

Prenuptial Agreements in India – Validity and Legality

Getting married is a wonderful moment for people, and no one would like to cast aspersions on the intentions of a would-be partner by bringing up topics like future financial obligations at such time. However, it must be considered that future is unpredictable, and feelings about one's partner might change with change in circumstances. Given that money and communication are typically two out of the top three reasons people get divorced, it is essential to foster healthy communications about finances between partners right from the beginning to prevent any disruptions in future. Prenuptial agreements are economically viable as they provide protection from costly legal disputes, involve the consent and conditions of both the parties, reduce the possibilities of fraud by keeping a check on misrepresentation by either spouse.

It is true that a marriage should be based on love and mutual understanding, however, blindly placing trust in one's partner without paying any attention to finances can lead to disastrous consequences, especially when the other partner is a 'gold-digger' who is marrying with an eye on the partner's money. Recent case of Amazon's CEO Jeff Bezos, who had to part with a hefty fortune, as divorce settlement in favour of his wife, is an example highlighting the need for thinking about one's current assets and potential for future wealth before getting married.^[1]

Prenuptial Agreements

Prenuptial agreement (commonly called prenup) or premarital agreement or antenuptial agreement is an agreement entered into by parties prior to getting married, and addresses matters like financial rights and liabilities, distribution of assets and custody of children in the event of judicial separation or divorce in future.

Prenuptial agreements are about money, providing for estate planning and the distribution of assets upon death or divorce, allowing couples to structure their finances according to a mutually predetermined plan, and in some cases, help protect family business or specific piece of property from possible claims by a former spouse. Parties who want to protect their assets for their children from previous marriage can also benefit from these agreements. A prenup can also include factors such as support for a spouse who gives up his or her career to care for the couple's children.

Benefits of Prenuptial Agreements

- Prenuptial agreements help to put parties in better control of their finances, in case of any future event like separation or divorce, and also save the time of the parties as well as the courts.
- Persons who want to protect assets for children from previous relationships also gain from having discussed their financial assets before a subsequent marriage.
- A prior understanding in a marriage, in the form of an agreement, requires the prospective partners to think about the legal and economic implications of marriage they are entering into before they are trying to get out of it. This would require and encourage an informed and careful decision making by the couple before they marry.
- A carefully executed agreement prior to marriage is an effective instrument to ensure proper and fair division of matrimonial assets, minimizes litigation, protects a person from other partner's debts and liabilities, tackles maintenance and child custody issues, prevents false prosecution by unscrupulous spouses who might otherwise take unfair advantage of women protection laws like PWDV Act, 2005 or section 498A of the IPC or section 125 of CrPC, 1973. These agreements can serve as a legal guide for future relations and provide an amicable way of resolving issues.
- A clear demarcation of marital property and other financial and non-financial assets can be useful to reduce the uncertainty surrounding division of assets earned by the couple separately before marriage, and together post marriage.
- The legal hassles surrounding issues like maintenance and custody of children also get reduced to a great extent if an agreement already exists to cater to such issues. Such agreements give couples more freedom and autonomy in distribution of their assets and minimize the interference of courts.

The growing number of divorces in India, has increased the demand for prenuptial agreements, particularly among affluent sections of the society. A practical approach is needed to understand the benefits of a prenup and its ability to avoid unnecessary hassles and inconveniences.

Current Legal Status of Prenuptial Agreements in India

The concept of prenuptial agreement is slowly gaining traction in India. Initiative has been taken by the ministry of Women and Child Development in India to outline the modalities for introducing prenuptial agreements into the existing legal system.

Prenuptial agreements in India are governed by the Indian Contract Act, and have as much sanctity as any other validly entered contract, provided the parties enter into such agreements voluntarily, on fair terms and without any fraud or coercion. The prenuptial agreements fall within the ambit of Section 10 of the Indian Contract Act, 1872. Section 23 of the Act lays down what consideration and objects are lawful, and what not.^[2] In *Jamna Dass vs Smt. Sahiboo*^[3], the Court upheld the validity of a prenuptial agreement conveying the assurance that in case the financial provision made for wife's upkeep after marriage was insufficient, the husband would make an additional payment of Rs. Fifty per month to her. It was cited by the Court that the prenuptial agreement indicated the financial potential of the husband some years before, and clearly established the position of the husband to pay maintenance to his wife.

Section 40 of The Divorce Act,^[4] states that the District Court may inquire into the existence of ante-nuptial or post-nuptial settlements before passing a decree of dissolution of a marriage.

Under the Portuguese Civil Code, 1867 applicable only in the State of Goa, the couples are required to register the properties that each owns before marriage and can establish their entitlement over the listed properties and in the event of divorce the couple can have their separate properties without any disputes. If the parties have not signed any agreement prior to marriage, the wife will then have equal ownership of her husband's property and the marital property will simply be divided equally between husband and wife. ^[5]

Agreements which are reasonable and in consonance with personal law have been taken into consideration by the Courts in India. An agreement executed by the father-in-law prior to marriage, which entitled the bride to receive kharcha-e-pandan, was held to be valid and enforceable by the Court in *Nawab Khwaja Md. Khan vs. Nawab Husaini Begam*.^[6] Courts however, exercise caution before sanctioning validity to any such agreements which are against public policy and encourage future separation between couples. ^[7]

Legal Status of Prenuptial Agreements in Other Countries

United States: Uniform Prenuptial Agreement Act, 1983 governs prenuptial agreements across US. Marital estate is defined by the state laws where the divorce is filed unless the prenup specifically states otherwise, which is often the case.

United Kingdom: The decision in *Radmacher v. Granatino* ^[8] demonstrated the increasing willingness of courts to reflect the terms of a marital property agreement in financial orders. The Law Commission of England and Wales, in its 2014 report ^[9] on Matrimonial Property, Needs and Agreements, recommended statutory confirmation of the contractual validity of marital property agreements.

Germany: A pre-marital agreement is called '*Ehevertrag*', which means 'marriage contract'. The notion of a contract is very broad, embracing legally relevant agreements including commercial transactions as well as marriage. Prenups are valid in Germany, wherein couples can enter into a contract prior to marriage and choose how they want their assets held. Such a contract can be renegotiated after the marriage.

France: In France the division of personal assets during a marriage is laid out right from the start. French couples decide whether to share financial gains and losses made during the marriage before marriage, and sign the agreement in front of a notary, a lawyer with a special appointment. The marital agreements are always upheld.

International Convention: The Hague Convention on the Law Applicable to Matrimonial Property Regimes, 1978 authorizes prenuptial agreements in international domain.^[10]

Prenuptial agreements can include following points:

- Pre-existing debts and financial responsibilities like student loan, house loan or vehicle loan.
- Allocation of debts upon divorce.
- Properties held prior to marriage, and properties acquired after marriage, whether held jointly or separately.
- Financial considerations and inheritance matter with respect to children from prior marriage, in case of a second marriage.

Certain matters which should not be included in prenuptial agreements are:

- Certain provisions like waiver of alimony or waiver of rights of ancillary relief in case of divorce or separation.
- Child custody matters in case of separation or divorce, are based on the best interest of child, and cannot be included in prenuptial agreements.

It should be borne in mind that prenuptial agreements are designed to address financial issues, and including any terms like division of household work and childcare provisions post marriage is bound to be looked down upon by courts, thus reducing the effectiveness of these agreements and chances of their acceptance by the courts.

Prenuptial Agreement – Important Provisions

The chances of prenuptial agreement being considered by the courts is dependent on a variety of factors, including fairness of the terms of agreement and the access to an independent counsel by each party. Failing to follow those rules opens the door to legal challenges of the agreement. Certain factors that should be considered carefully before signing a prenuptial agreement are as follows:

- Prenuptial agreements should include full and fair disclosure of assets, or a waiver of that right to disclosure.
- A provision to change or renegotiate the terms of agreement post marriage, on the request of either partner.
- The terms for penalty or forfeiture of assets, which have been divided pursuant to separation or divorce, in matters pertaining to fraud, extra-marital relationship or cheating by either partner.
- Safeguards into the agreements, providing powers of alteration and to ignore the terms of the agreement which are against public policy, unconscionable, include an element of fraud, undue influence or coercion, or are based on misrepresentation.
- The agreement should be fair, clearly stating the division of property, financial assets, joint and personal possessions of the parties, and should be certified by a separate lawyer for each party.
- Each spouse should be represented by independent counsel.

- If the parties belong to different regions or countries, the agreement needs to reflect any variance in state laws and include a provision on which state's law will prevail.

Changing norms of the society in today's world make it imperative to give a serious consideration to economic perspectives in a marriage. A well thought of marriage, in which future aspirations and challenges have been discussed by the would-be partners, helps increase transparency and build trust. Prenuptial agreements provide a viable solution to effectively tackle issues arising in case of dissolution of marriage. Such agreements clearly defining separation of assets also provide greater flexibility to couples in which both spouses are able to invest in their careers.

Prenuptial agreements help achieve the objectives of transparency and trust-building, in addition to minimizing legal hassles in case of marital issues, and hence are the need of the hour, provided, both the parties enter into such agreements carefully and with equal bargaining power. To realise the benefits of premarital agreements and to minimize the problems, it is important that the parties have full understanding and knowledge of their rights and have had the benefit of consultation with an independent lawyer, before entering into such an agreement.

[1] Kelli B. Grant, *Jeff Bezos didn't have a prenup. But maybe you should*, CNBC, Jan 10, 2019, available at <https://www.cnbc.com/2019/01/10/bezos-divorce-highlights-usefulness-of-prenuptial-agreements.html> (last accessed Apr 9, 2021).

[2] Indian Contract Act, 1872. Section 23 provides that a consideration or object of an agreement is unlawful, if it is forbidden by law, or of such a nature that, if permitted, it would defeat the provisions of any law, or the Court regards it as immoral or opposed to public policy.

[3] *Jamna Das v Smt Sahiboo* AIR 1975 HP 18.

[4] The Divorce Act, 1869, is an Act relating to the divorce of persons professing the Christian religion.

[5] The Portuguese Civil Code, 1867, is applicable to the State of Goa in many spheres. As per the code, a married couple share property equally, pre-nuptial agreements are the order of the day and assets are apportioned uniformly between the man and woman on divorce.

[6] *Nawab Khwaja Md. Khan vs. Nawab Husaini Begam*, (1910) 12 Bom LR 638.

[7] *A.E. Thirumal Naidu vs Rajammal Alias Rajalakshmi*, (1967) 2 MLJ 484.

[8] *Radmacher v Granatino* [2010] UKSC 42, [2011] 1 AC 534.

[9] http://www.lawcom.gov.uk/app/uploads/2015/03/lc343_matrimonial_property.pdf (last accessed Apr 09, 2021).

[10] The Hague Convention on 'The Law Applicable to Matrimonial Property Regimes' 1978, Art. 12.