



# Prenuptial Agreements in India:

An Idea Whose Time Has Come

By Nishant Kr. Srivastava

### Concept of Prenuptial Agreement

A prenuptial agreement, commonly referred to as “ante nuptial agreement”, “prenup”, or “premarital agreement,” is an agreement between parties desirous of marrying each other which contains the agreement arrived at between the parties, amicably and on their own free will, that alters or confirms the legal rights and obligations that would otherwise arise under the personal laws governing their marriage, had there been no such prenuptial agreement between such intending parties.

In simple words a prenuptial agreement is basically an agreement between the couple intending to marry, made before marriage that states in case of death or divorce, how the custody of children, monetary liability and division of assets of respective the spouse will take place.

Prenuptial agreements are relatively new in the Indian context, however due to the fact that in present times, the parties to a marriage are more aware about their rights and claims and that nowadays the husband is not the sole bread earner for the family, but also the wife is an equal partner in managing the financial affairs of the family, there has been a growing realisation that the existing personal laws do not take into consideration the present day aspirations and thought process of the young men & women and there is a need for giving recognition- both social and legal to the same. In fact, lately the women rights groups in India, more particularly Ministry of Women & Child Development has been trying since 2015 for making prenuptial agreements legally binding in the context of injustice being meted out to women who are deserted by their NRI grooms.

As on date such agreements are not legally binding in India unlike many western countries where such agreements are considered definitive and binding as far as issues agreed therein by the parties, however Indian courts have been taking into consideration such agreements to gather the intention of the parties while dealing with divorce cases where the parties have voluntarily entered into such a prenuptial agreement and the same is brought before the Court at the time of filing a divorce petition or during the pendency divorce proceedings between the parties.

### **Essentials of any Prenuptial Agreement**

Since the very reason for entering into a prenuptial agreement is that in an eventuality where the marriage is dead or there is irretrievable breakdown of marriage, for any reason whatsoever and when the parties themselves, their families and well-wishers are also unable to resolve the disputes and differences amicably, it is always better to have a roadmap to amicably, swiftly and



**A DISHONEST DISCLOSURE AND DECEPTIVE AND MANIPULATIVE CLAUSE INCLUDED IN SUCH AN AGREEMENT EVEN AT A TIME PRIOR TO SOLEMNIZATION OF THE MARRIAGE, MAY LAW DOWN THE FOUNDATION STONE OF FUTURE DISCORD AND LOSS OF TRUST, EVENTUALLY LEADING TO AN UNFORTUNATE DIVORCE, WHICH BOTH THE INTENDING COUPLE MUST BE CONSCIOUS OF.**

peacefully settle the all issues touching upon their married life and marriage, more specifically those in connection with the custody of children, separation of properties- both moveable and immoveable whether owned by one party or jointly owned by the parties, maintenance, alimony, liability of the debts- individual or joint-existing before the marriage or acquired or incurred during the subsistence of the marriage etc.

It is in this context that the couple intending to marry must sit and discuss such issues with fairness and disclose their financial assets and liabilities- both existing and future and must take into consideration issues like how to deal with, in the eventuality of an unfortunate irretrievable breakdown of marriage and resultant impasse, the matters in connection with the custody of children- exclusive or joint/ shared parenting, visitation rights, financial resource and time to be contributed by each parent towards the education, overall development and future of the children; separate properties i.e. properties separately owned by the boy and the girl at the time of marriage or acquired in personal name during the subsistence of marriage; shared properties i.e. properties jointly owned and the mechanism as to how to split the same; gifts which the couple receive before, at and during the time of subsistence of their marriage; operation, closing and other issues related with joint accounts, lockers etc. of the couple; maintenance entitlement of the wife or may be the husband; permanent alimony- a fixed amount or a formula to arrive at any fixed amount at the time of divorce; insurance (life) beneficiary of particularly life insurance claims

when the other spouse is not a nominee or when a party wishes to have such benefits to go to anyone outside the marriage; distribution of the savings- whether to include or to exclude the personal savings from distribution; debt service- debts raised by the couple during the subsistence of marriage (joint debt) or raised by either of the couple before the marriage; clauses as to protection of privacy, publication/ bar on publication of digital data, destruction or handing over of all the videos and photographs of the couple and children etc. taken before and during the subsistence of marriage; clause as to no future direct or indirect contact or interference in social life and on social media; distribution or non-distribution of the earning of the parties during the subsistence of the marriage etc. There also should be a severability clause which may provide that even if a certain provision is held to be null and void by a competent court of law, the other provisions would still hold binding and the entire agreement shall not be rendered invalid. Ideally there should be a list of assets and liabilities of the parties, which the parties must voluntarily and following the principles of *uberimma fides* (utmost good faith) must disclose

and draw and attach to any such prenuptial agreement which shall be read as a part and parcel of such an agreement. A dishonest disclosure and deceptive and manipulative clause included in such an agreement even at a time prior to solemnization of the marriage, may lay down the foundation stone of future discord and loss of trust, eventually leading to an unfortunate divorce, which both the intending couple must be conscious of.

Parties must also keep in mind not to include any clause in any prenuptial agreement which either directly or indirectly provides for the couple to not having child/ children out of the wedlock; or which tends to encourage

**ALL AGREEMENTS ARE CONTRACTS IF THEY ARE MADE BY THE FREE CONSENT OF PARTIES COMPETENT TO CONTRACT, FOR A LAWFUL CONSIDERATION AND WITH A LAWFUL OBJECT, AND ARE NOT EXPRESSLY DECLARED TO BE VOID.**

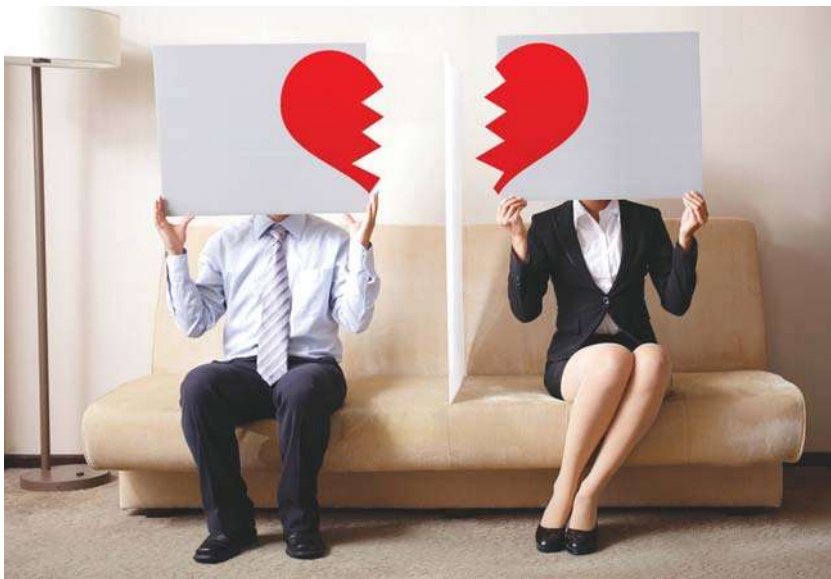
dissolution of marriage; or which specifies a particular religious upbringing of the child/ren born out of such wedlock where the couple is an inter faith couple; or otherwise limits the grounds available in law for seeking divorce which otherwise is available to the spouse under the personal laws governing the marriage of the couple.

The bottom line is that any prenuptial agreement must be fair to both the parties and must not contain such term/s which may be agitated by any of the parties to the same, at a later point of time, as unconscionable one (one that is so one-sided that it is unfair to one party and therefore, unenforceable under law). In case any of the parties agitate, during the pendency of the divorce proceedings that so and so provisions of their prenuptial agreement are unconscionable, the Court will have to intervene and look into such an agreement/such provisions and to modify/ strike down the same to make it fair and reasonable.

### **Prenuptial Agreements in India: Legal Sanctity & Enforceability**

Indian laws touching upon the issues like marriage, divorce, maintenance, custody of children, succession, inheritance etc. are primarily governed by the personal laws which in turn are governed by the religion professed by the parties concerned as each religious denomination has its own codified laws or un-codified customs & practices governing such issues.

Since in India a marriage is considered a sacred ceremony and never a contract, prenuptial agreements are generally out of the purview of personal laws in India. The only legal semblance a prenuptial agreement may claim could be recognition under the section 10 of Indian Contract Act, 1872 which lays down a condition that all agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with



a lawful object, and are not expressly declared to be void. Therefore, the sine qua non of any prenuptial agreement is that it must have been entered into with the mutual and free consent of both the intending parties i.e. to say no party (boy or the girl) is under any kind of force, coercion, undue influence, or is under any kind of misrepresentation and there is a lawful consideration and a lawful object (resolution of future disputes amicably could be considered a lawful consideration & lawful object of such an agreement).

Barring the provisions contained in section 40 of the Divorce Act, 1869 (that govern Christians), The Goa Civil Code, 1867 which allow and recognise prenuptial agreements under family law for property distributions, prenuptial agreements largely are viewed as not in conformity with the public policy of the land and therefore hit by the provisions of section 23 (What consideration and objects are lawful, and what not) and also section 26 (Agreement in restraint of marriage, void) of the India Contract Act, 1872 and thus, not specifically enforceable in a Court of law. The overwhelming legal position, which can be safely concluded from the various ruling of the Constitutional Courts of the country with respect to the prenuptial agreements is that the prenuptial agreements are only a kind of understanding of the parties and not at all absolutely binding upon the parties and in any case the terms contained in such a prenuptial agreement have to be in conformity with the laws governing the validity and enforceability of contracts and waivers in the country i.e. The Indian Contract Act, 1872 additionally such terms must not be in contravention of or in conflict with public policy of the land and must not curtail any of the rights and liabilities devolving upon any of the parties to such an agreement by the automatic application of personal laws as applicable to that party.

## Conclusion

A general perception about such prenuptial agreements, in the present Indian context where the marriage is considered a sacrament and divorce a stigma, is negative and the same is considered a sacrosanct issue and looked down upon accordingly. But, in the changing scenario the young generation, which is more empowered and aware and sorted out and wants certainty and predictability in life, is more open and agreeable to such prenuptial agreements since it encourages the couple intending to marry to discuss those issues which have the potential to become the most important issues and the most potent causes of dispute, in the

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unfortunate event when their relationship and their marriage is dead.

The benefit of having a prenuptial agreement is that neither of the parties, the husband or a wife, can contest a demand for dissolution of marriage during the divorce proceedings by raising claims and rights over the children, assets- personal or joint of the other spouse etc. which is contrary to the terms as agreed between them in the prenuptial agreement and it may also bar the other party from raising an unreasonable issue or a claim for the first time (which was never dealt with in the prenuptial agreement between the same parties) that too during a divorce proceedings and which suddenly comes as a bolt from the blue for the other party, and which the

practical experience proves is the single most important cause of bitter fight and resultant inordinate and astronomical delays in disposal of the divorce proceedings by the courts of law in India.

The society must shun its overarching and disparaging attitude towards prenuptial agreements, particularly when all the civilisations since time immemorial have accepted a similar wish of a person which we call a 'Will', which is similarly a planning during the life time and sets forth the testator's (the person making his Will) wishes regarding the distribution of his/her property and care of the minor children once he/she is no more and tends to give peace of mind to the testator about an eventuality which will arise in future. In any case, a prenuptial agreement gets life only when the couple decide to get divorced during their lifetime; otherwise it is just a dead letter. In today's India, when we are talking about empowering the womenfolk, creating awareness about prenuptial agreements and encouraging frank discussion and giving an equal say to the women (which in our present social set up is never given to women, until and unless she is faced with the prospect of unwanted divorce thrust upon her by her husband and at a time which is very late to fairly and objectively decide such life altering issues) in the drafting of such prenuptial agreement, is definitely going to be a progressive and forward looking shift. One may safely argue that in today's times there are no grounds- legal or moral- to discourage and not to give legal sanctity and recognition to prenuptial agreements entered into by and between the consenting couple intending to marry, by the society in general and the lawmakers and our courts in particular.

Nishant is the Founder & the Managing Partner of Actus Legal Associates and can be contacted at [nishant@actuslegal.in](mailto:nishant@actuslegal.in)

