



Prenuptial Agreements:

Are they valid and enforceable in India? [Part 1]



It was a beautiful Monday Morning, business was as usual, while I was sipping a hot mug of coffee two young individuals entered my chambers & we sat down for a discussion on prenuptial agreement.

Rahul runs a successful family-owned business, while Nitu is the head of human resources at a software firm. Both of them are in their late 30s and are doing well in their respective fields. They have been dating for two years and have now decided to tie the knot. However, before doing so, they wanted to take a decision on the fate of their finances & assets in case the marriage does not last and ends up in a divorce. How should they do it correctly, yet discretely was the focal point of discussion.

Most people do not think of divorce at the time of solemnising a marriage. However, if two individual consenting adults want to have control over their finances after an 'unlikely' divorce, it is critical that they discuss a prenuptial agreement before planning their wedding.

While I was discussing the pros & cons of a prenuptial agreement, I honestly did not know whether it would be valid in India & stand the test of Law, and how to go about drafting one. I for sure knew that a prenuptial agreement was a legal contract between spouse before marriage to outline plans for division of property and finances in case of a divorce.

After brain storming research on the subject we have now come to the following understanding on prenuptial agreements, which I would like to share:

What is a Prenuptial Agreement?

A prenuptial agreement is a contract between two individuals who are about to get married, outlining the state of finances and personal liabilities in case the marriage fails. Though it is not popular in India, the instrument helps avoid financial disputes and trauma at the time of separation.

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.

The Indian 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. For a prenuptial agreement to be successful, both parties have to be willing to participate in it and

have to be completely honest about their individual assets and liabilities. The contract also has to be in place before the wedding takes place.

A prenuptial agreement, antenuptial agreement, or premarital agreement, commonly abbreviated to prenup or prenupt, is a contract entered into prior to marriage, civil union or any other agreement prior to the main agreement by the people intending to marry or contract with each other. 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. They may also include terms for the forfeiture of assets as a result of divorce on the grounds of adultery; further conditions of guardianship may be included as well. It should not be confused with the historic marriage settlement which was concerned not primarily with the effects of divorce but with the establishment and maintaining of dynastic families.

A big advantage of having a prenuptial agreement is that it forces couples to have a financial discussion before marriage. The issues that can be efficiently dealt with through such a contract include protecting both the parties from each other's debts, preventing a division of the family businesses and disputes regarding separate and shared assets, as well as dealing with the issue of children's custody after the dissolution of a marriage. So, essentially, the agreement helps decide who gets what at the time of divorce.

Prenuptial Agreements in other countries

In some countries, including Belgium and the Netherlands, the prenuptial agreement not only provides for the event of a divorce, but also to protect some property during the marriage, for instance in case of a bankruptcy. Many countries, including Canada, France, Italy, and Germany, have matrimonial regimes, in addition to, or some cases, in lieu of prenuptial agreements. Prenuptial agreements are recognised in Australia by the Family Law Act 1975 (Commonwealth). Prenuptial agreements have historically not been considered legally valid in the United Kingdom. This is still generally the case, although a 2010 Supreme court test case between the German heiress **Katrin Radmacher and Nicolas Granatino**, indicated that such agreements can "in the right case" have decisive weight in a divorce settlement. The Law Commission is to consider whether a change should be made to the letter of the law, recognizing prenupts in a more general way. In the United States Currently, prenuptial agreements are recognized, although they may not always be enforced. Both parties should have lawyers represent them to ensure that the agreement is enforceable. In some cases, the parties retain a private judge to be present during the signing, to be sure that neither party has been coerced/ forced into the agreement. Some attorneys recommend videotaping the signing, although this is optional. Some states such as California require that the parties be represented by counsel if spousal support (alimony) is limited by the agreement. Prenuptial agreements are recognised as valid legal documents in several Western countries, but they have no validity in India.

The Indian Scenario

Prenuptial agreement may be useful in India to at least check some false prosecutions by unscrupulous Women, who are misusing Section 498A or Domestic Violence Act of IPC for blackmail and Extortion of money. That means, if the both parties are genuine, transparent and do not have any pre-planned ill mind, will accept the terms of the agreement before marriage itself. if the prenuptial agreement are signed, and in case of a divorce if the magistrate feels that some clauses in the agreement are unfair then he can dismiss the case, but once the magistrate has accepted the prenuptial agreement then for demanding extra money or anything beyond the prenuptial agreement the onus is on the other party to prove additional circumstances.

In Islam, the prenuptial contract, *Katb el-Kitab*, has long been established as an integral part of the Islamic marriage, and is signed at the marriage ceremony. Similar to Judaism, it outlines the rights and responsibilities of the groom and bride or other parties involved in marriage proceedings, the agreement is recognized & valid.

Marriage under the India law:

Section 2 [1] of the Hindu Marriage Act, 1955 says:

1. This Act applies - a.to any person who is a Hindu by religion in any of its forms or developments, including a Virashaiva,

- a. Lingayat or a follower of the Brahmo, Prarthana or Arya Samaj;
- b. to any person who is a Buddhist, Jain or Sikh by religion; and
- c. to any other person domiciled in the territories to which this Act extends who is not a Muslim, Christian, Parsi or Jew by religion, unless it is proved that any such person would not have been governed by the Hindu law or by any custom or usage as part of that law in respect of any of the matters dealt with herein if this Act had not been passed.

According to Hinduism, marriage is a sacred relationship. In some Hindu systems of marriage, there is no role for the state as marriage remained a private affair within the social realm. Within this traditional framework reference, marriage is undoubtedly the most important transitional point in a Hindu's life and the most important of all the Hindu "sanskaras" (life-cycle rituals). Therefore there was fierce religious opposition to enacting such laws for marriage, succession and adoption. Some have argued that Hindu marriage cannot be subjected to legislative intervention. According to Hindu Marriage Act, a marriage can take place between the two consenting individuals of opposite sex, who are of sound mind and the bride is more than eighteen years of age and the groom is more than twenty-one years of age.

One must also know that even if the marriage takes place between a girl and a boy who have not attained the requisite age, the marriage remains valid. However, it may lead to some penal provisions under the Hindu Marriage Act.

Generally, a couple shall be said to be married if they have completed the Saptpadi. "Saptpadi" refers to completing the seven steps around the holy fire. Merely exchanging garlands shall not amount to marriage. In cases, where the customs provide for different ceremonies, the couple shall be said to be married if they perform those ceremonies. If a spouse leaves other without just or reasonable cause, the other spouse can move to the court for restitution of conjugal rights. This is provided under Section 9 of the Hindu Marriage Act. We must also know that once a decree under section 9 is passed, it is obligatory for the spouse to come back to other and if the spouse fails to do so even after one year of the decree, it becomes a ground for divorce for other spouse.

The Supreme Court of India exercised its powers under Article 142 of the Constitution of India and ruled in August 2012 that marriages can be ended by mutual consent before expiry of the cooling period of six months stipulated in the Hindu Marriage Act, 1955. Section 13-B of the Hindu Marriage Act provides for the couple seeking divorce through mutual consent to wait for a period of six months after making first joint application for divorce. It is only after the expiry of the six months that the couple can move second application for the dissolution of their marriage.

A growing number of Indian elites – typically from business families – are now choosing to sign prenups before tying the knot, but in case of a divorce, these pacts would mean nothing in a court of law in India.

In India, prenuptial agreements are very rare and do not have any governing laws. However, with rising divorce rates people are showing increasing interest in prenups. Some lawyers are of the opinion that prenups don't have legal sanctity in India. However, some form of contract is signed in some cases, usually among affluent citizens. But, the agreements need to be reasonable and not violate pre-existing laws like the Hindu Marriage Act. Indian courts allow a memorandum of settlement to be signed during divorces. But, no court has yet been asked to enforce a prenup agreement.

These agreements may come under the Indian Contract Act 1872. The Section 10 of the Indian Contract Act states that agreements are to be considered contracts if they are made by the free consent of the parties. However, the Section 23 of the same act states that a contract may be void if they are immoral or against public policy. Goa is the only Indian state where a prenuptial is legally enforceable, as it follows the Portuguese Civil Code, 1867. A prenuptial agreement may be signed between the two parties at the time of marriage, stating the regime of ownership. If a prenuptial has not been signed, then the marital property is simply divided equally between the husband and wife.

Are prenuptial agreements valid and enforceable in India?... To be continued in the next edition



Prenuptial Agreements:

Are they valid and enforceable in India? [Part 2]

Necessity of a Prenup agreement

Prenuptial agreements are, at best, a partial solution to obviating some of the risks of marital property disputes in times of divorce. They protect minimal assets and are not the final word. Nevertheless, they can be very powerful and limit parties' property rights and alimony. It may be impossible to set aside a properly drafted and executed prenup agreement. A prenup agreement can dictate not only what happens if the parties divorce, but also what happens when they die. They can act as a contract to make a will and/or eliminate all your rights to property, probate homestead, probate allowance, right to take as a predetermined heir, and the right to act as an executor and administrator of your spouse's estate.

A prenuptial agreement is only valid if it is completed prior to marriage. After a couple is married, they may draw up a post-nuptial agreement.

If prenuptial agreements were made legal in India, would they really make it easier for women to get maintenance or property rights in case of a divorce? Not in a society as pervasively unequal as India.

But even if the government succeeds in making them legal, many lawyers believe prenups are unlikely to be popular in India, where marriage is considered a religious union and where a bride's family often has fewer bargaining powers than the groom's.

'They will definitely save the court's time'

Prenuptial agreements have been on the government's agenda for many years now, ever since the Marriage Laws (Amendment) Bill was introduced. The major aims of the bill were to include "irretrievable breakdown of marriage" as a clause for divorce and to allow women half the share of her ex-husband's property. "Prenups were lower down on the agenda and they were not discussed earlier, and eventually, even the other amendments proposed in the bill were not passed,"

Prenuptial agreements are in the limelight now, but for them to be given legal validity, Indians would first have to negotiate the link between marriage and religion. "The reason prenups are legally null and void right now is because marriage is considered sanctimonious and religious, and a prenuptial contract is not guided by religion". Even if you have a registered marriage in court, it would be considered as having religious sanctity." In a country steeped in tradition and religion, prenuptial agreements would have limited takers even if they were legal.

Requirements, Discussion & Drafting of a Prenup Agreement

Five elements are required for a valid prenuptial agreement:

1. agreement must be in writing (oral prenups are generally unenforceable);
2. must be executed voluntarily;
3. full and/or fair disclosure at the time of execution;
4. the agreement cannot be unconscionable;
5. it must be executed by both parties (not their attorneys) "in the manner required for a deed to be recorded", known as an acknowledgment, before a notary public.

Sunset Clause: A sunset provision may be inserted into a prenuptial agreement, specifying that after a certain amount of time, the agreement will expire. In a few countries the agreement will automatically lapse after the birth of a child, unless the parties renew the agreement. In some other countries a certain number of years of marriage will cause a prenuptial agreement to lapse.

Jurisdiction & Choice of Law: Choice of law provisions are critical in prenups. Parties to the agreement can elect to have the law of the state they are married in govern both the interpretation of the agreement and how property is divided at the time of divorce. In the absence of a choice of law clause it is the law of the place the parties divorce, not the law of the state they were married that decides property and support issues. It may be necessary to retain attorneys in both states to cover the possible eventuality that the parties may live in a state other than the state they were married. Often people have more than one home in different states or they move a lot because of their work so it is important to take that into account in the drafting process.

Critical Aspects: There are several ways that a prenuptial agreement can be attacked in court. These include lack of voluntariness, unconscionability, and a failure to disclose assets, these have to be addressed properly in the contract.

'Women cannot be self-sacrificing'

Divorce cases in India often run into several years of courtroom battles over property, assets and maintenance, and women often end up losing out on their rightful share. If the clauses and terms in the contract in connection with the property division and maintenance are clearly spelt out in a legally valid prenup, it could ensure that women get the assets and support they are entitled to without going through lengthy litigation. (Contracts have to be drafted equally to both parties it cannot be one sided)

“On principle, prenups contracts have to bring in equality for women,” But in India, where the tradition of dowry is still pervasive, signing pre-marital contracts could be a bit more complicated. Here, a girl’s family already has a set of social taboos to deal with – they are almost never on equal terms with the groom’s family,” “A bride’s family is not always in a position to choose, so would they be in a position to negotiate an agreement that can provide security to the girl?” and correct the agreements which are one sided??

“Prenups can work if women are smart and concise while writing them,” They must not be self-sacrificing and agree to unequal terms

Prenuptial agreement is more likely to stand the test of Law, if it meets the following conditions:

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 both sides 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.

It should also include the following key provisions:

1. **Separate Property:** The agreement will allow the parties to set out the property being brought into the marriage that should remain separate in the event of death or divorce
2. **Shared Property:** Identifies property that will be shared
3. **Division of Property:** Sets out how all property will be divided in the event of death or divorce
4. **Disclosure of Assets and Liabilities:** Gives the couple the opportunity to define each party's assets and debts coming into the marriage. This is an important provision as failure to list all assets and liabilities can actually invalidate the agreement.
5. **Alimony, Support and Maintenance:** Sets out any payments that will be made

6. Estate Planning/Wills: References the estate plan and/or wills of the couple and identifies what will be included (every couple should have a comprehensive estate plan)
7. Additional Clauses: Provides room for the parties to add additional provisions that they may find important.

With the number of divorce petitions in Bengaluru alone touching 7,000 in 2015, up from around 2,500 in 2005, many are going for prenuptial agreements to ensure things are clear when the marriage is on the rocks, these agreements will work only if the couples stick to the agreement when they decide to split, however prenuptial agreement is yet to be recognised in India as a legal document, the Union ministry for women and child development recently has called for a discussion on the subject with legal experts with the possibility of bringing about a law to legitimize the pact between spouse.

Marriage in India, being an important ritual in every man and women's life and deeply rooted in religious beliefs with traditional thinking that the woman takes care of the child & the house while the man is the provider and while many women are not financially independent, will prenuptial agreements work?? Will women be in a position to negotiate the terms?? Will this ever be legally enforceable?? Will there be an amendment in the marriage laws?? OR will this only be a mere contract under the Contract Act?? ... while we have successfully drafted the contract and the matter is in the advanced stages of negotiation, these questions are still unanswered, which only time will tell.