



## PRENUPTIAL AGREEMENTS IN INDIA: AN ANALYSIS

*By Rushabh Gurav*

*Advocate*

*LLM from Symbiosis Law School, Pune*

### Abstract:

Man is a social animal. This animal created society has the institution of marriage instilled within itself so deep, that is an essential to any community no matter how different their culture. Marriage in most faiths, and in turn their personal laws treat marriage as a sacrament rather than a contract. Sacrament implies that once it is formed, it is eternal and bound forever along with the higher purpose. In India, Marriage is mostly dealt by personal laws and even though there are laws like the Special Marriage Act, divorce is still a taboo. Marriage can be said to be a social contract and sacrament- and divorce is treated similarly and acts as a social event. Society creates a heavy taboo on any kind of divorce, whether it be lack of love, problems, unfaithfulness, bigamy, or even abuse of any kind. In such a situation- Prenuptial agreements in their essence are precautions for divorce but are often misinterpreted as preparation for divorce. In India none of the personal laws recognize any kind of prenuptial/premarital agreements, and such agreements fall truly and completely under the Contracts Law. Prenuptial Agreements are widely used around the world but are yet

to gain any kind of traction in India. Such agreements protect the rights of the spouses in case things turn sour and the marriage ends in divorce. Monetary, Child rights, Property, Maintenance etc. are all structurally dealt with in such agreements. In this paper, the researcher has attempted to assess the benefits that prenuptial agreements can have for couples in India and using it as a tool to manage their marriage.

**Keywords: Prenups, Prenuptial Agreements, Legality, Marriage Contracts, Maintenance.**

### Introduction:

Prenuptial agreements are being used in the western cultures and are also gaining popularity among new and young couples, who are looking to protect their property, money and rights in case it leads to divorce and ends the marital bond.<sup>1</sup> While there seems to be a steep rise in the rates of divorces in India and all over the world can definitely be seen as a reason that couples are looking to enter any sort of premarital agreements, and adding to that the attitude towards marriage as an institution in itself is changing and another factor is independence of women- all acting towards rising acceptance of such agreements.

Western countries have steadily grown in their acceptance of such agreements<sup>2</sup> but India faces a difficulty owing to the fact that

<sup>1</sup> Prenuptial Agreements Are on the Rise, and More Women are Requesting Them, Huffpost. (Oct. 22, 2013 08:25 PM October 22, 2013). [https://www.huffingtonpost.com/2013/10/22/prenups-\\_n\\_4145551.html](https://www.huffingtonpost.com/2013/10/22/prenups-_n_4145551.html)

<sup>2</sup> Amrita Ghosh and Pratyusha Kar, Pre-Nuptial Agreements in India: An Analysis of Law and Society, NUJS Law Review, 12 NUJS L. Rev. 2 (2019).



the law regarding prenuptial agreements is still in its adolescence.<sup>3</sup>

In this paper, I shall attempt to clarify the ambiguous nature of prenuptial agreements in India and also look into model clauses which can be implemented considering all the personal laws that control marriage and divorce in the country. Along with analyzing the criticisms that such agreements face from the societal front- providing counters for such. The literature taken for this paper will be talked about in detail and how they form the arguments and analysis for the topic of acceptance of Prenuptial agreements in India. Finally, the researcher will conclude with remarks on the future of implementation of prenuptial agreements in the Indian context.

### **Legality of Prenuptial Agreements in India:**

Marriage is bond of love, care, affection and respect- and this sanctity created is what makes divorce a taboo in the majority of cultures in the world. Divorce brings shame to the family in their society. It does not matter what stage the marriage has reached in, be it unhappy, uncomfortable, dissatisfied or even if the relationship or marriage has become abusive (sexual or otherwise).

As people become more aware, educated and financially sound (usually both spouses), and self-sufficient – they start looking to protect their interests in case of any mishaps. This is where Prenuptial agreements play a huge part. Prenuptial agreements can be defined as an “*agreement between a couple, before their marriage, to decide in advance how the*

*division of their property and assets, joint or otherwise.*”

The prenuptial agreement does not have to have a fixed format and there are certain clauses that can form part of such an agreement:

- Division of the joint property and assets
- Maintenance and alimony
- Custody of any children
- Insurance, Mediclaim, trusts and savings
- Any debt, individual or joint, however.

The global scenario in various jurisdictions such as the USA (where all prenuptial agreements are legally enforceable in all 50 states), Canada, Australia, and also where - Austria, France, Netherlands, Portugal also being a part of the Hague Convention, and last but not the least New Zealand- which has been the torch bearer for legal reforms in the new age.

In India the judiciary has been burdened with more than 1.5 crores of pending cases. Divorce cases take around 6 years to do away with. In such scenarios, prenuptial agreements would play an enormous role to guide the courts during the brutal (only way to describe divorce proceedings) and grueling court proceedings for divorce. The Ministry of Women and Child Development is pushing for the legalization of such agreements, and that would be the first step towards removing the taboo attached with it as well. But even then, such agreements will always face a long and difficult battle as it might seem like planning the end of marriage even before it begins, but there is no harm in

<sup>3</sup> Aarefa Johari, Is India really ready for prenuptial agreements, ask divorce lawyers, SCROLL. IN, November 20, 2015, available at

<https://scroll.in/article/770445/is-india-really-ready-for-prenuptial-agreements-ask-divorcelawyers> (Last visited on November 20, 2020).



preparation for uncertainty. Prenups do not profess divorce, but rather guarantee the protection of rights of both the wife and the husband in case the marriage ends in divorce.

### Validity of Prenuptial Agreements in India:

Prenuptial agreements are known as being widely used around the world as an effective instrument of delineating spousal rights in the course of subsistence of marriage as well as in its termination. The Indian Judiciary has made progress throughout history through its judgments portraying their acceptance and accommodation. This in turn inspires the legislation to shift gears and draft necessary statutes wherever necessary. The emotional and financial implications involved, make Divorces a potential for prolonged battles of the couple in the courtrooms, fighting on issues of money, maintenance, and custody-which inevitably leads to loss of money, time and causes lots of stress. Though it is not the intention, couples of this generation have to be aware of the possibility that the marriage might end up in divorce if things take a turn for the worse. In such circumstances, prenuptial agreements can be of grand help as they guide the couple and the court as well in managing the case of separation well.<sup>4</sup>

In India, in some places, prenuptial agreements hold their stance, such as Christian personal laws, which enumerate that the district courts look into the existence of prenups and refer to its terms while coming to a decision on the settlement of any property in question. Understanding the

resistance towards the acceptance of prenups, owing to the religious sentiments of the Hindu religion towards marriage, the authors have submitted that prenups should not be held as offensive to the religion and its sentiments attached with marriage.<sup>5</sup> But look upon other religious sanctums which recognize the rights of the spouses in case of separation and the upholding of Prenuptial agreements. But at the same time, it is reiterated that it is important that an agreement whose object or consideration is against the public policy is not valid itself as stated in contracts law. Some judgements throughout history have held certain agreements to be void as they fall against public policy. There are certain case laws which were so ridiculous that they were bound to be held void regardless of rule of law, but were rightly held as void under public policy. Generally prenuptial agreements protect the rights of the parties, but when such parties get over the line and start imposing restrictions in such agreements, then the agreement starts marching towards the line of void agreements.

In the case of *Tekait Man Mohini Jemadi v. Basanta Kumar Singh*<sup>6</sup>, the Calcutta HC held that the prenup entered into by the parties which stated that the husband could not remove his wife from her mother's house, and an additional clause compelling the husband to listen to instructions by the wife's mother at all times, was void on the grounds of public policy. It has to be reiterated that the purpose of prenups is not so that the parties can impose unwarranted and biased

<sup>4</sup> Matisa Majumder, Prenuptial Agreement: Enforcing Marriage in the eyes of Law, International Journal of Law and Legal Jurisprudence Studies :ISSN:2348-8212:Volume 3 Issue 1 (2016).

<sup>5</sup> Rishabh Tiwari, Prenuptial Agreements in India, IJARIE-ISSN(O)-2395-4396, Vol-4 Issue-5 (2018).

<sup>6</sup> *Tekait Man Mohini Jemadi v. Basanta Kumar Singh*, (1901) ILR 28 Cal 751.



restrictions on their spouses, but to rather ensure certain legal factors are catered to and understood prior to the commitment of marriage. Similarly, in another case, *Khatun Bibi v. Rajjab*<sup>7</sup>, the Allahabad HC held that a restriction or compulsion stating that the husband will only reside in the wife's house to be void on the same grounds of public policy. It further elaborated that such restrictions affect the liberty of the husband. It would be interesting to view the parallel version of such cases where the prenuptial agreements are used by men to put forth certain restrictions of residing at a particular place, especially in rural areas, and whether the Courts would cite the public policy or allow such prenups considering the paradigms of Indian society and culture.

When it comes to the monetary aspect of Prenuptial agreements, especially where the parties entered into a prenuptial agreement which stipulated a fixed amount of money to the wife in any case that the wife chooses to leave the husband was held to be violative of public policy and the contract, void by the Madras HC in *Krishna Aiyar v. Balammal*<sup>8</sup>. While furthering the public policy angle, the Bombay HC in *Bai Fatima v. Ali Mahomed Aiyab*<sup>9</sup> held that even a Mahomadden couple entered into a prenuptial agreement, which specified maintenance to be awarded to the wife in case of a divorce, was void and in violation of public policy with the reasoning that such an agreement encouraged Divorce and separation in addition to providing a mechanism for it.

<sup>7</sup> *Khatun Bibi v. Rajjab*, AIR 1926 All 615

<sup>8</sup> *Krishna Aiyar v. Balammal*, (1911) ILR 34 Mad 398.

<sup>9</sup> *Bai Fatima v. Ali Mahomed Aiyab*, ILR 1913 37 Bom 280.

<sup>10</sup> Moushumi Das Gupta, Too early to give prenuptial agreement legal backing: Govt, HINDUSTAN

Even though there appears to be a positive movement towards the acceptance of premarital agreements within the judiciary, but the lack of legislative steps as well the dark contours of public policy, the question of whether such agreements or when, rather, will be given effect in a court of law remains somewhat unknown. At present, it looks like the prenuptial agreements and its growing clout is making the government and legislature make moves in accepting the effect and role of such agreements in regulating the sanctum of marriage.

Though there have been reports that the government feels that it is way too early to go ahead with prenups as granting such agreements a legal status, footing, and feasibility of such a move requires further consideration and deliberation.<sup>10</sup>

Further, addressing the resistance to premarital agreements or prenups, one may argue that legalizing prenuptial agreements can lead to the spouses assuming an easy way out of the marriage in case things don't work out well. It can even go as far as suggesting that ending the marriage by separation or dissolution is much better and easier than working out the problem together as a couple. The final turn of this argument is that if such agreements lead to further cases of divorce, then eventually the institution of marriage will itself lose value. The counter to this lies in the analysis of Islamic law from the beginning. Under Islam, Marriage is regarded

TIMES, March 2, 2018, available at <https://www.hindustantimes.com/india-news/too-early-to-give-prenuptial-agreement-legalbacking-govt/story-1AK9s4oUMRT6eGdKtDgbYM.html> (Last visited on November 19, 2020).



as a sacrosanct contract.<sup>11</sup> Which in effect means such marital contracts cannot be treated as ordinary contracts under law. Even Hindu law treats marriage as a civil contract along with it being a sacrament.

While there is great potential for prenups to be capable of catering to the specific needs of Indian married couples, the lack or absence of regulating and legislative laws and guidance on the subject poses a serious problem in such agreements being used for its purpose. Everyone agrees that marriage plays a vital role in the Indian community and this fear that prenups may stain the clean white delicate coating of Indian families is legitimate. But it is high time that people open their eyes and realise the need for such properly structured laws that are in place for the protection of the community itself. The authors eventually propose a serious deliberation on the regulation of prenuptial agreements and how they can be regulated and incorporated within the Indian legal system instead of continuing to deal with such agreements in its current ambiguous state.

### Conclusion:

In sickness and in health, in poverty and in wealth, a prenuptial agreement entered into before marriage, goes a long way. Witnessing the rise in divorce cases, it can be said that there are a number of reasons for this rise, Independence and realization of the rights of women, westernization of society, younger generation of married couples living outside of their joint family among many, many others. If we take the example of Australia alone, 60% of the people are happy to sign

this piece of paper with ‘prenup’ written on the top before they commit their life to their significant other. Another statistic that furthers this cause is that 63% of divorce lawyers in the USA believe that there is an increase in prenups or premarital agreements since 2017.

This formal agreement duly entered into by the parties, enumerates primary clauses of issues such as distribution of property acquired jointly or severally during the subsistence of the marriage, custody of children, alimony, maintenance, etc. Several points can be understood throughout this analysis-

1. Prenuptial agreements are governed by the law of contracts and not personal laws.
2. Prenuptial agreements are seen as standing against public policy and as such, sometimes held void.
3. Some prenups are held as mere memorandums and not binding on the parties, nullifying its effect.
4. The Special Marriage Act provides for some acceptance of such agreements if certain conditions are satisfied.
5. This lack of legal and societal acceptance leads to ambiguity in the law of prenuptial agreements and lowers its impact in the protection of parties and their rights.
6. While the current law provides protection mainly for women, such agreements will ensure equal protection for all involved parties.
7. Determination of alimony and maintenance is always left to the courts, but prenups can help in such circumstances.

<sup>11</sup> Sirajmohammad Khan v. Jan Mohammad, AIR 1981 SC 1972



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8. Burden of post-breakdown of marriage problems is greatly reduced with a prenup in play.

Eventually, Prenups are like term insurance, one does not want to wish for any bad happenings but wants to protect himself and people around him in case things do go sour. In India the masses first need to remove the taboo attached to divorce itself (which is another topic for research in itself) along with prenups. In my opinion the courts and the legislation should in fact encourage prenuptial agreements in all personal laws for the protection of the parties.

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