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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **FAO 244/2014**

SEEMA SHARMA

..... Appellant

Through: **Mr. Gurmeet Singh, Advocate.**

versus

STATE AND ORS

..... Respondent

Through: **Mr. Sunil Malhotra and Mr. Rajat Malhotra, Advocates for R-1.
Mohd. Haris Usmani and Ms. Kanika Chauhan, Advocates for R-2 and 6.**

+ **FAO 246/2014**

SEEMA SHARMA

..... Appellant

Through: **Mr. Gurmeet Singh, Advocate.**

versus

STATE AND ORS

..... Respondent

Through: **Mr. Sunil Malhotra and Mr. Rajat Malhotra, Advocates for R-1.
Mohd. Haris Usmani and Ms. Kanika Chauhan, Advocates for R-2 and 6.**

CORAM:

HON'BLE MR. JUSTICE VALMIKI J. MEHTA

ORDER

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18.07.2017

1. These appeals impugn the judgment of the trial Court dated 11.12.2013 dismissing the probate petitions by applying Order 9 Rule 9 CPC inasmuch as the appellant/petitioner had earlier filed a probate petition.

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2. The Court below notes that a dismissal in default will not amount to *res judicata*, and rightly so because for the doctrine of *res judicata* to apply as per Section 11 CPC, the earlier judgment must be a judgment on merits and not an order of dismissal in default of the suit/proceedings.

3. The dispute in the present cases pertains to an immovable property belonging to late Smt. Shakuntala Devi. A partition suit is already pending between the parties with respect to the property of Smt. Shakuntala Devi.

4. Learned counsel for the appellant states that since the impugned judgment only dismisses the probate petition on a technical ground of Order 9 Rule 9 CPC and the same will not prevent pursuing or defending the rights in an immovable property on a different cause of action with respect to the rights in the immovable property, these appeals are disposed of as not pressed with liberty to the appellant to pursue his defence in the partition suit between the parties which is said to be pending. This partition suit is pending before the Court of Sh. Pritam Singh, ADJ, Saket Courts, New Delhi.

5. Accordingly, these appeals are disposed of as not pressed with

liberty to the appellant to pursue her defence in the partition suit which is pending between the parties and which issue of defence is not *res judicata* because the probate petitions in these cases have been dismissed not on merits but by applying Order 9 Rule 9 CPC.

6. These appeals are accordingly disposed of as not pressed but with the aforesaid liberty.

7. Since the appeals are disposed of not pressed, all pending applications will stand disposed of accordingly.


VALMIKI J. MEHTA, J

JULY 18, 2017

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