

15.05.2026  
Item No.63  
Ali  
ct. no.9

**In the High Court at Calcutta**  
Civil Appellate Jurisdiction  
Appellate Side

**C.O. 4021 of 2018**

**Sri Samir Sarkar & Anr.**  
**Vs.**  
**Smt. Kakali Sarkar & Ors.**

Mr. Debjit Mukherjee,  
Mr. Kaustav Bhattacharya,  
Ms. Priyanka Jana

..... for the petitioners

Mr. Pinaki Dhole,  
Mr. Rabindra Kumar Pathak,  
Ms. Srijita Nee

.....for the respondent No.1.

Mr. Avishek Prasad  
...for the respondent Nos.2,3,4,5,11,12,&13.

1. Learned advocates for the parties are present.
2. Heard learned advocates.
3. This application is directed against the order dated 09.10.2018 passed by learned Civil Judge (Senior Division), 1<sup>st</sup> Court, Malda in PS 233/2012. The learned Trial Judge by order dated 09.10.2018 has rejected the prayer of the petitioners who are the defendants No. 1 and 11 in the partition suit before the learned Trial Court. The learned Trial Court was pleased to reject the petition of maintainability filed by the petitioners who are defendants No. 1 and 11 before the learned Trial Court.

4. Upon perusal of the petition filed before the learned Trial Court it appears that the petitioners have prayed that the issue of maintainability be framed first and, thereafter, the matter be taken up, however the learned Trial Judge instead of fixing the issue with regard to maintainability have decided the same by passing the order dated 09.10.2018 by observing as follows:

*"The right to seek partition is a continuing right and it is always open to the co-owner to ask for separate enjoyment of his share in the property at any time he likes.*

*The right to partition cannot be refused so long as his interest in the property subsists and when the property remains joint and one of the co-owners has a good cause for bringing a fresh suit for partition notwithstanding the dismissal of the previous suit for partition. This principle of law is enshrined in AIR 1958 Assam page 67. **Apex Court in Dwarika Prasad Vs. Nirmala (2010) 2 SCC 107** has in pleased to observe if the previous suit for partition was dismissed on merits either on the ground that the properties are not the joint family properties or that they are impartible, the decision is res judicata and is binding on the partition and the representations. But if the dismissal is due to some formal defects, such as, the previous suit was dismissed on the ground that it is a suit for partial partition, a fresh suit for partition of the whole properties is not barred. The body of judgment of the previous suit being PS 218/02 along with the decree and schedule of the plaint of instant suit shows that previous suit has been dismissed on the*

*ground of partial partition. In the light of the principles, discussed above, the instant suit is not barred by res judicata.*

*The application is found merit less, liable to be rejected”.*

5. By the said order the prayer of the petitioners/defendants No. 1 and 11 was rejected.
6. Upon hearing the learned advocates and considering the facts of the case this Court is of the view that the power of the Court to frame the issue of maintainability is governed under Order 14, Rule 2 of the Code of Civil Procedure. Order 14, Rule 2 of the Code of Civil Procedure provides that notwithstanding that a case may be disposed of on preliminary issue, the Court shall, subject to the provisions of sub-rule (2), pronounce judgment on all issues.
7. It is further provided that where issues both of law and of fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on an issue of law only, it may try that issue first if that issue relates to (a) the jurisdiction of the Court, or (b) a bar to the suit created by any law for the time being in force and for that purpose may, if it thinks fit, postpone the settlement of the other issues until after that issue has been determined, and may deal with the suit in

accordance with the decision on that issue. Thus, Order 14, Rule 2 of the Code of Civil Procedure empowers the Court to pronounce the judgment of all issues. As the prayer is made by the petitioners who are the defendants before the learned Trial Court in the partition suit that the issue of maintainability be framed first it is incumbent upon the Court to frame the issue of maintainability although the Court has to frame other issues upon considering the plaint, written statement and materials on record.

8. Thus, this application under Article 227 stands disposed.
9. The matter is remitted back to the learned Trial Court to frame the issue of maintainability in the suit being PS 233/2012 pending before learned Civil Judge (Senior Division), 1<sup>st</sup> Court, Malda. Upon framing the issue of maintainability the learned Trial Court is permitted to proceed in accordance with law as provided under Order 14, Rule 2 of the Code of Civil Procedure. The learned Trial Judge is requested to dispose of the suit expeditiously.
10. It is however made clear that this Court has not gone into the merits of the suit and all points are kept open to be agitated by the parties.

11. The learned Trial Judge will proceed with the issue of maintainability as per Order 14, Rule 2 of the Code of Civil Procedure. The earlier order passed by the learned Trial Court and the order passed by this Court will not stand in the way of the learned Trial Judge in considering the issue afresh.

**(Biswaroop Chowdhury, J.)**