

# Prenuptial Agreements in India

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## Abstract

*Even though Indian laws don't recognize the prenuptial agreements under the marriage laws but when couples get married these days they discuss of getting a prenuptial agreements to protect their interests. The contents of prenups vary from agreement to agreement. Whether to recognize the prenuptial agreements in India is still a debatable issue as the government says this is not the right time and moreover they're valid contracts and thus they are legally binding and enforceable under contract act 1872. In this paper researcher would analyze the validity of premarital agreements, their importance and complications of prenups.*

**Keyword:** - Marriage, Prenuptial Agreements, Contract Laws.

## 1. INTRODUCTION

A prenuptial agreement, antenuptial agreement, or premarital agreement, commonly abbreviated to prenup or prenupt, is a contract entered into prior to marriage or civil union by the people intending to marry. The content of a prenuptial agreement can vary widely, but commonly includes provisions for division of property and spousal support in the event of divorce or breakup of marriage.

Prenups are accepted in various countries around the globe countries, countries including Canada (Quebec), France, Italy, and Germany recognizes these agreements.

### 1.1 History

Prenuptial Agreements are seen as a necessary tool for the modern era where metaphorically speaking, divorce takes place faster than marriages.<sup>1</sup> The concept of prenups isn't new; this concept was widely accepted in various religions but in different forms. In Anglo-Saxon society, marriage had a distinctly contractual flavour. The groom purchased the wife's guardianship, and thus the right to marry her, with a price fixed according to her rank in society.<sup>2</sup>

If we take the example of *Ketubah marriage* practiced among Jews, it shows slight impression of a valid prenuptial agreement. *Ketubah marriage* is a Jewish prenuptial agreement. The *Ketubah* basically consists of rights of the wife and obligations of a husband towards his wife and along with that, it also mentioned the maintenance claim of a wife from the husband during the event of dissolution of marriage by either death of the husband or divorce.<sup>3</sup>

Just like in *Ketubah* marriage in Jews, the concept of Dower in Mahomedan marriage also has characteristics of prenup agreements.<sup>4</sup>

<sup>1</sup>Akansa Ghose & Pallavi Agarwal, *Prenuptial Agreement: A Necessity Of Modern Era*, 2 International Journal Of Research And Analysis , 4-6 (2014),

[http://www.ijra.in/uploads/41952.2512314468FULL%20PAPER\\_Akansha%20Ghose%20&%20Pallavi%20Agarwa%20L.pdf](http://www.ijra.in/uploads/41952.2512314468FULL%20PAPER_Akansha%20Ghose%20&%20Pallavi%20Agarwa%20L.pdf) (last visited Sep 17, 2018)

<sup>2</sup>Lloyd Bonfield, *Property Settlements on Marriage in England from the Anglo-Saxons to the Mid-Eighteenth Century*, in *Marriage, Property, and Succession* 287, 292-93 (Lloyd Bonfield ed., 1992)

<sup>3</sup>Akansa Ghose & Pallavi Agarwal, *Prenuptial Agreement: A Necessity Of Modern Era*, 2 International Journal Of Research And Analysis , 4-6 (2014),

[http://www.ijra.in/uploads/41952.2512314468FULL%20PAPER\\_Akansha%20Ghose%20&%20Pallavi%20Agarwa%20L.pdf](http://www.ijra.in/uploads/41952.2512314468FULL%20PAPER_Akansha%20Ghose%20&%20Pallavi%20Agarwa%20L.pdf) (last visited Sep 17, 2018)

<sup>4</sup> *ibid*

In Mohammedan law the idea of pre-up was availed even before the popular western notion. As most Muslim marriages involve the negotiation of a *mahr* provision as part of a marriage contract which consists of a monetary payment from husband to wife.<sup>5</sup>

Thus, the concept of premarital agreements was in existence for a long time, every country, society and community exercises this practice in different different forms.

## 2. LEGAL ANALYSIS

Pre-nuptial Agreement in India sounds like an alien concept. India is a country that boasts of its rich culture and the love and warmth that people share.<sup>6</sup> Unlike in India, European countries accept and recognize the concept of prenups, in European countries marriage is a contract between a husband and a wife whereas in India marriage is considered as a sacrament and thus introduction of prenups is a foreign concept.

Ruling out any immediate change in law to recognise prenuptial agreement, the government has taken a view that it's an "urban concept" and "too early" to give it a legal backing.<sup>7</sup>

### 2.1 Validity and Enforceability

While prenups are common in western countries, they are still not warmly welcomed in the Indian society. Since marriages have a sacred status ascribed to them, it becomes difficult for us to weigh them in contractual terms.<sup>8</sup>

In India, prenuptial agreements are neither legal, nor valid under the marriage laws because they do not consider marriage as a contract. A marriage is treated as a religious bond between husband and wife and prenuptial agreements don't find social acceptance. However, these are governed by the Indian Contract Act and have as much sanctity as any other contract, oral or written.<sup>9</sup>

The courts take cognisance of a prenuptial agreement if both the parties mutually agree to it and sign it voluntarily, without any undue influence, force or threat. Besides, the agreement should be fair, clearly stating the division of property, personal possessions and financial assets of the parties, and should be certified by a separate lawyer for each.

Basically, prenups aren't popular India but they are valid and they are governed under the Indian contract act, 1872. They are legally binding if they're mutually agreed upon by both the parties and the clauses in the agreement are fair and clearly stated without any ambiguity.

### 2.2 Necessity

Inescapably, prenuptial agreements are about money. They focus on property and support rights upon the legal or natural end of the marriage.<sup>10</sup> The main purpose of getting into a prenup is to decide the fate of finances and personal liabilities in case the marriage fails and eventually couple get divorced.

Prenuptial agreements allow couples to write a "road map," that structure their finances according to a mutually predetermined plan. In addition, prenuptial agreements enable an individual to protect a family business or specific piece of property from possible claims by a former spouse.<sup>11</sup>

<sup>5</sup> Matisa Majumder, *Prenuptial Agreement: Enforcing Marriage in the eyes of Law*, 3 International Journal of Law and Legal Jurisprudence Studies, 468 (2016), <http://ijlljs.in/wp-content/uploads/2016/02/31.pdf> (last visited Sep 20, 2018)

<sup>6</sup> Is a Pre-nuptial Agreement Valid in India? News18, <https://www.news18.com/news/india/is-a-pre-nuptial-agreement-valid-in-india-1474033.html> (last visited Sep 13, 2018)

<sup>7</sup> Too early to give prenuptial agreement legal backing: Govt <https://www.hindustantimes.com/https://www.hindustantimes.com/india-news/too-early-to-give-prenuptial-agreement-legal-backing-govt/story-1AK9s4oUMRT6eGdKtDgbYM.html> (last visited Sep 16, 2018)

<sup>8</sup> Band, Baajaa, 'bargain': Legal Status Of Pre-nuptial Agreements In India Manupatrafast.com, <https://www.manupatrafast.com/articles/PopOpenArticle.aspx?ID=e42868ef-4b1d-43cb-ade4-720680f59c6e&txtsearch=Subject:%20Family%20Law> (last visited Sep 16, 2018)

<sup>9</sup> Are prenuptial agreements valid and enforceable in India? The Economic Times, <https://economictimes.indiatimes.com/analysis/are-prenuptial-agreements-valid-and-enforceable-in-india/articleshow/44782040.cms> (last visited Sep 13, 2018)

<sup>10</sup> Judith T. Younger, *Perspectives on Antenuptial Agreements: An Update*, 8 J. Am. Acad. Matrimonial Law. 1, 8 (1992)

As we earlier discussed earlier that in the modern era, where dissolution of marriages takes place as quickly as the actual commencement of marriages, Prenuptial Agreements may play a benevolent role in minimizing disputes over the distribution of share of assets and other possessions as well as liabilities of the parties and may provide for a hassle free process in which the alimony is paid by the party to the other.

## 2.2 Pre-requisites and Complications

As prenuptial agreements don't have a certain format and its content vary from agreement to agreement; this makes the whole concept complicated. In India, these agreements are neither popular nor easy, they involve a lot of complications there are certain prerequisites which we will be discussing in this section along with the certain complications.

**Prenuptial agreement is more likely to stand up if it meets the following conditions:<sup>12</sup>**

1. The Agreement should be fair, and duly acknowledged.
2. The Agreement should have attorney certification from both parties as well.
3. The Agreement should have clause stating that if any provision of the agreement is invalidated, the rest of the agreement still remains in effect.
4. There should be listing attached showing each spouse's assets and liabilities.
5. The Agreement should have all the clauses of agreements arrived at between the prospective spouses.
6. The Agreement may also contain the necessary history of proposed alliance.
7. The Agreement should be reviewed by separate lawyers and duly certified by them.
8. The Agreement should be setting out each party's assets, debts, and property rights before the marriage, settling issues of division of property and of spousal support in the event of marriage breakdown.

## 3. CONCLUSIONS

In the modern era where marriages break swiftly, it's a wise choice to have a prenup. However, for a prenup to be held valid certain conditions or guidelines are given and they are to be followed. The validity and enforceability is a tricky concept when it comes to prenups, as they're considered a legally binding contract but not governed under any of the marriage laws in India.

Though divorce is quite common in India now, it is still not considered a possibility before the marriage and hence there is no thought of a pre-nuptial agreement.

Prenups are a good choice these days, as they provide a hassle free litigation in case if marriage fails. Since the division of assets is already done before the marriage, implementing what has been decided before the marriage makes life simpler.

<sup>11</sup> Allison A. Marston, *Planning for Love: The Politics of Prenuptial Agreements*, 49 Stanford Law Review , 887 (1997)

<sup>12</sup> Pre-nuptial agreements Legalserviceindia.com, <http://www.legalserviceindia.com/article/I284-Pre-nuptial-agreements.html> (last visited Sep 20, 2018)

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