



# Transformative Marital Relations in India: A Need for Pre-Nuptial Agreement

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## Abstract

*In India, Pre-Nuptial Agreements are still a significantly underutilized and legally unclear instrument within matrimonial law. In contrast to numerous Western jurisdictions where Pre-Nuptial Agreements are recognized as enforceable legal contracts, Indian law does not officially acknowledge them within the existing framework of the Hindu Marriage Act, 1955, or other personal laws. This research provides a critical analysis of the legal standing of prenuptial agreements in India, investigating their enforceability through the perspectives of contract law, judicial precedents, and the necessity for Pre-Nuptial Agreements in India. The research highlights the socio-cultural transformations related to the perceived need for pre-nuptial agreements in a society where marriage is traditionally viewed as a sacrament rather than a contractual arrangement. Traditional marriage's structure is changing which brings new challenges such as same sex relationship, live-in relationship, rights of LGBTQ+ couples, increasing divorce cases, overburdened Court, Psychological Trauma and long battles faced by couple in divorce proceedings, Misuse of Dowry laws. The Solution for all these changing marital Relationship could be Pre-Nuptial Agreement. By examining the evolving nature of marriage in India, the study evaluates whether the establishment of a formal legal framework for pre-nuptials could contribute to the reduction of matrimonial conflicts, promote financial transparency, and safeguard individual rights. There is a pressing need to incorporate Pre-Nuptial Agreements into marriage, which would aid in reconciling legal enforceability with cultural sensitivities and also with the transformative marital relations in India, there is a need of Pre-Nuptial Agreement.*

**Keywords:** Pre-Nuptial Agreement, Enforceability, Transformative Marital Relationship, Solution.

## I. Introduction of the Study

The concept of divorce is not explicitly addressed in Hindu religious texts; however, certain circumstances may permit the abandonment of a spouse. The Hindu Marriage Act of 1955 formally introduced the legal recognition of divorce within Hindu marriages. In the context of divorce proceedings, spouses may choose to enter into a prenuptial agreement to protect the rights and interests of both parties and their children. A prenuptial agreement is a legally binding contract signed by prospective spouses prior to marriage, which typically outlines arrangements related to asset division, custodial considerations for children, and potential alimony obligations in the event of divorce. The growing incidence of divorce has led to an increased consideration of such agreements by many couples. Historically, similar arrangements have been documented in ancient India during the Treta Yuga and Dwapara Yuga, as well as within royal marriage treaties. Indian courts recognize Pre-Nuptial Agreements when they are considered valid contracts that do not violate public policy. Internationally, many

countries have legislation regulating Pre-Nuptial Agreements, and comparable arrangements, such as the Nikahnama under Muslim Personal Law, are acknowledged in India. Goa is currently the only Indian state that explicitly recognizes Pre-Nuptial Agreements as legally valid. Additionally, such agreements are permitted under the Indian Divorce Act, 1869, and the Special Marriage Act, 1954. While some Indian courts have upheld the enforceability of such agreements through judicial rulings, legal standards may differ across jurisdictions.

## II. Historical Background of Pre-Nuptial Agreement in India

Pre-nuptial agreements in Treta Yuga were a customary practice among the Kshatriya class in ancient times. The system known as kanya-sulka, meaning the "will of dowry," mandated that when a Kshatriya entered into marriage with a maiden, he needed to formally outline the properties and assets she would be entitled to as his spouse.<sup>1</sup> This practice was illustrated in the 'Valmiki Ramayana' which narrates the prenuptial agreements in Treta Yuga, where parents of the prospective couple would mutually agree on certain terms before the marriage took place.<sup>2</sup>

The story of Sita Swayamvara in Treta Yuga exemplifies a form of pre-marital agreement, in which King Janak of Videha established certain conditions for his daughter Sita's marriage. Similarly, during Dwapara Yuga, a pre-marital agreement was made between individuals identified as 'King of Mallaho' Kavatraj and Shantanu prior to Shantanu's marriage to Satyawati, daughter of Kevatraj. Devavrata, also known as Bhishma after taking a solemn vow, committed to renouncing his right to the throne to facilitate his father Shantanu's marriage to Satyawati. The Draupadi Swayamvara can be interpreted as an orchestrated pre-marital agreement conducted by King Drupada.

Throughout ancient and medieval India, strategic alliances played a vital role in the survival and growth of kingdoms. Practices such as arranging marriages between royal heirs (Santana Sandhi) or offering brides in marriage (Kanyopayana) were commonly employed to establish or strengthen political partnerships. Marriages of royal daughters to foreign kings or rival kingdoms often served as diplomatic tools to maintain peace and stability within and between realms. Royal women were frequently regarded as important political assets within these alliance-building efforts. These alliances were Pre-nuptial Agreement because alliances conditions were expressly or impliedly accepted by the ruler before the marriage. One of such incidences of marital alliance (Pre-Nuptial Agreement) is of Akbar who recognized the strategic significance of forming alliances with the Rajput Kingdoms to support his expansion efforts. He actively engaged in diplomatic relations with the Rajputs, including establishing marital alliances with their rulers. For instance, Akbar married his eldest daughter, Jodha Bai, to Raja Bharmal of Amber. These alliances helped to strengthen his relationships with the Rajput leaders and facilitated the integration of prominent figures such as Bhagwan Das and Man Singh into the Mughal administration. In subsequent years, Akbar continued to consolidate ties by marrying Rajput princesses from Bikaner and Jaisalmer, and his son Prince Salim married the daughter of Raja Bhagwandas. Jahangir, following a similar approach, adopted a policy of conciliation towards the Rajputs, which included marrying princesses from Jodhpur, Jaisalmer, and Bikaner. Additionally, Jahangir's mother was a Rajput princess, showing the importance of these alliances in maintaining diplomatic stability.<sup>3</sup>

## III. Pre-Nuptial Agreement in Different Personal Laws in India

Although prenuptial agreements are not explicitly recognized under Indian law, their enforceability depends on adherence to the provisions of the Indian Contract Act and applicable personal laws. Overall, prenuptial agreements have a varied historical background and hold significance in contemporary marital relationships,

<sup>1</sup> Bhagavatam-Katha available at <http://www.bhagavatam-Katha.com/Chapter1-dasharathas-desire-for-a-child/> (last visited on March 15,2024).

<sup>2</sup> Valmiki Ramayan, <http://www.valmikiramayan.net/utf8/baala/Sarga10/bala-10frame.htm> (last visited on 25 May,2024)

<sup>3</sup> Harish Chandra, "Mughal Rajput Relations (1526-1705): A Study",1 Ascent International Journal for Research Analysis 58.4 (2015).

particularly within different cultural and legal contexts such as India. In accordance with Muslim personal law, Mahr (dowry) may be agreed upon at the time of marriage and is payable to the wife in the event of the marriage's dissolution. Prenuptial agreements are common in Islamic marriages and are considered civil contracts. The terms of such agreements may include any conditions permitted under Islamic law, provided they are mutually agreed upon by both parties. For instance, the agreement may specify the payment of Mahr Mu'ajjal or Mu'akhhkar, which is disbursed to the wife upon separation or the husband's death.<sup>4</sup> A Nikah Nama, also referred to as the Nikah or Islamic marriage contract, is an important legal and religious document that delineates the terms and conditions of a Muslim marriage. It serves as a formal written record that officialises the union between two individuals within the context of an Islamic marital arrangement.<sup>5</sup> According to Islamic law, marriage is regarded as a civil contract, with the Nikahnama serving as a formal written record of this agreement. The legal recognition of prenuptial agreements in India remains uncertain. In the context of Muslim marriages in India, the Nikahnama functions as a prenuptial agreement and is considered a fundamental element of the marriage contract.

In Christian marriages in India, prenuptial agreements are recognized and considered relevant in decision-making processes related to the dissolution of marriage. Section 40 of the Divorce Act, 1869, which pertains to the dissolution of Christian marriages, explicitly grants district courts the authority to consider prenuptial agreements and incorporate their provisions into property settlement orders during divorce proceedings.<sup>6</sup> Section 40 of the Divorce Act, 1869, addresses the investigation of ante-nuptial or post-nuptial settlements. According to this provision, the District Court may examine the existence of any such agreements between the parties prior to issuing a decree for the dissolution or annulment of marriage. The court may then issue appropriate orders concerning the allocation of property derived from these settlements, for the benefit of the husband, wife, or children resulting from the marriage. The court will not issue orders under this Act that favour the parents at the expense of the children.<sup>7</sup>

Under the Special Marriage Act, 1954, which provides a framework for the marriage of individuals from different religious backgrounds or those choosing to forgo religious ceremonies, prenuptial agreements (commonly referred to as prenups) are neither widely recognized nor explicitly regulated. The Act primarily governs the registration of civil marriages and does not specifically address prenuptial arrangements. Although the Act does not directly cover prenuptial agreements, couples may still use such agreements to specify terms related to asset division and maintenance.

The legal recognition and enforcement of prenuptial agreements in Goa are governed by the provisions of the Portuguese Civil Code of 1867. This Code remains applicable in Goa as per Section 5(1) of the Goa, Daman, and Diu Administration Act, 1962<sup>8</sup>. Section 5(1) in The Goa, Daman and Diu (Administration) Act, 1962(1) state, "All laws in force immediately before the appointed day in Goa, Daman and Diu or any part thereof shall continue to be in force therein until amended or repealed by a competent Legislature or other competent authority." The Section 6<sup>9</sup> of the Daman, and Diu Administration Act, 1962, states that "The Central

<sup>4</sup> Amrita Ghosh & Pratyusha Kar, "Pre-Nuptial Agreements in India: An Analysis Of Law And Society" 12 NUJS L. Rev. 2,7 (2019).

<sup>5</sup> Shivendra Pandey, "All you need to know about Model Nikahnama", available at <https://blog.ipleaders.in/need-know-model-nikahnama/> (last visited on March 10, 2024).

<sup>6</sup> Amrita Ghosh & Pratyusha Kar, "Prenuptial Agreements in India: An Analysis of Law and Society", 12 NUJS Law Review 222 (2019).

<sup>7</sup> The Divorce Act, 1869.

<sup>8</sup> Manmeet Kaur, Gurtejpal Singh and Gaurangi Khanna, India: Pre-Nuptial Agreements: Validity In India, Mondaq (2023) available at <https://www.mondaq.com/india/family-law/1356564/pre-nuptial-agreements-validity-in-india> (last visited on March 23, 2024).

<sup>9</sup> Section 6, "Power to extend enactments to Goa, Daman, and Diu, The Central Government may, by notification in the Official Gazette, extend with such restrictions or modifications as it thinks fit to Goa, Daman and Diu any enactment which is in force in a State at the date of the notification".

Government may, by notification in the Official Gazette, extend with such restrictions or modifications as it considers appropriate, any enactment in force in a State at the date of the notification to Goa, Daman, and Diu.” In exercise of power conferred under Section 5(1) and Section 6 of ‘The Daman and Diu Administration Act, 1962’ Pre-Nuptial Agreements are valid in Goa under ‘The Portuguese Civil Code of 1867’.

In Jewish tradition, a ketubah, or marriage contract, is established to delineate the responsibilities and obligations of the engaged parties. In Jewish tradition, a ketubah, or marriage contract, is established to outline the rights and obligations of both parties involved in the marriage. The document may specify commitments such as providing sustenance and support, agreements regarding polygamy, and details about the dowry contributed by the bride. Signed by witnesses, the ketubah is traditionally recited aloud during the wedding ceremony.

#### IV. Enforceability of Pre-Nuptial Agreement

The enforceability of prenuptial agreements across different religious communities largely depends on judicial interpretation. In India, prenuptial agreements are not governed by any specific legislation; rather, they are regarded as contractual arrangements and are subject to the provisions of the Indian Contract Act, 1872. In certain cases, such agreements have been declared void if found to be contrary to public policy under Section 23 of the Indian Contract Act. Prenuptial agreements, commonly referred to as "prenups," are not explicitly regulated under Indian law and are relatively uncommon within the Indian context. Such agreements may differ from traditional Indian customs and perspectives regarding marriage. Their validity can be assessed under the Indian Contract Act, 1872, with key considerations including the potential for such agreements to be considered void if they contradict public policy. Indian courts have historically held that any agreements promoting separation or conflicting with personal laws are invalid. Since marriages in India are primarily governed by personal laws based on religious beliefs, for example, Hindu marriages are regarded as sacred, and any agreement that appears to foster separation may be deemed invalid. As contracts, prenuptial agreements must comply with the conditions outlined in the Indian Contract Act, 1872, including free consent, lawful purpose, and consideration. Jurisprudence regarding prenuptial agreements varies; in some cases, courts have invalidated such agreements on public policy grounds, whereas in others, they have been upheld provided they do not contravene personal laws.

Such agreements are relatively uncommon and may face legal challenges in Indian courts. Due to the absence of specific legislation governing prenuptial agreements in India, such agreements are typically regarded under the Indian Contract Act of 1872. However, courts declared these agreements as invalid if they are against public policy. *Tekait Mon Mohini Jemadai v. Basanta Kumar Singh*<sup>10</sup> is among the earliest Indian rulings concerning pre-marriage agreements. In this case, the wife sought to enforce a prenuptial agreement whereby the husband had consented not to remove her from her parental home. The court held that such an agreement was against public policy and unenforceable, as it conflicted with the matrimonial duties prescribed under Hindu law. In *Krishna Aiyar v. Balammal*<sup>11</sup> The court noted that agreements governing marital obligations, such as rights to conjugal cohabitation, are generally unenforceable, particularly if they violate Hindu law or moral standards. In *Bai Fatma v. Ali Mahomed Aiyab*<sup>12</sup> an agreement between a Muslim man and woman, whereby the husband would provide predetermined maintenance in case of future separation, was deemed invalid. The court held that such an agreement was against public policy as it anticipated separation and could encourage discord. Also, in the case of *Thirumal Naidu v. Rajammal Alias Rajalakshmi*<sup>13</sup> the court addressed agreements pertaining to future separation or living apart under Hindu marriages. It held that agreements for future separation are invalid,

<sup>10</sup> (1901) ILR 28 Cal 751.

<sup>11</sup> AIR 1935 Mad 321.

<sup>12</sup> ILR 1913 37 Bom 280.

<sup>13</sup> AIR 1968 Mad 201

reaffirming that Hindu marriage is sacramental with certain rights and obligations established by law that cannot be altered through personal agreements.

While prenuptial agreements are not extensively prevalent in Hindu marriages within India, there have been cases where such agreements have been recognized under specific conditions. It is important that these agreements adhere to principles of fairness and clarity, and do not conflict with public policy or established Hindu legal frameworks.<sup>14</sup> In *Pran Mohan Das v. Hari Mohan Das*<sup>15</sup> a father committed to providing his daughter with a house in exchange for her marriage. Following the marriage, the father transferred possession of a house through an unregistered gift, and the married couple took residence. Subsequently, the father sought to reclaim possession. The Calcutta High Court held that the pre-marriage agreement was valid, citing the principle of part performance of a contract. Since the father had already fulfilled his part by transferring possession, and the agreement was not related to marriage brokerage, it was not considered contrary to public policy. In the case of *Commissioner of Income Tax v. Mansukhrai More*<sup>16</sup> the agreement pertained to the transfer of property based on a pre-marriage understanding. The Calcutta High Court recognized the enforceability of the agreement, noting that the transfer was genuine and valid. In *Mohd. Khan v. Mst. Shahmali*<sup>17</sup> (Jammu & Kashmir High Court) the husband consented to reside as a son-in-law with his wife's parents, contingent upon his receiving compensation for wedding expenses if he did not fulfil this arrangement. The husband temporarily departed but returned thereafter, and the court subsequently upheld the validity of this agreement. The court noted that the agreement was legitimate, as it did not contravene applicable Muslim law or customary practices. In *Sunita Devendra Deshprabhu v. Sita Devendra Deshprabhu*<sup>18</sup> a prenuptial agreement concerning the division of assets was examined by a court in Goa. The court referred to the terms of the prenuptial agreement when determining the division of assets.

## V. Changing Dimensions in Hindu Marriage which Underscores the Need of Pre-Nuptial Agreement

In India, there are no specific laws governing Pre-Nuptial Agreements; however, such agreements are enforceable provided they do not violate the essential elements of a valid contract under Contract Law. Given the evolving nature of marital stability, matrimonial relationships, live-in arrangements, same-sex relationships, and other dynamics of marriage, there is an increasing need for legislation to address Pre-Nuptial Agreements effectively.

### A. Increased Divorce Rate and Overburdened Court

According to the 2011 census, there were approximately 1.5 million men who were divorced or separated and about 3.2 million women in India. Over the past two decades, the number of divorce and separation cases has more than doubled, with women representing a higher proportion than men. This upward trend has been consistent since 1991. Approximately 2% of marriages in India have resulted in divorce or separation within a 20-year period, reflecting a growing acceptance of divorce and evolving perspectives on marriage and family life. The rise in divorce rates since the 1970s indicates a notable shift in societal norms, particularly among younger populations, with divorce rates increasing sixfold between 1961 and 1991. In urban areas, the divorce rate increased from 7.4% to 11% between 1991 and 2001. This upward trend has corresponded with increased

<sup>14</sup> Supra Note 6.

<sup>15</sup> AIR 1925CAL 856.

<sup>16</sup> (1988)75 CTR (CAL) 101.

<sup>17</sup> AIR 1972 J&K 8.

<sup>18</sup> 2016 SCC Online Bom 9296.

demand for legal services related to divorce, as evidenced by the growth in the number of courts handling such cases in cities like New Delhi in 2007.<sup>19</sup>

To address the rising number of matrimonial cases, additional sessions judges of the Session Court in Delhi established five dedicated matrimonial courts in 2007. Many states, including Delhi, have also set up marriage bureaus to provide counselling services aimed at promoting reconciliation. According to a judge from one of the matrimonial courts in Delhi, the volume of cases has increased significantly over the years. Whereas cases were once limited in number, the courts now handle approximately 9,000 cases annually. Contributing factors such as dowry-related deaths, bride burning, and violence against women have influenced changing societal attitudes towards divorce. The presiding judge of a matrimonial court noted that divorce cases have seen a substantial rise; in the 1960s, only one to two cases were filed annually, which increased to 100-200 in the 1980s, around 1,000 in the 1990s, and approximately 9,000 cases per year currently. Legal expert Namita Roy identifies common grounds for divorce, including dowry harassment, incompatibility, and adultery, particularly among younger couples. Recently, educated, working couples often prefer separation agreements over prolonged litigation. The legal process for divorce, including mandatory reconciliation periods, varies across different religious communities, such as Hindu, Parsi, Sikh, Muslim, and Christian couples. Hindu couples seeking mutual consent divorce typically wait about a year for the process to complete. Muslim and Christian couples are governed by separate laws; Muslim men benefit from the practice of 'triple talaq,' while Christian men may cite adultery as grounds for divorce.<sup>20</sup>

The recent rise in matrimonial litigation has highlighted the limitations of the traditional adversarial dispute resolution process. Recognizing the importance of a specialized forum to handle sensitive personal matters, family courts were established under the Family Courts Act of 1984 to address this need effectively.<sup>21</sup>

The primary objective of these courts is to facilitate a more efficient and accessible litigation process by adopting a less formal approach. They seek to provide timely justice and promote prompt case resolutions, while also encouraging reconciliation and amicable settlements. However, as of December 2018, certain states and union territories had yet to establish family courts, despite the statutory requirement imposed on state governments. Additionally, the distribution of family courts across various states does not always correspond proportionally to their population sizes. According to data from the Department of Justice under the Ministry of Law and Justice, there were 535 operational family courts in India as of December 31, 2018.<sup>22</sup>

During a discussion in the Lok Sabha in July 2022 regarding the Family Courts (Amendment) Bill, 2022, presented for consideration by then Law Minister Kiren Rijiju, Members of Parliament highlighted the significant backlog of over 1.14 million cases in family courts across the country. They stressed the need to accelerate the resolution of these cases. Kaushalendra Kumar of the Janata Dal (United) pointed out the concerning increase in pending cases in family courts and advocated for prompt resolution. Similarly, Bhartruhari Mahtab of the Biju Janata Dal emphasized the importance of addressing the backlog, noting that there are 715 family courts across 26 states and Union territories, and urged the government to take decisive action to resolve these cases efficiently. Sunita Duggal of the Bharatiya Janata Party (BJP) proposed increasing the number of appointments in family courts to ensure cases are resolved in a timely manner and underscored the importance of streamlining the legal process in family court proceedings. The Family Courts Act of 1984 was enacted to establish family courts to facilitate conciliation and expedite the resolution of disputes related to

<sup>19</sup> Pinto Vincent & Laveena D'Mello, "Changing Trends of Divorce in India: Issues & Concerns", 3 International Journal of Management, Technology, and Social Sciences 153 (2018).

<sup>20</sup> Ibid.

<sup>21</sup> Soundara Pandian, "An Emerging Need for Strengthening Mediation in Resolution of Matrimonial Disputes", 47(2&3) Indian Bar Review 70 (2020).

<sup>22</sup> Id at 76.

marriage and family matters. As of 2022, there were 715 operational family courts across 26 states and Union territories. In Nagaland, two family courts were established in 2008, and in Himachal Pradesh, three family courts were set up in 2019 through notifications issued by the respective state governments. However, during proceedings in the Himachal Pradesh High Court in 2021, concerns were raised regarding the courts' lack of jurisdiction in the state.<sup>23</sup>

According to data from the Department of Justice within the Ministry of Law and Justice, as of December 12, 2018, there were 535 operational family courts across India. It is noteworthy that states including Haryana, Andhra Pradesh, Goa, Mizoram, and Meghalaya, as well as the Union Territories of Chandigarh, Daman, and Diu, did not have any family courts established up to that date. The current situation within family courts indicates notable challenges, characterized by a substantial increase in cases concerning divorce and judicial separation. This has contributed to heightened concerns and frustration regarding the efficiency and effectiveness of the family court system.

To address the rising divorce rates and the increasing burden on the court system, the implementation of Pre-Nuptial Agreements can be an effective solution. These agreements, entered into by couples prior to marriage, can streamline the divorce process by clearly outlining terms related to liabilities, maintenance arrangements, child custody, division of assets, alimony, and other relevant matters. As a result, this approach can facilitate easier dissolution of marriage for couples and help alleviate the caseload of the courts.

### ***B. Pre-Nuptial Agreement a Solution to Protect Rights of LGBTQ Couples***

The origins of LGBTQ discrimination in India can be traced back to the colonial period, during which British rule implemented Victorian-era laws and moral standards. In 1861, the British introduced Section 377 of the Indian Penal Code (IPC), which criminalized "unnatural offences," including consensual same-sex relations. This legislation remained in effect long after India gained independence in 1947 and contributed to the ongoing marginalization of the LGBTQ community.

During the 20th century, there was a growing movement for LGBTQ advocacy in India. Organizations such as the *Humsafar Trust* and the *Naz Foundation* were established in the 1980s and 1990s to raise awareness, provide support services, and advocate for LGBTQ rights. A significant milestone in this movement was the Naz Foundation's legal challenge to Section 377. In 2009, the Delhi High Court issued a landmark judgment that decriminalized consensual same-sex relationships among adults, recognizing that Section 377 violated the fundamental rights to equality, privacy, and dignity for LGBTQ individuals.<sup>24</sup> In 2013, the Supreme Court of India overturned the previous ruling in the case of *Suresh Kumar Koushal v. Naz Foundation*<sup>25</sup>, reaffirming the criminalization of consensual same-sex relationships. The court stated that amending or repealing Section 377 fell within the legislative authority.

The momentum for LGBTQ rights was reaffirmed with the landmark case of *Navtej Singh Johar v. Union of India*<sup>26</sup>, in this historic judgment delivered in September 2018, the Supreme Court invalidated certain provisions of Section 377, establishing that consensual same-sex relationships between adults are no longer subject to criminalization. This ruling underscored the significance of upholding individual autonomy, ensuring non-discrimination, and protecting fundamental rights for LGBTQ individuals. *The Bharatiya Nyaya Sanhita (BNS) 2023, which replaces the Indian Penal Code (IPC), does not contain Section 377 or any equivalent provision, in line with the Supreme Court's decriminalization of consensual same-sex relations in 2018.*<sup>27</sup>

<sup>23</sup> Kanu Sarada, "Explained: What is Family Courts Amendment Bill and why it concerns only two states", India Today, Jul 18, 2022.

<sup>24</sup> Government of NCT of New Delhi and others, WP(C) No. 7455/2001.

<sup>25</sup> Suresh Kumar Koushal V. Naz Foundation (2014) 1 SCC 1.

<sup>26</sup> AIR 2018 SC 4321.

<sup>27</sup> Khadija Khan, "Section 377 is gone, but some fear the proposed Bharatiya Nyaya Sanhita does not protect men against rape. This is why", The Indian Express, August 16, 2023.

The 2011 Census classified transgender individuals under the category of “Others,” providing data on employment, literacy, and caste. The census reported a total population of approximately 488,000 transgender individuals, including 55,000 children identified as transgender by their parents. Despite their integral role in society and recognition as the Third Gender by the Supreme Court in the case of *National Legal Services Authority v. Union of India*<sup>28</sup>, transgender individuals continue to face significant challenges in accessing fundamental civil rights such as marriage, adoption, and inheritance.<sup>29</sup> On October 17, 2023, the Supreme Court issued a unanimous decision stating that there is no fundamental right to marriage for same-sex couples.

Same sex relationships are legally recognised by the Courts in India but they have no right of getting the status of husband or wife, therefore the individuals in same-sex relationships, transgender partners, and members of the LGBTQ+ community to protect their rights in relationship if draft a written partnership agreement, similar to a prenuptial contract. This agreement would specify arrangements regarding shared expenses, property ownership, maintenance of bank accounts, and the disposition of assets in the event of relationship dissolution or the passing of a partner.

### ***C. Pre-Nuptial Agreement in Live-in -Relationship***

A live-in relationship can be defined as a living arrangement where an unmarried couple cohabits in a long-term partnership that resembles the commitments of marriage.<sup>30</sup> The concept of live-in relationships was acknowledged in the case of *Payal Sharma v. Nari Niketan*<sup>31</sup> by the Allahabad High Court, the Bench, comprising Justice M. Katju and Justice R.B. Misra, observed that "a man and a woman can choose to live together without formal marriage if they wish. While this arrangement may be regarded as immoral by certain segments of society, it is not unlawful. It is essential to distinguish between legal provisions and moral considerations."

Subsequently, in *S. Khushboo v. Kanniammal & Anr.*<sup>32</sup>, the Supreme Court affirmed that a live-in relationship between two adults, without formal marriage, does not constitute a criminal offense. Furthermore, the Court emphasized that there is no existing law prohibiting live-in relationships or premarital cohabitation. Article 21 of the Constitution of India guarantees the fundamental rights to life and personal liberty. In the notable case of *Lata Singh v. State of U.P.*<sup>33</sup>, the Court addressed issues related to honour-based violence, establishing that a major individual is free to marry or cohabit with whomever she chooses; such actions do not constitute an offence.

*The Protection of Women from Domestic Violence Act (PWDVA) 2005* was among the pioneering legislations to acknowledge live-in relationships by affording rights and protections to women who, although not legally married, cohabit with a male partner. *Section 2(f) of the Domestic Violence Act, 2005* defines “a domestic relationship” as a connection between two individuals who live or have lived together in a shared household, related by blood, marriage, or a relationship resembling marriage, as well as family members living together as part of a joint family. Although the Act does not explicitly define live-in relationships, it allows for judicial interpretation regarding the term "relationship in the nature of marriage." Currently, provisions under the

<sup>28</sup> (2014) 5 SCC 438.

<sup>29</sup> Sidharth Luthra and Mehaak Jaggi, “Marriage and Transgenders”, 47 Indian Bar Review 13 (2020).

<sup>30</sup> Anil Kumar Dubey, “Live-in Relationships in India: The Socio-Legal Perspective and Judicial Approach”, 46(3) Indian Bar Review 291 (2019).

<sup>31</sup> 2001 SCC All 332.

<sup>32</sup> (2010) 5 SCC 600.

<sup>33</sup> (2006) 5 SCC 475.

PWDVA support individuals in live-in relationships and confer certain fundamental rights to women to safeguard against issues such as fraudulent marriages and bigamous relationships.<sup>34</sup>

*The Malimath Committee*, convened in November 2000 to recommend reforms to the Criminal Justice System, submitted its report in 2003, which included several recommendations concerning offenses against women. One of the proposals involved amendments to Section 125 of the Criminal Procedure Code (CrPC) pertaining to maintenance rights for neglected and dependent spouses, children, and parents. The committee proposed expanding the definition of "wife" under Section 125 to encompass women who have been cohabiting with a man in a relationship similar to marriage for a significant period. To qualify for benefits under the Protection of Women from Domestic Violence Act (PWDVA), certain conditions must be satisfied, including the appropriate age, mutual consent, duration of cohabitation, and social standing, while transient or insincere relationships would be excluded.

In *Chanmuniya v. Virender Kumar Singh Kushwaha*<sup>35</sup>, the Supreme Court overturned the decision of the High Court, which had denied maintenance to a wife on the basis that only legally married women are eligible to claim such provisions under Section 125 of the Criminal Procedure Code. The Court clarified that the provisions of Section 125 should be interpreted in alignment with Section 26 of the Protection of Women from Domestic Violence Act, 2005, affirming that women in live-in relationships are entitled to claims and reliefs equivalent to those of legally married wives. Similarly, in *Abhijit Bhikaseh Auti v. State of Maharashtra and Anr*<sup>36</sup>, the Court observed that women in live-in relationships can also seek maintenance under Section 125 of the CrPC without the necessity of proving a formal marriage.

In *Indra Sarma v. V.K.V.Sarma*, the Supreme Court recognized that a woman who is aware of her partner's existing legal marriage and family may not be entitled to the protections provided to legally married spouses under the Protection of Women from Domestic Violence Act, 2005. However, the Court also expressed concern over the potential denial of protection under the Act and highlighted the significance of broadening the definition of 'domestic relationships' to include vulnerable individuals and their children.

The Supreme Court has established through various rulings that when a male and a female enter into a long-term relationship resembling marriage, which may include raising children together, the judiciary is likely to presume that a marriage exists. Consequently, the same legal provisions will apply to them and their relationship.

While live-in relationships may initially appear unconventional and relatively recent in India, they are increasingly common. This shift in modern living arrangements, partly driven by globalization, reflects a change in societal attitudes among individuals who may be cautious about assuming the responsibilities traditionally associated with marriage. For many young people, the concept of a voluntary cohabitation-based relationship, including acceptance of informal agreements such as pre-nuptial arrangements, is an appealing alternative. Live-in relationships are often viewed as an option that offers certain benefits without formal marital commitments. However, they also require a heightened sense of responsibility and an understanding of the relevant social and legal considerations.<sup>37</sup>

Prospective partners in a cohabitation arrangement may proactively mitigate potential legal concerns by drafting a formal agreement analogous to a premarital contract. This document should outline procedures for expense sharing, property management, policies regarding individual or joint bank accounts, and the distribution of assets in the event of a partner's passing or the termination of the relationship. The couples in a live-in

<sup>34</sup> Priya Sepaha, "Live-in Relationship in India: Laws and Challenges", 1LCJLS 3-4 (2021).

<sup>35</sup> 2010 AIR SCW 6497.

<sup>36</sup> Criminal Appellate Jurisdiction Criminal Writ Petition No. 2218 Of 2007.

<sup>37</sup> Priya Sepaha, "Live-in Relationship in India: Laws and Challenges", 1(II) Law Colloquy Journal of Legal Studies 8-11(April 2021).

relationship can establish a cohabitation agreement that details matter relevant to the allocation of individual interests and rights of each party involved.

#### ***D. Pre- Nuptial Agreement would Prevent Misuse of Dowry Laws***

The inclusion of a prenuptial agreement can help clarify the terms related to dowry gifts provided during marriage, thereby contributing to the prevention of dowry-related issues. Additionally, a prenuptial agreement serves to protect the rights of both spouses. In 2015, Maneka Gandhi, then serving as the Minister for Women and Child Development, advised D.V. Sadananda Gowda, the Minister for Law and Justice, to consider making prenuptial agreements mandatory prior to marriage. Her recommendation was based on concerns that many women from lower socio-economic backgrounds often face prolonged disputes over alimony and the division of property and assets during divorce proceedings. Prenuptial agreements could help prevent misunderstandings and potential exploitation between couples, thereby reducing the likelihood of disputes escalating into lengthy court battles. At the time of marriage, a joint declaration should be signed by both spouses affirming that no dowry has been exchanged. This measure would serve as a protective document in future litigation, helping to prevent the misuse of dowry laws.<sup>38</sup>

Pre-Nuptial Agreements, when implemented appropriately, can serve as valuable tools for spouses. A pre-nuptial agreement that defines compensation in cases of confirmed marital cruelty or abuse may function as an important safeguard against domestic violence and the misuse of dowry laws.<sup>39</sup>

An analysis of data from the National Crime Records Bureau (NCRB) conducted by the Ministry of Statistics and Programme Implementation (MoSPI). The report indicates that, between 2016 and 2021, approximately one in three reported crimes against women involved allegations of cruelty by the woman's husband and/or his relatives. According to MoSPI's 'Women and Men in India 2022' publication, cruelty by husbands and their relatives is the most frequently reported form of violence against women in India. Over this six-year period, there were nearly 2.28 million reported crimes against women nationwide, with approximately 700,000 cases, or 30 percent, reported under Section 498A of the Indian Penal Code (IPC). The report further highlights that, in each year of the study, cases registered under Section 498A consistently exceeded all other categories of crimes against women, including reports of rape and sexual harassment.<sup>40</sup>

Between 2021 and 2025, a total of 9,950 cases under IPC Section 498A were heard across five of Delhi's seven district courts. Of these cases, only 23 resulted in convictions, indicating a conviction rate of approximately 0.2%. Additionally, 47% of these cases were quashed by the Delhi High Court. According to the National Crime Records Bureau (NCRB) data from 2018, the national conviction rate for IPC 498A cases was 13%, which was among the lowest conviction rates across all IPC categories during that year. Nearly half of these cases are quashed, raising concerns about potential misuse for financial gain or personal motives.<sup>41</sup> Establishing a legally recognized prenuptial agreement that details asset transfers, maintenance obligations, and dowry arrangements prior to marriage could serve as an effective preventive measure. Such agreements would help clarify financial expectations, reduce ambiguity and false dowry claims, and promote judicial scrutiny in related disputes. Currently, India does not have a comprehensive framework for enforceable prenuptial agreements, with enforceability recognized only in Goa under specific personal laws, and broader reforms are still in progress. Implementing procedural safeguards such as independent legal counsel, judicial review for fairness, transparent

<sup>38</sup> Debi Prasad Dhal, "Cruelty Against Husband (With Special Reference to Section 498 A IPC)" 48(1&2), Indian Bar Review) 2021.

<sup>39</sup> Amrita Ghosh and Pratyusha Kar "Prenuptial Agreement in India: An Analysis of Law and Society" 12 (2) NUJS Law Review (2019).

<sup>40</sup> Nikhil Rampal, "Cruelty by Husbands and their Relatives makes up One-Third of Crimes against Women in India: MoSPI" The Print March 26,2023.

<sup>41</sup> Vineet Upadhyay, "Debate Over 498A Misuse Grows Louder" Times of India June 15, 2025.

disclosure, and reforms to make Section 498A more equitable and gender-neutral could significantly decrease misuse and better protect all parties involved in matrimonial matters.

### ***E. Pre-Nuptial Agreement could Reduce Psychological Trauma in Divorce***

Elevated levels of psychological stress are a common factor contributing to divorce and often result in a prolonged increase in stress levels. While the emotional impact of losing a spouse through death is generally anticipated, individuals who have a strong emotional attachment to their partner may find the experience of divorce more distressing. A sociological study focusing on the issues encountered by divorced women before and after divorce highlights “*the emotional disturbances, anxiety, feelings of loneliness, and lack of confidence that are often prevalent in this demographic.*”<sup>42</sup> Although many individuals successfully adapt to the transition and develop a sense of identity independent of marriage, for others, divorce can represent the conclusion of an unsatisfactory relationship, leading to significant psychological distress and anxiety.

Emotions such as anxiety and anger experienced during and after divorce may persist over time and negatively impact both physical and mental health. These psychological and emotional challenges can contribute to the development of serious mental health conditions. Mental research acknowledges “*divorce as the second most stressful life event a person can experience, following only the death of a spouse.*”<sup>43</sup>

A prenuptial agreement can offer certain benefits, particularly when it is thoughtfully designed to address the perspectives of both parties. The impact of such agreements on the emotional dynamics and long-term stability of a marriage is complex; while they can provide financial security and clarify roles and responsibilities, they may also, if handled insensitively, lead to feelings of resentment, vulnerability, or insecurity for one party. Effective communication between partners marked by care, understanding, and mutual respect is essential. When approached with sensitivity, a prenuptial agreement can serve as a foundation for long-term stability; however, an insensitive approach may undermine harmony and lead to discord. A compassionate, empathetic, and pragmatic approach focused on protecting both individuals and fostering the growth of the partnership through Pre-Nuptial Agreement can contribute to lasting stability, clarity, and resilience in navigating future challenges.<sup>44</sup>

### ***F. Pre-Nuptial Agreement a solution for Reducing Child Suffering During Divorce***

Custody and parental accountability disputes can significantly impact the emotional well-being of children. It is crucial to approach the development of custody arrangements and co-parenting responsibilities with careful consideration to minimize potential adverse effects on involved children<sup>45</sup>. Recognizing the impacts of divorce on children, the complexities inherent in custody disputes, and the importance of support systems highlights the need for comprehensive strategies aimed at safeguarding children's well-being. Future initiatives could focus on establishing supportive environments and legal frameworks that prioritize the best interests of children during divorce proceedings.

To ensure the protection and well-being of children throughout and following divorce proceedings, the implementation of Pre-Nuptial Agreements is the best solution. Such agreements should clearly outline the rights and welfare of the children, including custody arrangements and maintenance provisions, in the event of divorce. Custody and parental accountability disputes can significantly impact the emotional well-being of children. It is crucial to approach the development of custody arrangements and co-parenting responsibilities with careful consideration to minimize potential adverse effects on involved children. To ensure the protection and well-being of children throughout and following divorce proceedings, the implementation of Pre-Nuptial

<sup>42</sup> Mamta Trichal, “Effects of Divorce on Mental Health”, 9 (3) The International Journal of Indian Psychology 1388(2021).

<sup>43</sup> Id at 1381.

<sup>44</sup> Swarupa Tripathy, “SC’s stridhan ruling reignites debate: Should prenuptial agreements become the norm in India?”, The Indian Express, May 14, 2024.

<sup>45</sup> Aarti B. Padole, “ Dynamic Divorce Trends in India: Socio Economic and Cultural Perspectives”,1 JETNR 61 (2023).

Agreements is very useful. Such agreements should clearly outline the rights and welfare of the children, including custody arrangements and maintenance provisions, in the event of divorce.

**G. The use of Pre-Nuptial Agreements can also address issues related to multiple maintenance claims.**

In India maintenance laws are comprehensive and encompass various statutes. These include the Special Marriage Act of 1954, the Code of Criminal Procedure of 1973, and the Protection of Women from Domestic Violence Act of 2005, among others. Additionally, several personal laws contain provisions related to maintenance; for instance, a Hindu wife may seek maintenance under the Hindu Adoptions and Maintenance Act of 1956, the Hindu Marriage Act of 1955, the Code of Criminal Procedure of 1973, and the Protection of Women from Domestic Violence Act of 2005. Each claim made under these statutes is treated as distinct and separate, which can lead to issues such as multiple proceedings and conflicting orders.

Certain High Courts, including those in Madhya Pradesh and Calcutta, have established that maintenance proceedings under the law operate independently. As a result, respondents may be subject to multiple maintenance orders, as these obligations cannot be mutually offset or adjusted. Conversely, other High Courts, such as Bombay and Delhi, have adopted a different stance, permitting adjustments or offsets of payment orders in cases involving multiple claims.

In disputes involving overlapping jurisdictions, the Court has recognized that although parties may invoke multiple legal provisions for maintenance, requiring a spouse to fulfil each maintenance obligation without considering earlier relief would be unreasonable. Accordingly, the spouse seeking maintenance is required to inform the court of any existing maintenance awards from prior or separate proceedings. Additionally, when assessing the appropriate amount of maintenance, the court must take into account any existing orders to modify or offset the amount awarded.<sup>46</sup>

If a spouse has a pre-nuptial agreement that specifies the terms of maintenance during and after the divorce, it can significantly reduce confusion regarding maintenance determinations. Additionally, it helps prevent multiple proceedings and conflicting court orders, as the maintenance amount has already been agreed upon by the parties in the pre-nuptial agreement. Pre-nuptial agreements are designed to provide financial clarity and security for women by establishing arrangements for financial support in the event of a marital dissolution. This may include entitlements to a portion of the husband's estate or ongoing maintenance for themselves and their children. Additionally, such agreements can serve as a considerate measure to promote transparency and mutual understanding between partners.<sup>47</sup> Prenuptial agreements allow couples to formally establish the terms of alimony or spousal support in advance. This proactive approach can help minimize the potential for extended and costly legal disputes regarding financial arrangements in the event of a divorce.<sup>48</sup>

## VI. Recent Judicial Responses Related to Need of Pre-Nuptial Agreement in India

In the case of *Sh. Chhatter Pal & Ors. vs. State & Anr*<sup>49</sup>, decided on 16 May 2023, the Delhi Family Court at Patiala House recommended making prenuptial agreements mandatory in India. This recommendation was made while granting a no-fault divorce under Section 13B of the Hindu Marriage Act to a couple involved in a seven-year legal dispute. The court emphasized that requiring prenuptial agreements, entered into after appropriate counselling, could help prevent mental distress caused by legal proceedings during divorce. It also

<sup>46</sup> [Kruthika R](#), "The Court's guidelines clarify interim maintenance, the criteria to quantify maintenance and the enforcement of such orders", Supreme Court Observer 27th Nov 2020 available at [Court Frames Comprehensive Guidelines on Maintenance - Supreme Court Observer \(scobserver.in\)](#) (last visited on August 2, 2024).

<sup>47</sup> Sarthak Mishra, LEGAL VALIDITY OF PRE-NUPTIAL AGREEMENTS IN INDIA available at [d813401b-8a38-461c-8e9e-aea68e57f692.pdf \(manupatra.com\)](#) (last visited on August 25, 2024).

<sup>48</sup> SS Rana, Validity of Prenuptial Agreements in India, Lexology, November 1, 2023 available at [Validity of Prenuptial Agreements in India - Lexology](#) (last visited on August 1, 2024).

<sup>49</sup> Neutral Citation no. 2023: DHC:3396.

observed that many matrimonial cases involve exaggerated or fabricated allegations aimed at satisfying legal criteria for divorce, which can place additional burdens on the judicial system. Court noted that denying divorce in such cases could otherwise prolong the suffering of the parties involved and would be contrary to the objectives of the Family Court Act, which aims to resolve disputes amicably. The ruling further suggested that any breaches of prenuptial agreements should be reported, highlighting that ignoring such breaches could undermine future legal claims.

*The Indian Express (2023)*<sup>50</sup> reports that a Family Court judgment in Delhi, addressing a longstanding divorce case, recommended the consideration of mandatory prenuptial agreements alongside counselling. The court noted that such measures could help prevent mental cruelty and facilitate the resolution of marital disputes. Additionally, it emphasized that prenuptial agreements may allow couples to better understand potential risks prior to marriage.

According to *Rebecca (2023)*<sup>51</sup>, in Mumbai in 2023, a Family Court concluded that while prenuptial agreements are not legally binding, they can provide valuable insights into the intentions of both parties during divorce proceedings.

The landmark judgment in *Maya Gopinathan v. Anoop SB*<sup>52</sup> reaffirmed that 'Stridhan' constitutes the exclusive property of the woman, with no ownership or control rights conferred upon the husband. Even in instances of financial hardship, the Court emphasized that the husband has a moral obligation to return the 'Stridhan.' The Court clarified that documentary proof of acquisition is not mandatory in civil proceedings; instead, the standard of proof is based on resolving the balance of probabilities rather than the stricter criteria applied in criminal cases. The Supreme Court's 2024 ruling reaffirmed a woman's unequivocal rights over her 'Stridhan,' including property gifted to her before, during, or after marriage. This decision has notably reignited discussions surrounding prenuptial agreements and marital property rights.

*Swarupa (2024)*<sup>53</sup> notes that the 'Stridhan' judgment has spurred renewed dialogue on prenuptial agreements, emphasizing the importance of empowering women and recognizing their contributions to asset accumulation. Although the judiciary has not officially endorsed prenuptial agreements, the ruling has catalysed increased public debate on the subject.

***Dara Lakshmi Narayana (2024) Supreme Court Case has renewed discussions regarding the legal recognition of prenuptial agreements in India.***

The Supreme Court has observed an increasing pattern of the misapplication of Section 498A, which was originally enacted to protect women from cruelty within marriage. The Court has characterized the misuse of Section 498A as a form of “legal harassment,” where broad and ambiguous allegations are used to intimidate and exert undue pressure on husbands and their families.

In the case of *Dara Lakshmi Narayana v. State of Telangana*<sup>54</sup>, the Supreme Court annulled a dowry harassment FIR, noting that it was filed as a retaliatory response to a divorce petition and lacked specific or credible allegations. The Court emphasized the importance of carefully reviewing complaints, especially when they appear to be retaliatory or lack concrete evidence. It also recommended that Parliament reconsider Sections 85 and 86 of the BNS prior to their enforcement, highlighting the need to address “pragmatic realities” and prevent potential misuse.

In recent years, there has been a noticeable increase in matrimonial disputes nationwide. This trend has been accompanied by heightened discord and a tendency to utilize provisions such as Section 498A of the IPC as

<sup>50</sup> Express News Service, “‘Make Prenuptial Agreement Compulsory’: Delhi Family Court as It Grants Divorce to Couple”, The Indian Express, November 1, 2023.

<sup>51</sup> Rebecca Samervel, “Prenup not Valid in India but Indicate Intent: Court”, Times of India Oct 9, 2023.

<sup>52</sup> Civil Appeal No. \_\_\_\_\_ of 2024 [Arising out of SLP (Civil) No. 13398/2022], decided on April 24, 2024.

<sup>53</sup> Swarupa Tripathy, “SC’s Stridhan Ruling Reignites Debate: Should Prenuptial Agreements Become the Norm In India?” The Indian Express May 14, 2024.

<sup>54</sup> (Arising out of Special Leave Petition (Criminal) No.16239 of 2024).

tools for personal vendettas, the judgment noted. A report by Business Standard (2024)<sup>55</sup> mentions that the Supreme Court, in *Dara Lakshmi Narayana (2024)*, highlighted that such misuse not only leads to false allegations but also encourages coercive tactics by wives and their families. The recent tragic suicide of Bengaluru-based technology professional Atul Subhash underscores the risks associated with the improper application of these laws. Subhash, originally from Uttar Pradesh, took his own life at his Bengaluru residence on Monday, leaving behind a 24-page suicide note and a 90-minute video in which he accused his wife and her family of severe harassment. This case has reignited discussions concerning the legal recognition of prenuptial agreements in India, which currently have limited enforceability under Indian family law.

## VII. Conclusion

A prenuptial agreement is a legally binding contract entered into by parties prior to marriage, specifying the division of assets, liabilities, and responsibilities in the event of divorce or separation. Such agreements are generally recognized and enforceable in jurisdictions including the United States, Germany, France, Australia, and, to some extent, the United Kingdom, provided they are entered into voluntarily with full financial disclosure and legal counsel. In India, however, prenuptial agreements are not officially recognized as legally binding under most personal laws, as marriage is primarily regarded as a religious or cultural sacrament rather than a contractual arrangement. Consequently, Indian courts often deem such agreements unenforceable if they conflict with public policy, as held in cases such as *Tekait Mon Mohini Jemadai v. Basanta Kumar Singh and Krishna Aiyar v. Balammal*. Nonetheless, limited acknowledgment may be granted in specific contexts, for instance, in Muslim marriages, where Mehr functions similarly to a prenuptial arrangement due to its contractual nature, and in Goa, where the Portuguese Civil Code permits enforceable prenuptial agreements. Despite these exceptions, Indian courts tend to exercise caution, especially where agreements seek to waive statutory rights such as maintenance under Section 125 of the Criminal Procedure Code or Section 25 of the Hindu Marriage Act. Conversely, many countries including the United States (under the Uniform Premarital Agreement Act), the United Kingdom, France, Germany, and Thailand recognize and enforce prenuptial agreements that meet specified legal standards, such as voluntary participation, fairness, and proper documentation. These jurisdictions generally view marriage as a civil contract, providing couples with greater autonomy to determine property and financial arrangements, contrasting with India's traditional, policy-oriented legal framework. Overall, Prenuptial Agreements can provide valuable benefits to couples and their families over the long term and are increasingly being accepted within India. Prenuptial agreements give couples an alternative to traditional marriage customs, allowing them to take charge of their finances and lowering the possibility of conflict. The absence of legal clarity around prenuptial agreements in India emphasizes the need for judicial guidance and legislative reforms in order to successfully negotiate this complex issue. Prenuptial agreements must be recognized and upheld in order to improve marital autonomy and safeguard individual rights as India transitions to more progressive legal frameworks and adapts to changing social dynamics.

<sup>55</sup> "SC Flags Misuse of Cruelty Laws Amid Bengaluru Techie's Death by Suicide", Business Standard December 11, 2024.