (Sep 13, 2024).

¹² Arya Senapati, Love with a Clause: Prenuptial Agreements in India, i blog, (April 17, 2025). <https://blog.ipleaders.in/prenuptial-agreements-in-india/>

¹³ Amrita Ghosh & Pratyusha Kar, PRENUPTIAL AGREEMENTS IN INDIA: AN ANALYSIS OF LAW AND SOCIETY (June 2019).

agreements may be enforceable under Muslim law but they don't come under the ambit of the Indian Contract Act unless they are synchronized with public policy.

In **Saifuddin Sekh v. Soneka Bibi**,¹⁴ there was a prenuptial agreement between the spouses according to which the husband was forbidden from bringing his former wives to stay with him without the consent of his plaintiff wife, if he violated the agreement then his wife would divorce him. This agreement did not prevent him from enjoying his matrimonial rights and duties, moreover this agreement only talked about the consent of his wife. Therefore, the Gauhati Court considered it valid as the prenup did not violate the public policy clause of section 23 of the Indian Contract Act.

IV. TIME WHEN JUDICIARY SUPPORTED THE PRENUPTIAL AGREEMENTS

In **Pran Mohan Das v. Hari Mohan Das**,¹⁵ a pre martial agreement made by the fathers of both the spouses according to which the groom's father would get his son married to the daughter of the second party on the promise to transfer some property to him was valid and not opposed to public policy. Though the agreement was not between the parties to the marriage but the agreement was for the marriage as a pre-condition set and therefore was one of the types of pre-nuptial agreement as per the court documents.

In **Bai Appibai v Khimji Cooverji**,¹⁶ the wife wanted separate maintenance and residence from her husband which was already stated in a prenuptial agreement entered into by them and the court considered it valid as it did not violate any public policy

In **Commissioner of Income Tax v. Mansukhrai More**¹² the Calcutta High Court accepted the validity of a pre-nuptial agreement and considered it valid if it falls under the ambit of transfer of proper act. In this case the husband made a prenup with his wife to transfer property into a trust for the benefit of their future children. The court held that this was a genuine concern by the defendant towards his children and therefore he was not liable to pay the cost of transfer of his property.

Apart from these judgments recently the Family court judge Harish Kumar from the Patiala House Courts, while granting divorce on a no-fault basis to a couple who had been involved in

¹⁴ Saifuddin Sekh v. Soneka Bibi, AIR 1955 Gau153. Saifuddin Sekh v. Soneka Bibi, AIR 1955 Gau153.

¹⁵Pran Mohan Das v. Hari Mohan Das 4 AIR 1925 Cal 856.

¹⁶ Bai Appibai v Khimji Cooverji AIR 1936 Bombay 138.

legal battles for over seven years, observed, "The time has come to make compulsory a prenuptial agreement to be executed before the appointed authority after counselling of parties about the possible risk of marriage going haywire for a variety of reasons..."¹⁷

Mumbai Family Court was involved in a case where the husband and wife entered into a prenuptial agreement on July 2016, acknowledging they were middle-aged and could mutually separate if issues arose. Later on the court held that though prenups are not legally binding in India, they can be used as evidence to know the intention of the parties.¹⁸

V WHY IS THERE A NEED FOR PRENUPITALS IN INDIA

Change in Generation

Society never remains the same, their ideals, beliefs and concept change with time. The priority of new generation is different from the previous one and that is the reason why we need a well structure legal framework for Prenuptial Agreements. Change is the only constant and with reference to that public policy and public interests have changed, who would have thought that Indian Courts would one day decriminalize LGBTQIA++ Communities, who would have thought and live in relationships would be accepted under Uniform Civil Code. All these judicial decisions indicate that judicial interpretation evolved with evolving society and moreover what is wrong with planning your future if you ever get a divorce. People now think and plan ahead of their present, they have become more rationale and financially autonomous. They want a secure future. Entering into a prenup should not always be considered against public policy, it is more like we should hope for the best and prepare for the worst situation because no one knows how long would their relationship last.

Increasing Divorce Rates

Earlier India was a country with zero divorce rate but it is not the same anymore. In urban areas, the divorce rate has increased by 30–40% in the past decade.¹⁹ The major factors behind this social change is infidelity and depression. It has been found that new generation is less

¹⁷ Time to make 'pre-nup pact' compulsory, says Delhi court, Times of India(November 1, 2023). http://timesofindia.indiatimes.com/articleshow/104870242.cms?utm_source=contentofinterest&utm_medium=te xt&utm_campaign=cppst

¹⁸<https://voiceformenindia.com/prenup-agreements-not-valid-in-india-but-signing-prenup-indicates-intent-of-parties-mumbai-family-court/>

¹⁹Harsh Bajaj, Legal crusader, Divorce Rate in India: Trends, Causes, and Legal Insights,(2025).

committed towards their relationships which also often leads to depression and ultimately divorce their partner. Education is another important factor associated with divorce. The study has found that hat women who are highly educated are more likely to end their married life due to marriage incompatibility.²⁰ It is always better to pre decide the division of proper, alimony and maintenance before entering into a marriage, We can see it like a life insurance, a precaution to protect us and are loved ones from suffering. What is the point of fighting in a court for maintenance and alimony when you can already decide it peacefully.

Welfare of the children

A prenuptial agreement can include inheritance and property rights of children born before the marriage, after the marriage or children born out of previous marriage. While entering into prenups the couple can decide the ratio and proportion of their shares and property to be distributed among their children especially if they are half blood or uterine blood. This can bring harmony and transparency in the family.

Protection From Each Other Debts

A Prenuptial Contract can protect the couple from each other's debts and liability. The prenuptial agreement can specify the debt incurred by a partner prior marriage, it could be any student debt, credit card debt, loan or any family debt. This can prevent them from carrying the burden of their partners debt if by any chance their marriage ends.

VI. IMPORTANT CLAUSES IN A PRENUPTIAL AGREEMENT

Prenuptial being an agreement should first and foremost fulfil all the essential conditions of an agreement given in the Section 10 of the Indian Contract Act 1872 and should also not violate the Section 23 of the same Act.

Asset Clause

Assets both movable and immovable are an important component of household, for example li car, jewellery, utensils, house, money in joint account and funds. When entering into a prenuptial agreement, marital couples often combine their individual assets together to form a

²⁰Pinto Vincent &Laveena D'Mello, Changing Trends of Divorce in India: Issues & Concerns, 10.47992/IJMTS.2581.6012.0053 (December 2018).

consolidated asset which they use for mutual use during the period of their marriage.²¹ In a prenup the couples can determine the ratio and proportion in which they can divide the asset.

Alimony and Maintenance clause

This is a very important and a must clause in a prenuptial contract. Nowadays many women are misusing the law by falsely framing their husband in order to get a hefty amount of alimony and maintenance. Groups like the Save Indian Family Foundation have documented thousands of cases where husbands were falsely accused, leading to loss of jobs, social ostracization, and even suicides.²² If the amount of alimony and maintenance is pre decided the divorce would become much easier and can prevent mental and monetary loss to both the parties. This also increases the transparency and faith among the couples

Alternative Dispute Resolution Clause

Prenups can be helpful to resolve a dispute through mediation, and if not resolved, then such disputes can be resolved through binding arbitration instead of litigation. This clause in a prenuptial agreement can save the time of both husband and wife. They can easily decide the disputes like child custody or amount of maintenance or alimony through this clause. It is better to quote this in a prenuptial agreement than being indulged in a mentally straining ugly divorce.

Stridhan Clause

This clause encourages rights of women and protects her property from being taken away from her. In Hindu Marriage a women get gifts from her relatives, parents and friends which she brings with her after the marriage sacrament in her new home. Stridhan can include clothes, ornaments, jewellery or any immovable property. The wife can enter into a prenup that neither he or his family would take the gifts away from her if they get a divorce in future.

VI. CONCLUSION

Prenuptial Agreement is a western concept that has taken its roots in India and is gradually

²¹Alok Kumar Yadav, Masoom Ali, Prenuptial Agreements in the Institution of Marriage in India: Legal Framework & Societal Perceptions. Legal Research & Analysis 2, 12-16, (December 2024).

<https://doi.org/10.69971/s7nqbs85>

²² Abhishek Raj, Rethinking Marriage: Why India Needs Prenups to Protect Justice and Fairness for Innocent Husbands? (Dec 2024).

<https://www.linkedin.com/pulse/why-legalizing-prenuptial-agreements-india-necessary-abhishek-1br0f/>

growing with the evolution in the society. There is no legal framework for prenuptial agreements in India but various jurist have given their concern for its enforceability. It is the need of time that we give importance to prenups because divorce rates are rising especially in urban areas. Not only this but Prenups can make the life of a person much efficient and can prepare him for the worst situations in life so that he does not deal with any mental trauma later on. Prenups have proved to be a good option in US and if it can be successful there, then it can also be successful in India.