



MAJESTY LEGAL

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Author – Ganesh Suthar, Associate Advocate

PRENUP AND MATRIMONIAL LAWS – DEVELOPING STAGE IN INDIA

INTRODUCTION:

A Prenuptial agreement (prenup) is a type of contract entered into by the couple prior to the marriage¹. The allocation of assets, liabilities, and issues relating to child custody in the event of marriage annulment are typically described in a signed, registered, and notarized document. Such a contract also lays out in detail the costs incurred at the marriage and includes a list of the objects or presents that guests brought to the wedding as well as those that the groom gave the wife (and vice versa).

The prenuptial agreement's numerous clauses address matters such as how to divide any property or assets acquired during the course of the marriage, who would have custody of any children, and how to divide obligations relating to the property.

In Hinduism, the religion views marriage as a sacred union that can only be broken under certain conditions and these generally includes when one partner is either adulterous, cruel, leaves the marriage, or develops an incurable mental disorder. Before a court is willing to grant a divorce decree, either of these grounds must be established. The prenuptial agreement can be serves as a persuasive tool for the judge to use in deciding the case².

Goa is the only Indian state which recognized the concept of prenup as it follows the PCC³. If proper registration of all the documents of declaration is followed to solemnized a marriage under Special Marriage Act, 1954 then prenups are considered as legally binding.

¹According to the law, marriage is a contract between man and a woman to support each other and Article 21 of the Indian Constitution and Article 16(2) of the 1948 Universal Declaration of Human Rights both recognize the right to marry.

² Sunita Devendra Deshpabhu v. Sita Devendra Deshpabhu AIR 2016

³ Portuguese Civil Code, 1867



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PRENUP AGREEMENT AROUND THE WORLD

In **Australia**, the prenuptial agreement is considered as the binding financial agreements and it became enforceable in 2000 through an amendment in the Family law. Part VIIIA of the Act stated forth specific provision which deal with prenup agreements.

In **Belgium**, a marriage contract is explicitly approved by regulation as a proper deed in which a future a couple set out any terms of their marriage as they see fit, however inside the bounds of the legitimate principles. They may not stray from the principles overseeing public request and basic courtesy.

In **Canada**, the courts in Ontario and other local law provinces of Canada considered such agreement as against the public policy but after the Family Law Reform Act 1978, now it is enforceable and special provision also added to support such agreement, however court may set aside a prenup agreement if the party failed to under the terms & condition and consequences of the agreement.

In **China**, provision of prenup agreement is given under Article 19 of the 2001 Marriage law, such agreement must be in writing and in the absence of such agreement or a vague agreement the Articles 17 & 18 shall apply. In the year 2003 the Supreme Court of China held that the property in prenup agreement includes the housing allowance, party's invested income, insurance or income from intellectual property rights.

The provision for prenuptial agreement is also enforceable in the countries like Germany, Denmark, Hong Kong, Russia, Indonesia, Portugal, Israel, Italy, Korea, Taiwan, New Zealand etc. but in Countries like India, Japan, Philippines, is unenforceable agreement.



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LEGAL STATUS OF PRENUPTIAL AGREEMENTS IN INDIA

The concept of prenups is gaining popularity in India although the legal standing of such agreements is still not clear.

WITH RESPECT TO INDIAN CONTRACT ACT, 1872 –

Courts have refused to give these agreements legal force because of certain terms that violate public policy under Section 23⁴ of The Indian Contracts Act, 1872, despite the fact that they meet the requirements of Section 10⁵ of The Indian Contracts Act, 1872, which states 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 hereby expressly declared to be void.

*Bai Fatma v. Ali Mahomed Aiyad*⁶, in this case the question at hand was whether or not a Muslim husband and wife's agreement regarding the payment of specific maintenance in the event of a subsequent separation was legal. The court noted that because it was against public policy, a contract encouraging future divorce between spouses must be declared null and void.

WITH RESPECT TO DIVORCE ACT, 1869

Pre-marital agreements are only specifically mentioned in Section 40 of the Divorce Act 1869, This provision states that the District court will look into the existence of pre-marital or post-marriage agreements before deciding about the dissolution of the marriage.

WITH RESPECT TO SPECIAL MARRIAGES ACT, 1954

A prenuptial agreement is considered legally binding if it is submitted to the registrar along with the necessary documents if the marriage is solemnized under the Special Marriages Act of 1954

⁴ What considerations and objects are lawful, and what not.

⁵ What agreement are contract.

⁶ AIR 1912



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PRE-REQUISITES FOR A PRENUPTIAL AGREEMENT:

The prenuptial agreement should have following conditions-

1. It should be honest, fair, reasonable and duly acknowledged.
2. It should be certified by attorneys of both the parties
3. The list of Assets and liabilities of both the spouses must be attached.
4. It should be contained details of the agreed issues like Maintenance/Alimony division of Assets and Liability in Case of Dissolution of Marriage.

CLAUSES WHICH A PRENUPTIAL AGREEMENT SHOULD CONTAIN:

The following are the essential clauses that must be stated by both the parties –

- Financial investments or monetary state
- Ownership of property
- Estate planning
- Disclosure of assets and liabilities
- Alimony, maintenance or spousal support and child custody
- Retirement benefits and accounts
- Division of property
- Gifts in the form of jewellery, engagement ring, precious bands, art etc.
- Credit card limits, debts, spending, payments, life insurance & medical insurance, claims.

It is preferable to examine the emotional capability of a prenup, which is frequently viewed as a sign of mistrust or lack of commitment among couples even before marriage, while the debate regarding its legal validity continues. Prenuptial agreements aren't going to change society overnight, but they are becoming more and more popular in India, especially in the big cities. However, pre-nuptial agreements are neither legal nor valid in India. This is because Indian laws don't look like anything considering marriage as a contract. The husband and wife share a religious bond with one another. In India, no one anticipates a divorce when two people get married. Because of this, no one even gives a prenuptial agreement much thought. An agreement that goes against or in opposition to public policy is not acceptable. This merely indicates that a prenuptial agreement continues to be viewed as a threat to the marriage or even the couple anticipating a breakup.



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CONCLUSION

The concept of prenups may be difficult for some couples to approach. Many people mistakenly believe that discussing prenuptial agreements will make marriage pointless. However, it is probably going to boost trust in the other spouse's motives. Prenuptial agreements can prevent people from getting into marriages where one partner is looking to secure their financial future by marrying the other.

It would be one of the most economical solution instead of approaching court which charged high price, and legal cost for the divorce, adoption or maintenance, and party have the freedom to mutually decide the terms and condition which would suit them. It maintains a test on misrepresentation made through either spouse and decreases opportunities of fraud and consequently spouses can escape from such sour experience.

However, public opinion stands as a huge challenge as in India wondering that marriage will not survive before stepping into it, for this reason considered to be against the public policy. As of now prenuptials do not have any validity in India.

TEAM MAJESTY LEGAL⁷

OFFICE : B-87, Alaknanda Apartment, G-1, Ganesh Marg/Moti Marg, Bapu Nagar, Jaipur, Rajasthan-302015. ([Google Map Link](#))

CHAMBER : 204, E-Block, Rajasthan High Court, Jaipur.

MOB : 9785461395

E-MAIL : mahi@majestylegal.in
majestylegal9@gmail.com

WEBSITE : www.majestylegal.in

⁷ Majesty legal is law firm, established in 2013 by Ms. Mahi Yadav and aim of the present article is to provide insights on law and statutes. The opinion presented in the article are personal in nature and not to be deemed as legal advice.