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JUDICIAL SEPARATION AS A MATRIMONIAL REMEDY- A LESSER EVIL THAN DIVORCE UNDER INDIAN LAW

~ *Aritra Saha*

Introduction

"Marriage is a relatively enduring tie between acceptable partners," as noted anthropologist Robert Lowie once stated. Hinduism's social tradition views marriage as a sacrament. It is believed that marriage is a person's religious obligation and that it is an unbreakable bond. But this notion has changed over time, and it is no longer thought to be inseparable. According to Indian matrimonial law, a marriage can end through a judicial separation agreement or a divorce. Judicial separation is a legal remedy available to married couples who want to temporarily suspend some of their rights and obligations, as opposed to divorce, which totally dissolves a marriage. A court separation agreement is an option instead of divorcing. Judicial separation, to put it simply, is a legal process that permits a couple to split up while maintaining their marriage. It is a time of separation granted by a court order to allow a troubled marriage to reflect. It is derived from the mensa et thoro concept in English. During the judicial separation period, the parties have time to decide whether to dissolve their marriage; however, if they are unable to reach a consensus, the court will enforce divorce as the only possible outcome.

The Concept of Judicial Separation

Legally speaking, judicial separation provides a window of time for both parties in a troubled marriage to reflect on their lives. Law guides a married couple to live apart while also giving them the opportunity to reconsider whether to continue their relationship. This is the last option available to both spouses for a legal dissolution of the marriage, and it gives them the freedom and legal space to consider their options going forward. The Judicial Separation is provided for both spouses of those who are married under the Hindu Marriage Act, 1955, under Section 10. By submitting a petition, they can request the relief of judicial

separation. After the order is granted, they are not required to live together.

What is Judicial Separation ?

A judicial separation is an order from the court directing a husband and wife to live apart or stop having sexual relations without formally ending their marriage. In certain situations, being separated from "bed and board" is referred to as "divorce mensa et thoro." The husband and wife are released from all essential marital duties and are not obliged to live together or cohabit after receiving a judicial separation order. Their voluntary separation only provides them time to think back on their marriage. A judicial separation agreement usually results in either a husband and wife's reconciliation or in their divorce. As a result, they can assess their marriage during this period of separation and decide whether or not to file for divorce if they change their minds about being married.

Since the parties are still husband and wife, a separation agreement forbids them from getting married again. In addition, if they get remarried, they might face bigamy charges. If one spouse dies while the separation agreement is still in force, the other spouse will inherit their possessions. Another requirement for a legal separation was that the parties be lawfully married. Although a separation agreement cannot be made in an invalid marriage, things may be different if the marriage is voidable.

The Madras High Court thoroughly examined the nature and application of judicial separation in *Subbarama Reddiar v. Saraswathi Ammal*, specifically addressing the grounds of adultery. The court noted that if a spouse requests judicial separation on the grounds outlined in Section 13 of the Hindu Marriage Act, 1955, the request may be granted provided the petitioner spouse is able to provide evidence of the adulterous relationship.

Judicial Separation under Hindu Law

In Hinduism, marriage is considered a sacred ceremony that is unbreakable and eternal. It is considered not only for this life but for many more to come. An ancient jurist named Manu declared that a marriage could not be dissolved. However, the introduction of new issues in modern society led to several modifications in Hindu law. Marriages are no longer thought to be permanently fixed. The parties to a marriage have several options for settling disputes or other matters, such as the ability to file for divorce or judicial separation.

Section 10 of the Hindu Marriage Act of 1955 grants matrimonial relief in the form of

"judicial separation," and Section 23 of the Special Marriage Act of 1954 provided a similar circumstance. When either the husband or the wife requests a decree of judicial separation, the same grounds are specified in the provisions of both laws for divorce agreements.

Different grounds for judicial separation were outlined under Section 27 sub-sections (1) and (2) of the Special Marriage Act of 1954 and Section 13 sub-sections (1) and (2) of the Hindu Marriage Act of 1955.

Under the circumstances outlined in subsection (1), a petition for judicial separation may be filed on behalf of either party; however, under subsection (2), only the wife may file on her own behalf.

These are a handful of the reasons why:

1. Cruelty, abandonment, conversion, and abuse
2. mental disease or mental instability,
3. cutaneous disease,
4. Abandonment,
5. seven years absent,
6. Bigamy: Husband found guilty of rape, sodomy, or bestiality.

Grounds of Judicial Separation in India

ADULTERY

It describes consenting sexual relations between partners who are not married's offspring. The respondent, the wife, had cheated on her husband, so the court granted judicial separation to the appellant, the husband, in *Dr. H.T. Vira Reddi v. Kistamma* (1968) AIR 1969 Mad 235. The Court decided that legal separation would still be granted even in the event that only one instance of the other spouse's adultery could be proven.

CRUELTY

The ordinary person's interpretation of the word "cruelty" is not accurate. The meaning of "legal cruelty" is distinct. Within the context of marriage, the Supreme Court attempts to define the term "cruelty" in the case of *G.V.N. Kaeswara Rao v. G. Jalli* (2002). The Supreme Court ruled that an act would qualify as cruel if it was performed with the intention of hurting

the other person. The spouse may not worry that living with the other spouse will negatively affect them. What the person intending to act cruelly intended is irrelevant. It's also not required to be done exclusively by the respondent or in opposition to the petitioner.

DESERTION

A two-year period of continuous desertion may serve as the foundation for a judicial separation appeal. It means that, without any reason and with the other party's permission, one party completely renounces their marital obligations. Three categories are possible:

Actual desertion

When either partner acts in a way that renounces the other. In the *Meena v. Lachman* (1959) case, for example, the wife went to her parents' house without telling her husband and made up promises to return, but she didn't for two years. The Bombay High Court issued a desertion and judicial separation decree.

Constructive Desertion

When one spouse fosters an environment that forces the other to leave, the spouse who is forced to leave calls this "constructive desertion." For example, in the case of *Jyotish Chandra Guha v. Meera Guha* (1969), the wife was forced to file for divorce due to her husband's lack of interest in her and his cold and rude behaviour towards her from the beginning of the marriage, causing her to suffer greatly on a mental and physical level. It was regarded as the spouse's deserting.

Willful Neglect

When one partner deliberately ignores the other without actually moving out, it is called willful neglect. It involves refusing to live together or ignoring a host of other marital obligations.

CONVERSION

If one of the spouses has converted from Hinduism to another religion, the other spouse may file an appeal for judicial separation. The husband filed for divorce in the 1983 case of *Vilayat Raj v. Smt. Sunila* after converting to Islam. It was not clear whether a Hindu

apostate could file an appeal for the dissolution of their marriage under the terms of the Hindu Marriage Act of 1955.

The Court decided that he can because a person's conversion to a different religion does not, in and of itself, give rise to a dissolution of their marriage.

UNSOUND MIND

If one spouse is difficult for the other to live with due to an irreversible mental illness or disorder, or if that spouse is incapable of making decisions, one may file an appeal for judicial separation. It was argued that the wife had schizophrenia at the time of the marriage in the 1968 case of *Anima Roy v. Proboth Mohan Roy*, in which the husband attempted to have the marriage declared void on the grounds that his wife was mentally unfit. The petition was denied by the court due to the unsatisfactory quality of the evidence provided and the unwarranted three-year delay from the purported date of learning of his wife's illness.

VENEREAL COMMUNICABLE DISEASES

If either spouse has any infectious, terminal sexual diseases (e.g., HIV/AIDS, HPV, syphilis, etc.), the other spouse may file for judicial separation. Due to his wife's syphilis-related venereal disease, the husband in *Madhusudan v. Smt. Chandrika* (1975) challenges the District Judge's decision to deny his request for a judicial separation or annulment. Because he was unable to prove that his wife had syphilis for three years prior to the petition date, the court dismissed the appeal. Furthermore, the diagnosis of terminal illness was not established.

RENUNCIATION

A person who has renounced everything in order to live a spiritual life and achieve enlightenment is said to have given up all material comforts and the world. It is one of the reasons one can use to ask for a spouse to be granted judicial separation. In the *Teesta Chatteraj v. Union of India* (2012) case, the term "renounce the world" was defined as giving up material pursuits in favour of a spiritual life. It means formally endorsing the renunciation, surrender, or abandonment of any property, claim, or other entitlement.

PRESUMPTION OF NOT BEING ALIVE

If one of the spouses has been absent for at least seven years and no one knows where they

have gone or if their family or friends are aware of their presence, the other spouse may file a request for judicial separation on this basis.

GROUND OF JUDICIAL SEPARATION AVAILABLE TO WIFE BIGAMY

It refers to marrying the other person when one is already lawfully wed to another. Should the husband remarry before the Act becomes operative, the wife may request a judicial separation from her husband, even if she is still alive. In *Harmohan Senapati v. Smt. Kamala Kumari* (1978), the plaintiff (wife) filed a judicial separation lawsuit upon discovering that the defendant (husband) had wed the other woman and lived with her without formally dissolving their previous marriage.

GUILTY OF RAPE, SODOMY & BESTIALITY

On these grounds, the wife may ask for a judicial separation in the event that the husband engages in bestiality, sodomy, or rape after the marriage. For example, in the event that married couple 'A' and 'B' are found to have sexually assaulted another woman, 'B' may request a judicial separation.

NON-RESUMPTION OF COHABITATION AFTER AN ORDER OF MAINTENANCE

If the husband was found in violation of any law, including the Hindu Adoptions and Maintenance Act of 1956 or Section 125 of the Code of Criminal Procedure of 1973, and the wife has not lived together for a year or longer, she may petition the court for judicial separation.

REPUDIATION OF MARRIAGE AFTER THE AGE OF 15 AND BEFORE THE AGE OF 18

If the girl left the marriage after turning 15, but not before turning 18, and she was not yet 15 when the marriage was formally dissolved, the wife may file a petition for judicial separation. This field is crucial for providing relief to young girls who were coerced into marriage, particularly those from impoverished areas.

CONSEQUENCES OF JUDICIAL SEPARATION

A court-ordered separation agreement removes the husband and wife's obligation to live

together. They are still legally married, but their ability to live together is still pending. Section 376B of the Indian Penal Code, 1860 provides legal protection to a separated wife. It states that if the husband engages in sexual activity with the woman after the judicial separation decree, he will be punished. A minimum sentence of two years and a maximum sentence of seven years will be imposed for such a crime. Furthermore, even though the marriages were legally dissolved, the partners were prohibited from entering into new unions. It was determined that it would be bigamy in the *Narasimha Reddy v. Basamma* (1975) case if one of the spouses was married during the separation period prior to the divorce. The Supreme Court's 2015 decision in *Krishna Bhattacharjee v. Sarathi Choudhary* established the wife's right to "stridhan" subsequent to a separation agreement, meaning that spouses who had undergone judicial separation were still entitled to their pre-separation property rights. The wife alone was the rightful owner, the judge decided.

A judicial separation decree, good for a year, may occasionally be issued by the court to allow spouses to choose between conciliation and divorce. They can think back on their marriage and establish common ground during this time.

IS JUDICIAL SEPARATION THE SAME AS DIVORCE?

Legal statutes provide matrimonial remedies, such as judicial separation and divorce, to a spouse who feels mistreated in a marriage. Both are ways to terminate one partner's rights and obligations in a marriage. Legal separation is a "lesser evil" than divorce, though, because it does not end the marriage as a whole.

It only keeps them apart and forbids them from cohabiting; the husband and wife's marital relationship as husband and wife remains unchanged. One can reverse the decision of judicial separation by moving in together or by taking back their conjugal responsibilities and rights towards each other.

The Allahabad High Court, in the 2019 case of *Amit Singh v. Sandhya Singh*, enumerated several distinctions between judicial separation and divorce.

The differences given are as follows

Grounds	Divorce	Judicial Separation
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Termination of Marriage	After the agreement of divorce, the marriage bond between the spouses is terminated.	After the agreement of judicial separation, the bond of marriage between the spouses is not terminated.
Mutual rights and obligations	The mutual rights and obligations against each other end with the divorce.	The mutual rights and obligations against each other remain suspended only in the case of judicial separation.
Chance of reconciliation	There is no chance for reconciliation as the marriage no longer exists.	There is a chance for reconciliation if the spouses agree to live with each other again and resolve their differences.
Right to remarry	The parties are allowed to remarry as they are no longer bound by any marital bond.	The parties are not allowed to marry again as their marriage was merely suspended and not ended.

WHY JUDICIAL SEPARATION IS BETTER THAN DIVORCE?

Since there is a higher chance of marriage reconciliation, it has been decided in several cases that judicial separation is a "lesser evil" than divorce. A legal separation does not lead to the irreversible breakup of marital bonds, in contrast to divorce. Consequently, it affords both spouses the chance to consider their past exchanges and decide on their future course of action, including whether to file for divorce or get back together.

Given that minor issues can occasionally lead to disagreements in marriages, divorce seems to be a major step for such problems. Judicial separation provides the victim with an alternative course of action in these circumstances.

A judicial separation is a form of limited divorce in which the requirement of cohabitation is the only thing that is lifted, leaving the marriage intact. It resolves their marital disputes as the final step before a final divorce. This also allows the parties some time to think through their decision and consult with friends and family for advice.

In *Mozelle Robin Solomon v. Lt. Col. R.J. Solomon* (1968), the Bombay High Court held that there is a distinction between the two because, as a result of a divorce decree, the marriage and the marital bond are terminated, leading to an absolute legal and factual separation between the parties.

A judicial separation decree, however, is only for legal separation and does not, by itself, end the marriage. It is not an absolute irrevocability decree.

Since it allows the couple to revoke the decree and reunite after some time apart, a judicial separation is preferable to a divorce. The legal tool known as judicial separation allows both parties in an unsatisfactory marriage some space for reflection and the autonomy to make their own decisions. Divorce officially ends a marriage at the couple's discretion, even though judicial separation allows both the husband and the wife to consider the possibility of avoiding the permanent legal separation by annulling the marriage. Judicial separation is preferable to divorce because it allows the couple to think clearly and make reasonable decisions.

CONCLUSION

Consideration is marriage to be a sacred bond in our society, and breaking this bond is deemed unlucky, particularly in India. Many couples have been forced into unhappy forced marriages since the beginning of time. Since getting a divorce is a big step for most people and can harm their reputation, especially for women, people are reluctant to do so. They therefore have a variety of other choices. Judicial separation is an option to divorce, which can be sought at any time after marriage. The married couple can pray for a court order granting them a legal separation and take stock of their relationship if they are unhappy together. Because judicial separation has a number of advantages over a divorce settlement, the courts believe it to be a lesser evil than divorce. It allows the parties time to think things through and come to a mutually agreeable decision. It has been shown that applying this strategy can support family reconciliation and preserve marriage as a sacred institution.