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## Legally bound

Pre-nuptial agreements have no legal sanctity in India yet a few rich and affluent insist on signing them

Indulekha Aravind & Priyanka Sharma | Bangalore/ New Delhi  
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When Facebook founder and billionaire Mark Zuckerberg surprised girlfriend Priscilla Chan, celebrity-watchers were agog to know whether the two had signed a prenuptial agreement, or pre-nup. A few days before the wedding, much-married fellow-billionaire Donald Trump had advised him to do so on CNBC, while a celebrity divorce lawyer was quoted as saying that if Zuckerberg hadn't, he should consult a psychiatrist. More recently, the Tom Cruise-Katie Holmes split sparked similar talk about what the terms of their prenuptial agreement would have been and what Holmes would walk away with (not much, as it turns out).

A prenuptial agreement, as it is understood in the West, defines how assets will be divided in the event of a divorce, and helps limit the claims spouses can make on each other. It could also lay down the terms of custody of children, or even, as is rumoured in the case of actors Catherine Zeta Jones and Michael Douglas, contain clauses on infidelity. With celebrity prenups abroad stoking so much interest, it is hardly surprising that ordinary people consider signing similar agreements.

After all, the desire to protect one's assets is natural, more so with divorce rates rising. "Our office receives 30-35 enquiries about prenuptial agreements in a year," says Shiv Kumar, senior advocate and founder-partner of Bangalore law firm Law & Options. "These are not idle enquiries, but queries from people who want to take the next step of drafting an agreement."

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Some typical prenup demands

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- Wife pays the rental of the house from her share of the income. She also bears other expenses: groceries, medical expenses, etc. and the purchase of everyday household items
- Wife and husband shall jointly buy a house for their joint use during the marriage. Both parties will pay EMIs, if any, in equal proportion towards the house
- In the event of divorce, both parties will be entitled to a refund of their respective shares along with division of appreciation in equal proportion from the proceeds of the sale of said house
- Wife will keep the jewellery received from her parents or husband
- Wife shall have the physical custody of the child from Monday to Friday; husband from Friday evening till Sunday afternoon every week
- Husband shall bear the educational expenses of the child(ren) and higher education in the event of divorce



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But that next step mostly does not happen because of one crucial factor — prenuptial agreements have no legal sanctity in India. This is because of the differences in the definition of marriage itself — marriages in the US are regarded as contracts entered into by equal parties, whereas the law in India views them primarily as a sacrament, explains Sarasu Esther Thomas, a professor at National Law School, who has been teaching family law for 15 years. The idea of a prenuptial agreement, which accepts the possibility of a separation, would thus strike at the very heart of that definition. And one cannot do something by private contract when it is prohibited by law, she adds.

\* \* \*

Most clients, say lawyers, lose interest in a prenuptial agreement when they are told it will not be enforceable in a court of law. But there are a few who persist in having some kind of a contract drawn up. Typically, these are people who belong to the extremely affluent class, says Geeta Luthra, a senior lawyer based in Delhi. Wealthy clients entering into a second marriage also request her to draw up a prenup. "In such cases, a degree of cynicism and wariness enters relationships," where couples may not want to jeopardise their assets. These couples request their lawyer to draw up a prenup to provide for a smooth transition in case of a separation, especially if children are involved. The document may not provide for a clear division of assets, but may simply be a way to pre-determine the maintenance provisions and custody decisions.

However, such a prenup must have "reasonable" stipulations, cautions Luthra. For instance, if the agreement states that the children will stay with only one parent after the marriage, it will be struck down by the courts on the grounds that it contradicts public policy. "Also, if a Fortune 500 business magnate's marriage breaks down after six months, both parties can't walk away with 50 per cent of the estate. At the same time, a millionaire cannot draw up a prenup giving his wife only Rs 500," says Luthra.

But if these agreements do not hold good in court, why do people want them? "As a lawyer, I can suggest it as a guide for future relations and an amicable way of resolving issues," says Delhi-based Hasan Anzar. His firm receives 10-15 requests for prenups every four months. The agreements are typically divided into two parts: terms and conditions during the marriage as well terms and conditions in case of a divorce. "When tempers are running high between warring couples, it's difficult to agree on anything. In such cases, a prenup comes in handy, as one is equipped with a draft upon which the couple can rely."

Anzar recalls an instance a year ago, where he had helped a couple draw up a prenuptial agreement that involved much negotiation. When the marriage collapsed, the husband paid his wife the Rs 6 crore he had agreed to, according to the terms. But any such agreement, Anzar too emphasises, will be valid only to the extent that it does not go against the provisions of existing laws, such as the Hindu Marriage Act. The couples who had signed similar agreements did not wish to comment for this article.

\* \* \*

It is not just the very wealthy who would like to have some kind of a prenuptial agreement in place. The enquiries Shiv Kumar receives are mostly from the upper middle-class rather than the very wealthy because, he surmises, "the really rich would prefer to settle everything within the family". Ujwala Mandgi,

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a senior lawyer in Bangalore, says the in the software industry. “I try to con blindly ape the West,” says Mandgi. T working in the US and the bride is in stipulating that the couple would not for which household expenses.



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Delhi-based Luthra, who supports the inclusion of prenuptial agreements in Indian marriage laws, finds the lack of legal sanction strange. “In divorce proceedings, the couple might sign a memorandum of settlement which the court recognises without much fuss. So why not a law on prenups?” Such an agreement, she feels, would rule out the nagging fear about assets that plagues most affluent couples before they tie the knot. So far, there has been no instance where the courts have been asked to enforce such a contract, says NLS’s Thomas.

Nevertheless, couples thinking of a prenuptial agreement should consider that they might be signing a document that a court can dismiss as worthless piece of paper.

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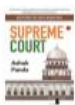
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