

No need for a written arbitration clause for appointing arbitrator by consent of Parties – Supreme Court of India

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In Swadesh Kumar Agarwal case² decided on 5th May 2022, Supreme Court of India ruled that there is no requirement of a written arbitration agreement between the parties, if the arbitrator is appointed under Section 11(5) of the 1996 Act³ but the existence of a written an arbitration clause is mandatory if an application for appointment of arbitrator is filed in the court under Section 11(6) of the Act. The general mis-understanding about the requirement of a written arbitration agreement is clarified by the Bench of the Supreme Court of India bench consisting of Hon’ble Judges Mr MR Shah & Mrs B.V.Nagrathna.

The fact of the case is that both the parties appointed a sole arbitrator to resolve certain family related issues, by consent. The arbitration got delayed and one of the parties filed an application under Section 14(1)(a) seeking to remove the arbitrator on the ground of the inability of the arbitrator to conclude the proceedings within time. The district court dismissed the case. Hence the aggrieved party appealed to the High Court and also filed an application under Section 11(6) seeking appointment of new arbitrator. The High Court allowed the appeal and also appointed an arbitrator exercising its powers under Section 11(6), which came to be challenged in the Supreme Court of India.

Hon’ble Supreme Court while deciding the said case, settled law that High Court can exercise Jurisdiction under 11(6) only if there is a written arbitration clause and not otherwise. But for the parties to appoint an arbitrator by consent there is no requirement of a written arbitration clause.

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² Swadesh Kumar Agarwal Vs Dinesh Kumar Agarwal & others Civil appeal Numbers 2935-38 of 2022

³ Arbitration and Conciliation Act,1996