Similar amendment was made by this Court and Rule 23-A had earlier been incorporated in the Code of 1908. In view of the observations by the Supreme Court if section 13 of the Act is read along with Rule 23-A of the Code of 1908, the appellants are entitled to refund of the court-fee because the decree was reversed by the appellate Court and retrial was considered necessary by it. A contrary view had been taken by this Court in *Jawahar Singh Sobha* Singh v. Union of India and *others* (2), and *Krishan Sarup Oberoi* v. *Ram Niwas* (3). The aforesaid judgments, however, are impliedly overruled by the Supreme Court in *Chandra Bhushan Misra's case* (supra).

(6) No other argument was raised in Civil Miscellaneous No. 595|C-I of 1980.

(7) For the aforesaid reasons, I accept the petitions and direct that necessary certificate authorising the petitioners to receive back from the Collector the full amount of court-fee on the memorandum of appeal as contemplated by section 13 of the Act, be issued to them. No costs.

Before P. C. Jain & B. S. Dhillon, JJ.

MARUTI LIMITED,—*Petitioner.*

versus

B. G. SHIRKE AND CO. and others,—*Respondents.*

C. A. No. 93 *of* 1978 *in*

C. P. No. 60 *of* 1978.

September 11, 1980.

Companies Act (I of 1956)—Sections 9 and 446(2)—Arbitration Act (X of 1940)—Sections 34—Agreement to refer disputes to arbitration executed by a Company—Such Company ordered to be wound up—Arbitration agreement—Whether continues to bind the company after the winding up order.

(2) A.I.R. 1958 Punjab 38.

(3) A.I.R. 1975 Punjab and Haryana 22.

Held, that after a Company is ordered to be wound up, it is the company Court which would entertain or dispose of any suit or proceeding and any claim made by or against the company, but if an application is made that instead of the court deciding the matter, the same in terms of the agreement may be referred to arbitration, the Court in exercise of its jurisdiction, would go into that question and decide on the merits of each case whether to refer a matter to arbitration or not. Such being the position, it cannot be said that the jurisdiction of the court by mere existence of such a clause in the agreement, is being taken away. So far as the provisions of section 9 of the Companies Act, 1956 are concerned the same do not in any way conflict with the provisions of section 446(2) of the Act. The arbitration clause in the agreement does not take away the jurisdiction of the Court, nor is it repugnant to the provisions of section 446(2) of the Act. A party to an arbitration agreement has a perfect right to bring an action in respect of the dispute covered by an arbitration agreement and the Court has jurisdiction to try such dispute or stay the action and refer the matter to arbitration. It is only when a Court has jurisdiction to entertain an action, that it either tries the dispute itself or refers it to arbitration. Thus, a clause existing in an agreement for making reference of dispute to arbitration, continues to bind a company subsequent to the order of winding up as it did before, that such a clause does not impinge upon or take away the jurisdiction of the Court and that it would be for the court to decide whether to try the dispute which has been brought before it or to stay the action where the other party applies in time and otherwise complies with the conditions of section 34 of the Arbitration Act, 1940. (Paras 8 and 12).

Application under section 34 of the Arbitration Act, 1940 praying that the proceedings initiated by the petitioners in the above petition be stayed and the petitioner be ordered to resort to the remedy of arbitration as agreed upon in the said lease-deed.

Kuldip Singh, Bar-at-law, R. S. Mongia, Advocate, *for the applicant-Respondent.*

J. S. Narang, Advocate, *for the Respondent-Petitioner.*

JUDGMENT

Prem Chand Jain, J.

(1) Maruti Limited (in liquidation through the Liquidator attached to this Court, has filed a petition (C.P. No. 60 of 1978) under section 446(2) of the Indian Companies Act, 1956 (hereinafter referred to as Act) read with rule 9 of the Companies (Court) Rules, 1959 for a claim of a sum of Rs. 6,000 against M|s. B. G. Shirke and Co. (P) Ltd. and others.

(2) Notice of the claim petition was given to the respondents, who in obedience to the notice, put in appearance and filed C.A. No. 93 of 1979 under section 34 of the Arbitration Act, 1940 to the effect that the proceedings instituted in C.P. No. 60 of 1978 be stayed and the petitioner be directed to resort to the remedy of arbitration as agreed upon in the lease deed entered into between the parties. C.A. No. 93 of 1979 came up for hearing before me on November 15, 1979. Considering that the point involved in the application was of considerable importance, I decided to refer the matter for decision to a larger Bench and that is how we are seized of the matter.

(3) The question that needs determination by us, may be stated thus:

> "Whether an arbitration agreement to which the company was a party, continues to bind the company subsequent to the order of winding up as it did before ?

The contention of Mr. J. S. Narang, learned counsel for the petitioner was that the Official Liquidator is not bound by the arbitration clause in the agreement, that after a company goes in liquidation, it is only the Court which has exclusive jurisdiction to entertain or dispose of any suit or proceeding by or against the company or any claim made by or against it, and that as the clause in the agreement envisaging reference of the dispute to arbitration is repugnant to the provisions of section 446 (2) of the Act, the same was void and could not legally be enforced.

(4) On the other hand, Mr. R. S. Mangia, learned counsel for the respondents contended that even after the order for winding up of a company is passed, the company is bound by the clauses of the agreement, that the clause in the agreement envisaging reference of the dispute to arbitration is not repugnant to the provisions of section 446 (2) of the Act, that the said clause does not in any way take away the jurisdiction of the Court inasmuch as the reference to arbitration can be made only with the permission of the Court and that the clause in the agreement for making reference to arbitration does not become void as such a clause is not repugnant to any of the provisions of the Act.

(5) After giving our thoughtful consideration to the entire matter, we find ourselves unable to agree with the contention of Mr. J. S.

Accession No. 66110
Dated 5-1-83 C-4

Narang. The two provisions of the Act which are relevant and to which our attention was drawn, read as under:—

"9. Save as otherwise expressly provided in the Act:—

(a) the provisions of this Act shall have effect notwithstanding anything to the contrary contained in the memorandum or articles of a company, or in any agreement executed by it, or in any resolution passed by the company in general meeting or by its Board of Directors, whether the same be registered, executed or passed, as the case may be, before or after the commencement of this Act; and

(b) any provision contained in the memorandum, articles, agreement or resolution aforesaid shall, to the extent to which it is repugnant to the provisions of this Act, become or be void, as the case may be."

"446(1) When a winding up order has been made or the Official Liquidator has been appointed as provisional liquidator, no suit or other legal proceeding shall be commenced, or if pending at the date of the winding up order, shall be proceeded with against the company, except by leave of the Court and subject to such terms as the Court may impose.

(2) The Court which is winding up the company, shall, notwithstanding anything contained in any other law for the time being in force, have jurisdiction to entertain, or dispose of—

(a) any suit or proceeding by or against the company ;

(b) any claim made by or against the company (including claims by or against any of its branches in India);

(c) any application made under section 391 by or in respect of the company;

(d) any question of priorities or any other question whatsoever, whether of law or fact, which may relate to or arise in course of the winding up of the company;

whether such suit or proceedings has been instituted or is instituted, or such claim or question has arisen or arises or such application has been made or is made before or after the order for the winding up of the company, or before or after the commencement of the Companies (Amendment) Act, 1960.

(3) Any suit or proceeding by or against the company which is pending in any Court other than that in which the winding up of the company is proceeding may, notwithstanding anything contained in any other law for the time being in force, be transferred to and disposed of by that Court.

(4) Nothing in sub-section (1) or sub-section (3) shall apply to any proceeding pending in appeal before the Supreme Court or a High Court."

(6) An analytical study of section 446 would show that sub-section (1) provides that when a winding up order has been made or the Official Liquidator has been appointed as provisional Liquidator, no suit or other legal proceedings shall be commenced, or if pending at the date of winding up order, shall be proceeded with against the company except by leave of the Court and subject to such terms as the Court may impose. Sub-section (2) provides, *inter alia,* that the Court which is winding up the company shall, notwithstanding anything contained in any other law for the time being in force, have jurisdiction to entertain or dispose of any suit or proceedings in any claim made by or against the company. Sub-section (3) provides that any suit or proceeding by or against the company which is pending in any court other than that in which winding up is proceeding may, notwithstanding anything contained in any other law for the time being in force, be transferred to and disposed of by that Court. So far as clause (b) of section 9 on which reliance has been placed, is concerned, it provides that any provision contained in the memorandum, articles, agreement or resolution shall to the extent to which it is repugnant to the provisions of the Act, become or be void.

(7) The question on the respective contentions of the learned counsel for the parties, that needs determination is :

"Does the clause, existing in the agreement for making reference of dispute to arbitration in any way take away the jurisdiction of the Court"?

In our view, the answer has to be in the negative. It may be observed at the outset that the contention of the learned counsel for the petitioner is based on a foundation which is non-existent. What is pre-supposed by the learned counsel is that the mere existence of the arbitration clause in the agreement would take away the jurisdiction of the company Court to entertain or dispose of any suit or proceeding and any claim made by or against the company. But this approach is not legally tenable.

8. After the winding up, it is the company Court which would entertain or dispose of any suit or proceeding and any claim made by or against the company, but if an application is made that instead of the Court deciding the matter, the same in terms of the agreement may be referred to arbitration, the Court in exercise of its jurisdiction, would go into that question and decide on the merits of each case whether to refer a matter to arbitration or not. Such being the position, it cannot be said that the jurisdiction of the Court by mere existence of such a clause in the agreement, is being taken away. So far as the provisions of section 9 are concerned, the same do not in any way conflict with the provisions of section 446(2) of the Act. The arbitration clause in the agreement does not take away the jurisdiction of the Court. It is not repugnant to the provisions of section 446(2) of the Act. As earlier observed, the foundation on which the argument was built by Mr. J. S. Narang, is non-existent. A party to an arbitration agreement has a perfect right to bring an action in respect of the dispute covered by an arbitration agreement and the Court has jurisdiction to try such dispute or stay the action and refer the matter to arbitration. It is only when a Court has jurisdiction to entertain an action, that it either tries the dispute itself or refers it to arbitration.

(9) Mr. R. S. Mongia, learned counsel for the appellant, had drawn our attention to a Division Bench judgment of the Gujarat High Court in *Star Trading Corporation* v. *Rajratna Naranbhai Mills Co. Ltd., (in Liquidation)* (1), where a similar question with which we are faced, had arisen, and the learned Judges on that aspect of the matter observed thus:—

> Now one thing is clear that, when a company is ordered to be wound up, the arbitration agreement, to which the company was party is not superseded: it does not cease to

(1) 1971 Company cases 1023.

be operative. The arbitration agreement continues to bind the company subsequent to the order of winding up as it did before. It is obvious that this should be so because when a company is ordered to be wound up, it does not cease to exist as a company; no transformation takes place in so far as its legal or juristic entity is concerned. The rights, properties, assets and liabilities of the company continue to remain vested in the company. The only change which takes place is that the board of directors is dissolved and the management of the company is taken over by the official liquidator for the purpose of winding up the company. The company, therefore, continues to remain bound by the arbitration agreement just as it would remain bound by any other contract entered into prior to the date of winding up. This becomes amply clear if we look at the provision enacted in section 446, sub-section (1). If an arbitration proceeding is pending against a company at the date of the winding-up order, it cannot, by reason of the bar enacted in section 446, sub-section (1) be proceeded with against the company except with the leave of the Court and except on such terms as the Court may impose. This provision clearly postulates that if leave is granted by the Court, the arbitration proceeding can be continued against the company. But how can the arbitration proceeding be continued if the company ceases to be bound by the arbitration agreement ? Section 446, sub-section (1), therefore, necessarily involves the postulate that the arbitration agreement continues to bind the company even after an order has been made for winding it up.

But then the question is: what is the effect of the arbitration agreement on the jurisdiction of the High Court under section 446, sub-section (2)? Does it in any way impinge upon the jurisdiction or detract from it? Is the enforcement of the arbitration agreement inconsistent with the conferment of jurisdiction on the High Court under section 446, sub-section (2)? The answer must clearly be in the negative. An arbitration agreement does not in any way oust the jurisdiction of the court which is otherwise competent to entertain and decide the dispute. It is a well-settled principle of jurisprudence that parties cannot

by consent confer jurisdiction on the court or oust it. An arbitration agreement is merely a contract between the parties that the dispute between them shall be decided by the private forum of arbitrators. It does not take away the jurisdiction of the Court. A party to an arbitration agreement has a perfect right to bring an action in respect of the dispute covered by an arbitration agreement and the Court has jurisdiction to try such dispute despite the existence of the arbitration agreement. The Court cannot throw out the action on the ground that it has no jurisdiction to entertain it. The court has, of course, discretion to say whether it will try the dispute or stay the action where the other party applies in time and otherwise complies with the conditions of section 34 of the Arbitration Act, 1940, but that is very much different from saying that the court has no jurisdiction to entertain the action. The very fact that the Court may refuse to grant stay of the action shows that the court has jurisdiction to entertain it. When the court stays the action, it does so not because of any lack of jurisdiction but because the court is of the view that a party should not be permitted to proceed with the action in breach of the arbitration agreement by which he is bound. See Russell on Arbitration, seventeenth edition, pages 65-66. There is, therefore, no antithesis between an arbitration agreement and the jurisdiction of the court to entertain the dispute covered by the arbitration agreement.

Here section 446, sub-section (2), confers jurisdiction on the High Court to entertain and dispose of any claim made by or against the company in liquidation and, therefore, if the company files a suit for enforcing a claim against a third party, it would have to be filed in the High Court. But if the suit is filed in breach of an arbitration agreement which continues to be binding on the company despite the making of the order of winding-up, the High Court can, certainly, in the exercise of its discretion under section 34 of the Arbitration Act, on proper application made to it on behalf of the third party, stay the suit with a view to enforcing the arbitration agreement. The High Court would not in such a case be disowning its jurisdiction. It would, on the contrary, be exercising its

> jurisdiction by saying that, though it has jurisdiction to entertain and dispose of the suit, it would hold the parties to their arbitration agreement and stay the suit filed in breach of the arbitration agreement."

(10) The aforesaid observations with which we are in respectful agreement, clearly support the view which we are taking.

(11) In all fairness to Mr. J. S. Narang, reference may be made to a Single Bench judgment of the Allahabad High Court in the matter of *Dehra Dun Mussoorie Tramway Co., Ltd.,* (2) on which the learned counsel has placed great reliance. A bare reading of that judgment would show that the facts of that case are entirely different and the point with which we are concerned, was never debated before the learned Judge. In that case, a suit had been instituted by the Liquidator against the Allahabad Bank Limited for recovery of over two lakhs of rupees on certain grounds. After some time, the Liquidator and the Allahabad Bank Ltd. filed an application for permission to get the difference between them settled by private arbitration. That application of the parties was declined by the learned Judge on the ground that reference to arbitration by the Official Liquidator is not permitted under the Act. In that case, there was no agreement, between the parties, containing an arbitration clause. That was a simple suit for the recovery of an amount of over two lakhs of rupees. But in the instant case, reference to arbitration is being asked on the basis of an agreement entered into between the company and the third party. As observed by the earned Judges in *Star Trading Corporation's case,* when a company is ordered to be wound up, the arbitration agreement is not superseded and the same continues to bind the company subsequent to the order of winding up as it did before. In this situation, as earlier observed, the Allahabad High Court judgment is of no help and assistance to the learned counsel for the petitioner.

(12) As a result of the aforesaid discussion, we hold that a clause existing in an agreement for making reference of dispute to arbitration, continues to bind a company subsequent to the order of winding up as it did before, that such a clause does not impinge upon or take away the jurisdiction of the Court and that it would be for the Court to decide whether to try the dispute which has been brought

(2) A.I.R. 1928 All. 553.

before it or to stay the action where the other party applies in time and otherwise complies with the conditions of section 34 of the Arbitration Act, 1940.

Bhopinder Singh Dhillon, J.—I agree.

N. K. S.

Before M. R. Sharma, J.

UDHE CHAND,—*Appellant.*

versus

PATTI MUNICIPAL COMMITTEE, AMRITSAR,—*Respondent.*

Regular Second Appeal No. 1191 *of* 1970.

September 17, 1980.

Punjab Civil Services (Punishment and Appeal) Rules 1952 —*Vol. I, Part II—Rule* 7(6)—*Delinquent official found guilty in an enquiry held against him—Copy of enquiry report not given to such official—Show cause notice regarding proposed punishment also not given—Requirement of rule 7—Whether violated—Dismissal of Government servant—Whether liable to be set aside.*

Held, that the language employed in sub-rule 6 of rule 7 of the Punjab Civil Services (Punishment & Appeal) Rules, 1952 Vol. I, Part II is pre-emptory in nature and casts a duty on the authority concerned to serve a notice upon a delinquent public servant after he has been held guilty in an enquiry. This notice has to mention therein the proposed punishment which is sought to be inflicted upon him. The said rule also provides that the public servant concerned should be given sufficient time to rebut the allegations against him and in case he makes a representation that should also be given due consideration. Where no notice whatsoever is served upon the public servant it must be held that the action taken against him is in contravention of the aforesaid rule. The said rule provides three types of major punishments that is, dismissal, removal or reduction in rank. In that situation it is open to the public servant to contend that had he been given the statutory show cause notice he might have been able to convince the employee that in the facts and circumstances of the case the extreme penalty of dismissal should not be imposed. As such, the dismissal of the public servant is liable to be set aside. (Paras 8 & 9).