

## **LEGAL VALIDITY OF PRENUPTIAL AGREEMENTS IN INDIA**

### **ABSTRACT:**

This article endeavours to understand the legal validity of Prenuptial Agreements in the context of Indian Contract Act, 1872. First of all, the article introduces the term Prenuptial Agreements and covers the essentials for its drafting and formation. Sufficient stress has been laid upon the significance and the need of Prenuptial Agreements in the 21<sup>st</sup> Century. The terms which may be included in a Prenuptial Agreements have also been covered. It explores the current global scenario of Prenuptial Agreements around the world and draws a comparison with the current legal scenario of India. Further, the hurdles to the validity of Prenuptial Agreements have been investigated, with respect to Public Policy and Restraint to Marriage. The concept of Public Policy has been discussed in depth as the practices of different religions have been observed. Validity of the Prenuptial Agreements with respect to the clause of separation given in them has also been elaborated. Sufficient cases have been relied upon to highlight the precedents set by the courts. Further, some of the important cases have been referred to enhance our understanding about the present status of Prenuptial Agreements in India. Lastly, a conclusion has been drawn and suggestions have been made to rationalise and direct the steps that could be taken ahead.

## INTRODUCTION:

A Prenuptial Agreement, also known as Antenuptial Agreement or Premarital Agreement, is an agreement entered by people intending to marry, before their marriage.<sup>1</sup> It is a signed, registered, and notarized document<sup>2</sup> outlining the state of finances and personal liabilities of parties<sup>3</sup> in the unfortunate event of divorce, separation, or death.<sup>4</sup> They help to preserve the nature of property if the marriage ends.

In addition to the traditional role which is known to the general public i.e., the division of physical assets and setting terms for any required spousal maintenance at divorce, Prenups can also cover death, incapacity, estate planning, student loans, and a variety of other such legal issues including the division and appropriation of wealth earned during the marriage.<sup>5</sup>

Prenuptial agreements are increasingly becoming popular among the younger people because they keep looking for better choices to protect and safeguard themselves in the event of the end of their marriage bonds.<sup>6</sup> As one starts to get more aware, financially secure, educated, and secure amidst the rising social standards, one's conception of divorce and Prenup Agreements also changes considerably.<sup>7</sup> It has been often shown in movies and television that rich people enter into Prenup Agreements (The Massey Prenup from Intolerable Cruelty inevitably crosses our minds), but in an actual sense, any couple belonging to any economic background may enter into a prenup agreement.

Rising rates of divorce, changing attitudes of people towards marriage, and an increase in the independence of women can be understood as the factors responsible for the popularity of the

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<sup>1</sup> Paras Ahuja & Nishta Ojha, Analysing the validity of pre- nuptial agreements in India, IJLPP (22<sup>nd</sup> December, 2020, 13:05 PM) <https://ijlpp.com/analysing-the-validity-of-prenuptial-agreements-in-india/>.

<sup>2</sup> Law Rato, THE BETTER INDIA (22<sup>nd</sup> December, 2020, 13:54 PM) <https://www.thebetterindia.com/131143/prenup-agreement-marriage-divorce/>.

<sup>3</sup> Girija Gadre, Arti Bhargava & Labdhi Mehta, Are Prenuptial Agreements valid and enforceable in India, THE ECONOMIC TIMES (22<sup>nd</sup> December, 2020, 13:28 PM) [https://economictimes.indiatimes.com/analysis/are-prenuptial-agreements-valid-and-enforceable-in-india/articleshow/44782040.cms?utm\\_source=contentofinterest&utm\\_medium=text&utm\\_campaign=cppst](https://economictimes.indiatimes.com/analysis/are-prenuptial-agreements-valid-and-enforceable-in-india/articleshow/44782040.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst)

<sup>4</sup> Definition of a Prenuptial Agreement, LEGALZOOM (22<sup>nd</sup> December, 2020, 13:07 PM) <https://www.legalzoom.com/knowledge/prenuptial-agreement/topic/prenuptial-definition>.

<sup>5</sup> Z. Devji, What is Prenup?, NBC NEWS (22<sup>nd</sup> December, 2020, 13:12 PM) <https://www.nbcnews.com/better/lifestyle/prenuptial-agreements-what-prenup-should-i-get-one-ncna993616>.

<sup>6</sup> Amrita Ghosh & Pratyusha Kar, Prenuptial Agreements in India: a review of Law and Society, 12 NUJS L. Rev. 2 (2019), NUJS Law Review, 1.

<sup>7</sup> Prenup Agreements: Legal Angle, LEXLIFE INDIA (22<sup>nd</sup> December, 2020, 17:49 PM) <https://lexlife.in/2020/05/14/prenuptial-agreement-legal-angle/>.

Prenuptial Agreement in modern times.<sup>8</sup> Couples who wish to escape the common law applicable in their countries can do so by moulding prenup agreements that are suitable to their own needs and desires.<sup>9</sup>

Prenup Agreements do not have any specific legal format or structure.<sup>10</sup> A well-drafted prenup is a multi-tiered document.<sup>11</sup> It is decided by the two parties with the help of their advocates. But some of the major clauses which may be included are<sup>12</sup>:

1. Division of Joint Property or Assets of the Couple
2. Disclosure of assets and liabilities
3. Real Estate and Shared properties
4. Separate Properties
5. Alimony or Maintenance
6. Child Custody and Maintenance
7. Life Insurance, Medical Insurance, and Claims
8. Management of bank accounts or joint accounts
9. Management of Household expenses, bills, etc.
10. Gifts in the form of jewellery, engagement ring, precious wedding bands, arts, etc.
11. Clauses related to spousal rights and duties.<sup>13</sup>
12. Lifestyle Clauses<sup>14</sup>

There have been some recent additions to the clauses like the sunset clause which lays down the expiry of the prenup (conditional or time-based) or the infidelity clause which lays down additional sets of conditions or additional liabilities upon the spouse found “cheating” on the other.<sup>15</sup> A mutually drafted agreement with the free consent of the parties also helps the court while deciding the rights and liabilities of individuals at the time of divorce proceedings.<sup>16</sup>

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<sup>8</sup> *Why are prenuptial agreements becoming so popular?* WINSTON SOLICITORS LLP, September 17, 2015, (22<sup>nd</sup> December, 2020, 13:22 PM) <https://www.winstonsolicitors.co.uk/blog/why-are-prenuptial-agreements-becoming-so-popular.html>

<sup>9</sup> American Bar Association, *Premarital Agreements*, 20 *YOURLAW* 1, 3 (2007).

<sup>10</sup> *Supra* note 7.

<sup>11</sup> Divyanashi Chandra, *Band, Baajaa, ‘bargain’: Legal Status of Pre-nuptial Agreements in India*, *MANUPATRA*, 1 (23<sup>rd</sup> December, 2020, 00:53 AM) <http://www.manupatrafast.com/articles/PopOpenArticle.aspx?ID=e42868ef-4b1d-43cb-ade4-720680f59c6e&txtsearch=Subject:%20Family%20Law>

<sup>12</sup> Vijaya Das, *Are Prenuptial Agreements valid in India?*, *NEWS 18* (22<sup>nd</sup> December, 2020) <https://www.news18.com/news/india/is-a-pre-nuptial-agreement-valid-in-india-1474033.html>.

<sup>13</sup> *Supra* note 6.

<sup>14</sup> *Supra* note 6 at 57.

<sup>15</sup> *supra* note 11 at 1.

<sup>16</sup> *Supra* note 7.

## THE GLOBAL SCENARIO OF PRENUP AGREEMENTS:

Even though Prenuptial Agreements have several visible benefits, (like an assurance of transparency in divorce proceedings and reference for demarcation of rights and liabilities owed by the spouses to each other) they have still not received uniform feedback from the different nations.<sup>17</sup> These variations can be observed with a brief discussion about the legal validity of Prenup Agreements across some of the nations:

1. **United States of America:** Prenup Agreements are legally enforceable in all fifty states but the procedural requirements vary from state to state.<sup>18</sup> A Uniform Premarital Agreement Act (UPAA) was drafted in 1983 and it has been adopted by 28 states so far.<sup>19</sup> However, few common practices are followed throughout all the states. These include full and fair disclosure of assets on the part of both the parties and the agreement must be accomplished voluntarily, should not be unconscionable, should have been arrived with access to independent legal consultation, and should not be against public policy<sup>20</sup> But the interpretation of the public policy is very liberal. And critics have come up with many loopholes in the same i.e., issues in dealing with the inequality caused due to difference in bargaining power and the inability of people to have access to independent legal access and, consideration of duress and coercion which may result in the signing of agreements.
2. **United Kingdom:** Prenup Agreements were not traditionally accepted in the UK as binding legal contracts<sup>21</sup> and the court had the power to decide about the consequences in the event of the breakdown of a marriage under the Matrimonial Causes Act, 1935<sup>22</sup>. These agreements were thought to be against the public policy as the institution of marriage is based upon an agreement of staying together and a separation agreement taints the same.<sup>23</sup> Gradually, the validity of prenup agreements was accepted by the UK, though with a few reservations as seen in *Hyman v. Hyman*.<sup>24</sup> However, in 2010, the

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<sup>17</sup> *Prenuptial Agreements: Yours, Mine and Ours*, PRIDE LEGAL, (22<sup>nd</sup> December, 20, 19:37 PM) <https://pridelegal.com/prenuptial-agreements/>.

<sup>18</sup> Amberlynn Curry, *The Uniform Premarital Agreement Act and its Variations throughout the States*, 23 JOURNAL OF THE AMERICAN ACADEMY OF MATRIMONIAL LAWYERS 355, 356 (2010).

<sup>19</sup> Why States Should Adopt the Uniform Premarital and Marital Agreements Act, Uniform Law Commission, National Conference of Commissioners on Uniform State Laws, 2012.

<sup>20</sup> Uniform Premarital and Marital Agreements Act, 2013, §9 (United States of America).

<sup>21</sup> Law Commission (United Kingdom), *Matrimonial Property Agreements*, Consultation Paper No. 198, Part 4 (2011).

<sup>22</sup> Matrimonial Causes Act, 1973, §§21-25 (United Kingdom).

<sup>23</sup> *Cocksedge v. Cocksedge*, (1844) 60 ER 351.

<sup>24</sup> *Hyman v. Hyman* (1929) AC 601.

status of Prenup Agreements underwent a significant change as three factors were laid down by the Supreme Court in *Radmacher v. Granatino*<sup>25</sup>:

- a. The parties should enter the agreement freely i.e., there should be free consent.
- b. The significance of the agreement should be clear and total financial disclosure must be ensured.
- c. There should be no unfair circumstances caused due to enforcing the agreements. (This shall be determined by the prevailing conditions- need, compensation, and sharing at the time of separation.)

Therefore, the prenup agreements in the UK are not per se, always enforceable. It depends on the court's interpretation of "fairness" and that the terms of the agreement should not be contrary to it.<sup>26</sup>

3. **Canada:** Prenup Agreements are recognized as marriage contracts under Section 52 of the Family Law Act, 1990.<sup>27</sup> They dictate the rights and liabilities of both the spouses in case of separation, annulment, or death. They may or may not deal with the custody of children. Though as a general rule, the community property law of equitable distribution of assets applies to all Canadian Provinces. The Canadian Courts take prenup agreements as a factor while deciding upon the consequences of the breakdown of a marriage.<sup>28</sup> There are various grounds like fraud, coercion available for setting aside such agreements.
4. **Australia:** Binding Financial Agreements exist that gained popularity with the enactment of the Family Law Amendment Act, 2000.<sup>29</sup>
5. **New Zealand:** The Prenup Agreements are legally enforceable after the enactment of the Matrimonial Property Act, 1976.<sup>30</sup>
6. **Austria, France, Netherlands, Portugal** are a party to the Hague Convention on Laws applicable to Matrimonial Property Regimes which specifically authorizes prenups.<sup>31</sup>

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<sup>25</sup> *Radmacher v. Granatino*, (2010) UKSC 42.

<sup>26</sup> Law Commission (United Kingdom), *Matrimonial Property, needs and agreements: the future of financial orders on divorce and dissolution*, Executive Summary, (22<sup>nd</sup> December, 23:14 PM) [http://www.lawcom.gov.uk/app/uploads/2015/03/lc343\\_matrimonial\\_property\\_summary.pdf](http://www.lawcom.gov.uk/app/uploads/2015/03/lc343_matrimonial_property_summary.pdf).

<sup>27</sup> Prenup Agreements: Legal Angle, LEX INDIA (22<sup>nd</sup> December, 2020, 23:21 PM), <https://lexlife.in/2020/05/14/prenuptial-agreement-legal-angle/>.

<sup>28</sup> Divorce Act, R.S.C. 1985, 15.2(4) (Canada).

<sup>29</sup> *supra* note 23.

<sup>30</sup> *supra* note 23.

<sup>31</sup> Hague Convention on Laws applicable to Matrimonial Property Regimes, 1978 (22<sup>nd</sup> Decemeber, 2020, 23:40) <https://assets.hcch.net/docs/3fccda38-481c-4bf1-b41b-b07fc5346654.pdf>.

7. **China:** Prenup Agreements are legally enforceable and have to be in writing.<sup>32</sup>

## **CURRENT LEGAL SCENARIO IN INDIA:**

Prenuptial Agreements though not specifically regulated by any legal provision, have been an important part of society and the legal system for a long. Since marriages bear the load of social norms, it is very difficult to weigh them in contractual terms. Secondly, due to the lack of the Uniform Civil Code, marital laws are decided by personal codes of each religion. And hence there are different approaches applicable to the issues dealing with alimony or custody of children. However, four different views exist in this arena<sup>33</sup>:

1. The first view states that Prenup Agreements should be treated as a contractual agreement and be governed under the contract laws and not matrimonial laws. The validity of these types of agreements should be scaled against Section 10 of the Indian Contract Act, 1872.<sup>34</sup>
2. The second view negates the first argument and claims that Prenup Agreements are “against public policy” and are, therefore, void under Section 23 of the Indian Contract Act, 1872.<sup>35</sup> Additionally, it can also be construed to be in restraint of marriage and therefore, void under Section 26 of the Indian Contracts Act.
3. The third view holds that prenups are Memorandum of Understanding (i.e., a document outlining the broad terms of an agreement reached by two parties and is not enforceable in a court of law<sup>36</sup>), between spouses and is, therefore, not legally binding.
4. This view says that Prenup Agreements are legally binding under the Special Marriage Act, 1954 if submitted along with necessary documents for declaration of marriage and then, duly registered with Registrar’s office.

In a general sense, Prenup Agreements are not legally enforceable in India and serve as guidelines that are considered by the court before delivering any judgement with regards to the breakdown of any marriage. A prenup can be understood to be the headstones or name tags

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<sup>32</sup> Marriage Law of the People's Republic of China, 2001, Art. 19 (China).

<sup>33</sup> *supra* note 11 at 3.

<sup>34</sup> Indian Contract Act, 1872, §10 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”

<sup>35</sup> Indian Contract Act, 1872, § 23 states that “The consideration or object of an agreement is lawful, unless ... the Court regards it as ... opposed to public policy.”

<sup>36</sup> Will Kenton, Memorandum of Understanding (MoU), INVESTOPEDIA (23<sup>rd</sup> December, 2020, 01:17 AM) <https://www.investopedia.com/terms/m/mou.asp#:~:text=A%20memorandum%20of%20understanding%20is,a%20binding%20contract%20is%20imminent.>

that are referred by the courts in the administration of justice if they feel that the directions provided by them are fair and reasonable.

## **UNDERSTANDING PRENUPTIAL AGREEMENTS UNDER INDIAN CONTRACT ACT:**

Section 10 of the Indian Contracts Act lays down the essentials for an agreement to be a contract and hence, be legally enforceable.<sup>37</sup> The essentials are:

1. Free consent of the parties
2. Competency of the parties
3. Lawful consideration and Lawful object
4. Agreements that are not expressly declared to be void.

Prenup Agreements can satisfy the first two essentials as free consent and competency of parties to contract can be proved if the consent of both the parties can be proved under Section 13 of Indian Contract Act and if it has been caused by coercion, undue influence, fraud mistake or misrepresentation. Further, the clauses must be free from ambiguity and fair to both spouses.<sup>38</sup> But for lawful consideration and object, Section 23 of the Indian Contract Act<sup>39</sup> mentions that agreements whose consideration or object is opposed to public policy have an unlawful consideration and object.

Further, Section 26 of the Indian Contract Act, mentions that “every agreement in restraint of the marriage of any person, other than a minor, is void.”

We shall examine these two essentials in detail.

### **1. Public Policy in the context of prenuptial agreements:**

Public Policy is very wide. It is very difficult to limit it to narrow interpretations. As held in *Richardson v. Melish*, “Public policy is a very unruly horse, and when you get astride, you never know where it will carry you.”<sup>40</sup>

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<sup>37</sup> Indian Contract Act, 1872, § 10 states that, “All agreements are contracts if they are made by the free consent of parties competent to contract for a lawful consideration, and are not hereby expressly declared to be void.”

<sup>38</sup> Kishan Dutt Kalaskar, Prenuptial Agreements, (08<sup>th</sup> January, 2021) [https://legatoapp.com/blog-in-detail.php?bp\\_id=259](https://legatoapp.com/blog-in-detail.php?bp_id=259).

<sup>39</sup> § 23, Indian Contracts Act, 1872.

<sup>40</sup> *Richardson v. Melish*, (1824) 2 Bing. 229 at 252, per Burrough J. Q.B.

Agreements against public policy have been held void under Section 23 of the Indian Contracts Act. Generally, agreements against public policy may include and are not limited to:

1. Agreements against public/ society at large.
2. Agreements against the sale of a government office.
3. Agreements dealing with trade with “enemy.” (declared by the government)
4. Agreement to commit an offense or to help conceal it.
5. Any agreement which interferes with the cause of justice.

Therefore, Prenup Agreements have been facing opposition as they are considered to be against the society at large i.e., the first category. The “separation” clauses or “no child clauses” which are a part of Prenup Agreements may be against Public Policy.<sup>41</sup> However, it is binding on us to mention that Prenup Agreements have been existing in India for a very long time. Even though there has been subsisting resistance towards prenup agreements, due to the religious and spiritual stance of people towards marriage, there are a few communities that have followed the practice of prenup for a very long time.

1. In Jewish, the Ketubah Marriage contract before the nuptials where the groom commits providing economic safeguards in writing to the wife can be considered as a form of prenup agreement.<sup>42</sup>
2. In Islam, marriage is regarded as a civil contract and the agreement to pay Mahr, which is the amount paid to the wife after divorce or death of the husband is also a well-known example of Prenuptial Agreements.<sup>43</sup>
3. Section 40 of the Divorce Act, 1969, which applies to the dissolution of Christian Marriages specifically provides for the provision of prenup agreements and advises the court to refer to the terms before passing a decree for separation of property.
4. However, the acceptance of Prenuptial Agreements on the part of Hindus has not been so seamless as they regard marriage as more of a religious bond and less of a contractual obligation i.e., Hindu Marriage is a sacrament and not a contract.<sup>44</sup>

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<sup>41</sup> Supra at 36.

<sup>42</sup> Justice (Retd.) S.A. Kader, *Dissolution of Muslim Marriage and Remarriage of the Divorced Couple*, (2004) 1 LW (JS) 41.

<sup>43</sup> Abdul Moin v. Mst. Rafia Bano, Court of Civil Judge, Tis Hazari Court, New Delhi, Suit No. 125/2012 (March 13, 2014).

<sup>44</sup> *Are prenuptial agreements valid and enforceable in India?*, THE ECONOMIC TIMES, October 13, 2014, (26<sup>th</sup> December, 2020) <https://economictimes.indiatimes.com/analysis/are-prenuptial-agreements-valid-and-enforceable-in-india/articleshow/44782040.cms?from=mdr>.

The Indian Courts have not laid down a specific and distinct definition of Public Policy and it keeps changing with the facts of the case.

## **2. Prenup Agreements as Restraint of Marriage:**

According to Mulla, an agreement is in restraint of marriage if it prevents a party from marrying any person or which is a deterrent in so far that it makes a person understand whether or not he may marry. The Indian Law is stricter in this context than the English Law as it does not allow general or partial restraint to marriage.

In *Cartwright v. Cartwright*, it was held that agreements providing for separation prospectively are void. As such an agreement shall induce the parties to not perform their marital duties and this is a concern of the entire society.<sup>45</sup>

But the 13<sup>th</sup> Law Commission Report recommended that clarity should be provided about partial restraints and they should be held void only if the court regards them as unreasonable.

## **EXISTING CASE LAWS REGARDING PRENUP:**

Some of the important cases regarding Prenup Agreements are listed below:

- 1. Tekait Mon Mohini Jemadai v. Basanta Kumar Singh:** In this case, a Prenup Agreement existed between the husband and the wife which provided that the husband cannot ask the wife to move away from her parental house. But the Hindu Marriage Law requires the wife to reside with her husband to wherever he may choose to reside and therefore, the court felt that this agreement was not valid as it had an unlawful object which made it void in the eyes of law.<sup>46</sup>
- 2. Krishna Aiyar v. Balammal:** The agreement was entered by the husband and wife after marriage and provided for their separation. The court held that such an agreement was invalid as Hindu Marriage Act does not allow husband and wife to enter into agreements of such nature and it was, therefore, against public policy.<sup>47</sup>
- 3. Commissioner of Income-Tax v. Smt. Shanti Meattle:** In this agreement, the wife and husband had an agreement to separate after their marriage and to live separately

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<sup>45</sup> *Cartwright v Cartwright* (1853) 3 De GM & G 982.

<sup>46</sup> *Tekait Mon Mohini Jemadai v. Basanta Kumar Singh* 1901) ILR 28 Cal 751.

<sup>47</sup> *Krishna Aiyar v. Balammal*, (1911) ILR 34 Mad 398.

without molesting each other or interfering with each other, or bringing a suit against each other. The court held that this agreement was invalid and hence, unenforceable.<sup>48</sup>

- 4. Sunita Devendra Deshprabhu v. Sita Devendra Deshprabhu:** In this case, a prenuptial agreement existed between Raghunath Deshprabhu and Sita Deshprabhu, it provided for a separation of assets. After the death of Raghunath Deshprabhu, his wife filed the suit but died after some time. The prenup agreement signed by them was relied upon by the court while distributing their assets as it proved that they had agreed to the regime of separation of assets. However, no claim was made as to the validity of the agreement.<sup>49</sup>

## **CONCLUSION & SUGGESTIONS:**

In India, prenup agreements are neither valid nor invalid. However, they are still considered taboo. The legal position of India has long overlooked British precedents to hold that Prenup Agreements are contrary to the public policy as they are contrary to the marital obligations. However, now the English Law has also moved from its conservative position.

India could benefit by adopting a liberal understanding of public policy as done by the United States. Further, legislation drawn on the lines of the U.S. will help the cause of Prenup Agreements in India greatly.

In 2018, the Government considered making Prenup Agreements legally enforceable. They gave the reasons that it will help maintain the system of marriage as due to the distribution of assets in advance, parties will be wary to dissolve their marriages. Further, the injustice being meted to Indian Women who marry NRIs was also given as a reason. A similar move was adopted in 2015 too but it was opposed thoroughly as some officials held that families cannot be broken down into mere contracts.<sup>50</sup>

It is also important to understand Public Policy in keeping with the theory of Social Engineering given by Roscoe Pound as it states that the interests of the individual are to be balanced with that of the society. And in the present case, it is difficult to do so. Even though Public Policy is vague and ambitious, interpreting it in a narrow sense is not helpful to this cause.

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<sup>48</sup>Commissioner of Income-Tax V/s Smt. Shanti Meattle, 1973 90 ITR 385 All.

<sup>49</sup> Sunita Devendra Deshprabhu v. Sita Devendra Deshprabhu, 2016 SCC Online Bom 9296.

<sup>50</sup> Raghav Ohri, "Prenup Agreements now on Government's radar," (08<sup>th</sup> January, 2021) <https://economictimes.indiatimes.com/news/politics-and-nation/prenuptial-agreement-now-on-governments-radar/articleshow/63088773.cms?from=mdr>.

As the Indian Society is evolving and so are the thoughts of individuals, the need and call for Prenup Agreements are also rising. As Benjamin N. Cardozo said, “The inn that shelters the traveller for the night is not the journey’s end. The law is like a traveller and must be ready for tomorrow.”

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