Intellectual Property Rights, And Competition Law

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Lecture-32

Introduction to Competition Law in India

Hello all, welcome to this module on Indian Competition Law and Intellectual Property law aspects. In this session, we will discuss about the various provisions of Indian Competition Law. Let us understand, what is Indian Competition Law. In the earlier classes, we have discussed the various anti-competitive provisions mentioned in the European competition policy, particularly the anti-competitive agreements, abuse of dominance in the context of the European Union, how these are perceived, the jurisprudence, how it has developed and with the latest technological advancement how the IP and competition policy are playing important roles in the globalised era. Bringing the discussion forward, let us discuss the Indian Competition Law.

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In this module, we will look into the brief history of competition law in India, what were the earlier provisions, when was the Indian Competition Law enacted. We will look into

the provisions relating to anti-competitive agreements and abuse of dominant position with regard to India.

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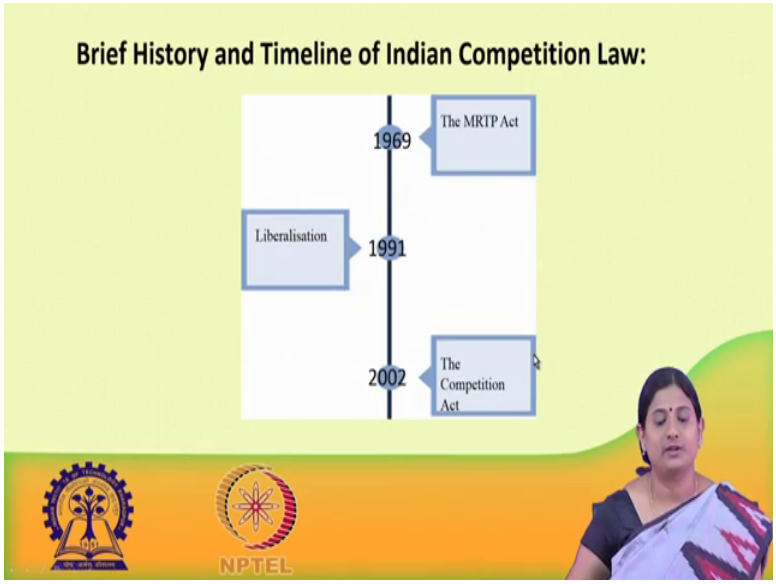

Before the enactment of the Indian Competition Law, the provision relating to the economic power with respect to the market players were controlled by the MRTP Act which is otherwise known as the Monopoly Restrictive Trade Practices Act of 1969. After the economic liberalisation in 1991, the need for a separate competition policy was felt. After various deliberations, finally, in the year 2002 the Indian Competition Law was enacted which came into force in the year 2003.

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The purpose of the MRTP Act was to inquire, investigate and pass remedial measures against restrictive trade practices. Earlier, the concept of anti-competitive practice was not clear in the Indian market. It was, the concentration of the economic power with certain entities, either government or private, because it was agricultural based growth.

India has developed its history from kingdom based system. The economic power were concentrated with one or few organisations. To prevent those, that may lead to anti-competitive behaviour MRTP Act was passed in 1969. But that may not be per se anti-competitive, however, it was regulated by the Act. There were no specific provisions regarding the anti-competitive practices or mergers or acquisitions.

After the economic liberalisation in 1991, when India became a signatory to the WTO agreement in 1995, the Indian economy was opened to the players in India as well as those outside India. There was a need for a level playing field, where the foreign entities or the Indian entities can compete with each other in a fair manner, which would give an inclusive growth to all the players operating in the Indian market as well as provide benefit to the population of India as a whole.

Looking at the liberalisation, the Raghavan committee was constituted in the year 1999 to address some of the changes that might be needed in view of the liberalisation,

particularly in combating the trade related anti-competitive practices. The Raghavan committee looked into various aspects and gave the recommendation based on which the MRTP Act was repealed, and the need for a new modern competition law was proposed on the basis of which the Indian Competition Law was enacted in the year 2002.

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The preamble of the Indian Competition Act of 2002 has four major objectives. First: to prevent the practices having an adverse effect on the competition, Second: to promote and sustain competition in the markets, third: to protect the interest of the consumers, fourth: to ensure freedom of trade carried on by other participants in the markets in India. These are the four major objectives, which the preamble of the Indian Competition Act puts forward.

One of the interesting thing is that, in the preamble itself the economic growth was considered to be inclusive with competition in the market. Earlier competition was never thought to promote economic growth or advancement in the market. However, with the Competition Act, it was proposed that the economic growth is proportional to good or a fair competition in the market. As we discussed earlier, one of the major advantage of intellectual property is that we are getting new innovations. At the same time, it is also motivating others to innovate. Similarly, the Indian Competition Act has mentioned four

major objectives and the motto of the Competition Act is to provide a fair competition, for the greater good of the society, with respect to India.

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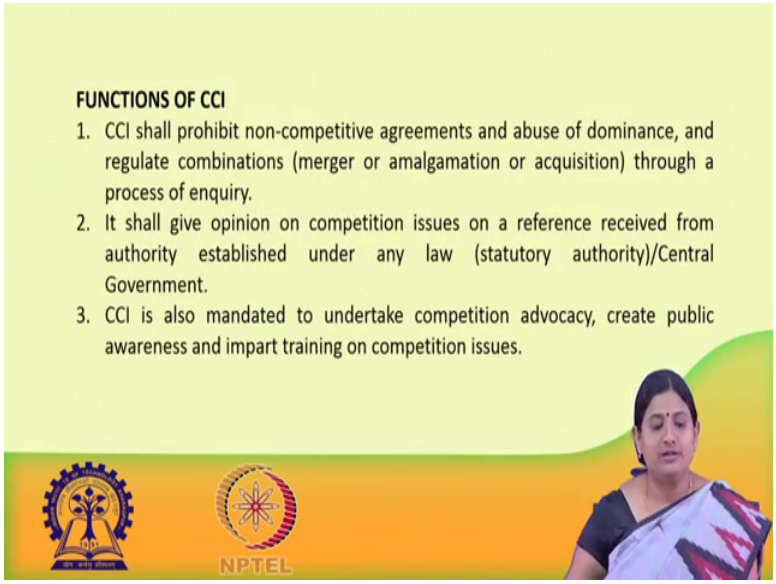

With these objectives, the competition law proposed the creation of a Competition Commission of India. The role of competition commission of India is to prohibit the non-competitive agreements, abuse of dominance and to regulate various combinations such as mergers, amalgamations or acquisitions, through a process of enquiry. It also gives opinion on competition issues when reference is received from any authority established under the law.

It is mandated to undertake competition advocacy, create public awareness and impart training on competition issues. As we mentioned earlier, the MRTP Act was silent about anti-competitive practices. With the commencement of the new act, one of the provisions included was the advocacy of competition law to the general public to create awareness regarding anti-competitive behaviour and competitiveness of a player, in the market. These are the major functions of the competition commission of the India.

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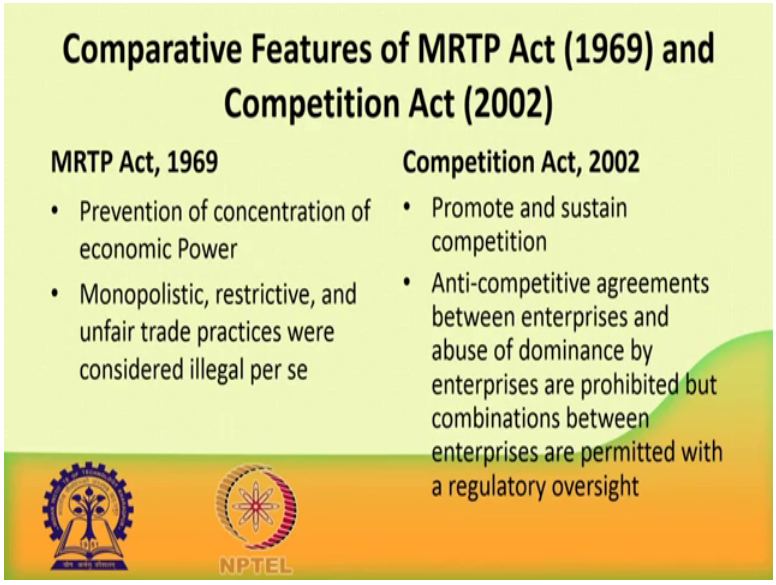

Let us look into, the basic differences between Competition Act of 2002 and MRTP Act of 1969. First: the aim of the MRTP Act was prevention of concentration of economic power whereas the aim of the Competition Act is to promote and sustain competition.

In the MRTP Act, the monopolistic or restrictive and unfair trade practices were considered illegal per se and there was no rule of reason approach. So, if there was monopolistic behaviour or if a behaviour is found to be restrictive in nature, it was considered illegal. However, in Competition Act anti-competitive agreements between the enterprises, abuse of dominance by the enterprise, combinations or mergers or acquisitions hampering good competition in the market, are prevented. Here monopolistic behaviour is not anti-competitive per se, in the Competition Act whereas, the MRTP Act was silent about anti-competitive behaviour.

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In the MRTP Act dominance was per se bad, but in Competition Act abuse of dominance is bad. There was no provision for regulating mergers or acquisitions under the MRTP Act of 1969 whereas, separate provisions have been made in the Competition Act, for regulating mergers and acquisitions.

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There was no competition advocacy in the MRTP Act, competition advocacy is statutory mandate under Section 49 of the Indian Competition Act. In case of the MRTP Act, cease

and desist order was the only remedy with the final appeal before the supreme court under Section 55 and no individual liability provisions existed in that law. Whereas, in the Competition Act, pecuniary fines, division of dominant undertaking besides cease and desist order, two-tier appeal with penalty against an individual found to be guilty of breach of law, provision for individual penalty is present.

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The Director General enjoyed the *suo moto* powers for initiating investigation concurrently with the MRTP commission whereas, in Competition Act there is no *suo moto* powers available with the DG. These are few of the differences between MRTP Act and the Competition Act.

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Let us look into the major provisions of Indian Competition Act. There are three kinds of provisions; first: the enforcement provisions, second: advisory provisions and third: advocacy provisions. Indian Competition Act is unique in the sense that it is having an advocacy provision.

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The enforcement provision deals with prohibition of anti-competitive agreements. Section 3, deals with agreements which can be considered as anti-competitive. Then,

there are provisions relating to abuse of dominant position, Section 4 of Competition Act talks about abuse of dominant position. Section 5 and 6 talks about regulation of various combinations; the conditions under which combinations or mergers or acquisition agreements can be considered as anti-competitive. These are the three enforcement provisions.

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The advisory provision are applicable on the reference by a statutory authority; Section 21 and subsection (1) of Section 49 are the relevant sections for this. There are advocacy provisions as mentioned under subsection (3) of Section 49 to promote awareness regarding competitive aspects of market behaviour. These are the three major provisions of the Indian Competition Act.

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We will now look into the details of these various enforcement provisions. We discussed Article 101, 102 of the treaty of functioning of European Union, how they consider agreements as anti-competitive or abuse of dominant position. Similarly, in Indian Competition Act, Section 3 talks about anti-competitive agreements. It prohibits anti-competitive agreements, both horizontal as well as vertical agreements under Section 3.

Section 3 says that no enterprise or association of the enterprise or person or association of persons shall enter into any agreement in respect to production, supply, distribution, storage, acquisition or control of goods or provision of services which cause or is likely to cause an *appreciable adverse effect on competition* within India. We will also discuss what can be considered as an appreciable adverse effect.

It also specifies that any agreement entered into in contravention of this provision contained in subsection (1) shall be void, further it has specified, what kind of agreements can be considered as anti-competitive.

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Subsection (3) says that any agreement entered between the enterprise or association of enterprise or person or association of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or association of persons, including cartels engaged in identical or similar trade of goods or provision of services, shall be presumed to have an appreciable adverse effect on competition: shall be void. It talks about cartels, formation of cartels, in general all the horizontal agreements, including enterprises which are dealing with identical or similar trade of goods.

We have already discussed in the European Union provisions that when all the market players or any firms or entities are dealing with similar kind of goods and services, the agreement they enter into are known as horizontal agreement, when they are at the same level of supply chain. Subsection (3) tells us that, if any association or enterprise or association of the enterprise and including cartels are engaged in identical or similar trade of goods or provision of services, horizontal agreements shall be presumed to have an appreciable adverse effect on the competition.

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And, it shall be void if it directly or indirectly determines the purchase of the sales price, limits or controls the production, supply, markets, technical development, investment, provision of services or, if it shares the market or source of the production or the provision of services by way of allocation of geographical area of the market or types of goods or services or the number of customers in the market or in any other similar way or directly or indirectly results in bid rigging or collusive bidding.

If any of the agreement is performing any of these four act mentioned in the section, it will be considered as anti-competitive and shall be presumed to have an appreciable effect on competition. The per se rule will be applicable on horizontal agreements and the agreement will be considered as anti-competitive. In the per se rule, there is no reasoning required. The agreements are per se considered to be anti-competitive. One of the important thing about anti-competitive behaviour in case of horizontal agreement is that they are considered to be anti-competitive per se.

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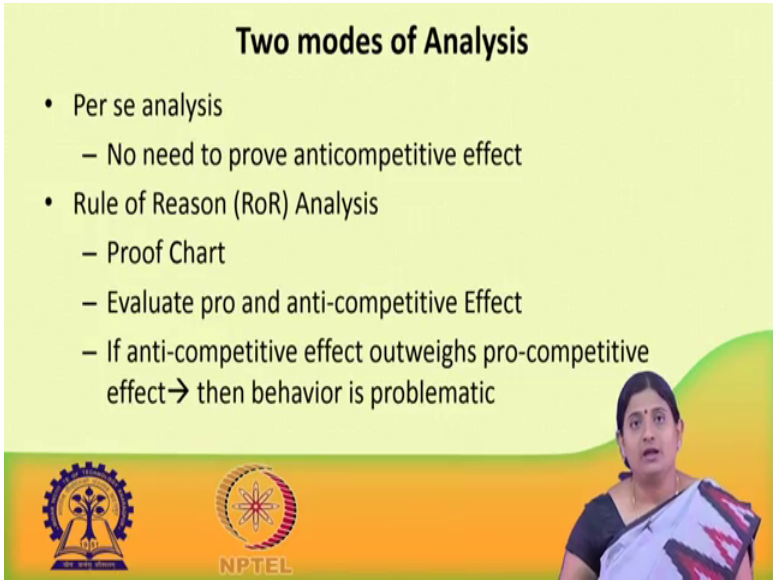

Indian competition commission analyses agreements in two ways of analysis for finding whether any of the agreements are anti-competitive or not. One is known as *per se analysis,* wherein there is no need to prove anti-competitive effects and the second is *the rule of reason analysis*, wherein they will analyse whether the behaviour is leading to any anti-competitive effect or not. Enough proofs would be taken into consideration, and if they outweigh the anti-competitive effect with pro-competitive effect then the agreement will be considered as an anti-competitive. Horizontal agreement is considered per se anti-competitive. There is no *rule of reason approach* used in case of horizontal agreements.

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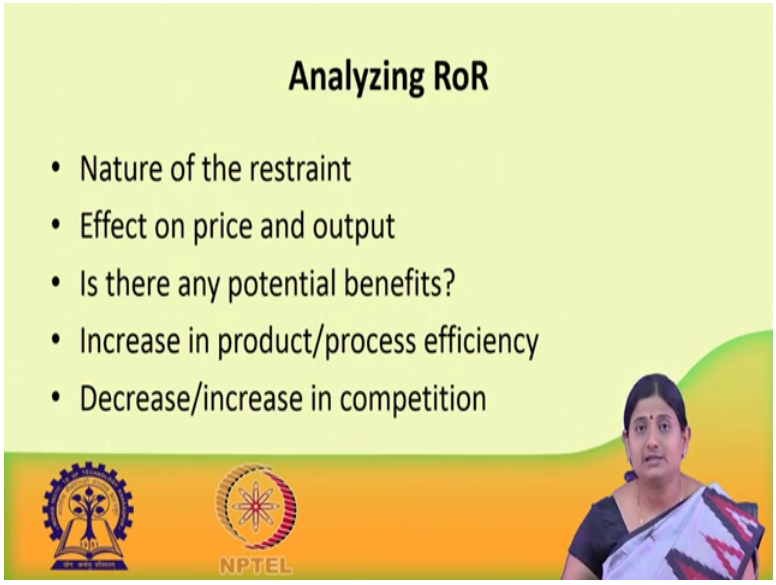

While analysing through rule of reason approach, the commission looks at the nature of the restraint and several parameters such as what restrictions have been put in the agreement, what is the effect on the price or output, on the product and is there any potential benefit of the restriction. They also look into whether there is product or process efficiency achieved by this kind of restriction in the agreement? Whether there is an increase or decrease in the competition? The rule of reason approach, considers all these parameters and outweighs the positive and negatives effects of the restraint, then they decide whether the agreement is anti-competitive or not.

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Let us look into the appreciable adverse effect on competition. What is it? Indian competition law has, in detail, put forward what can be considered as *Appreciable Adverse Effect on the Competition or AAEC*. As per Section 3, appreciable adverse effect on competition will have the following parameters. First: whether it is creating any barriers for new entrants in the market i.e. restrictions in a certain agreement.

Whether it is creating any barrier for the entry of a new player, in the same product category, in the market or not? Whether it is driving the existing competition out of the market. The other parameter which is considered is the foreclosure of competition by hindering the entry into the market, accrual of benefits to the consumer i.e. whether for the price increase consumers are getting any direct benefit or not. Improvement in the production or distribution of goods or availability of provision of services. Promotion of technical, scientific and economic development by the means of production or distribution of goods or provision of services.

All these effects are taken together, and are considered to analyse, whether any agreement is having an appreciable adverse effect on the competition or not. So, it may be possible that something may promote scientific endeavour while at the same time restricting competition. Not a single parameter, but all the parameters are taken together

to consider the appreciable adverse effect of the agreement or restriction put in an agreement.

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So far, we have discussed subsection (3) of the Section 3, about the horizontal agreement and the conditions under which it will be considered as anti-competitive. And also subsection (4) of the section 3, about vertical agreements and the conditions under which vertical agreement can be considered as anti-competitive. We also discussed, in the earlier sessions, that vertical agreements are agreements between players which are operating at different levels of the supply chain.

For example, there is a manufacturer, a distributor or a promoter, these are players at different levels of the supply chain. Any agreement among the enterprise or the persons at different stages or level of production chain, in different market, in respect of production, supply, distribution, storage, sale or pricing or trade of goods, provision of service, shall be an agreement in contravention of subsection (1); if such agreement causes or is likely to cause an appreciable adverse effect on the competition in India.

One of the important distinction from horizontal agreement is that, it is not per se anti-competitive; it is anti-competitive only when it is causing or likely to cause an appreciable effect on the competition. In case of vertical agreement, in general, the rule

of reason approach is applicable to find out whether the agreement is having any appreciable effect on the competition or not. This is an important distinction between horizontal and vertical agreement.

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This section specifies all kinds of vertical agreements i.e. the tie-in arrangements, the exclusive supply agreement, the exclusive distribution agreement. It also deals with the refusal to deal aspect and resale price maintenance. Any of these provisions in an agreement may lead to anti-competitiveness in the vertical agreement.

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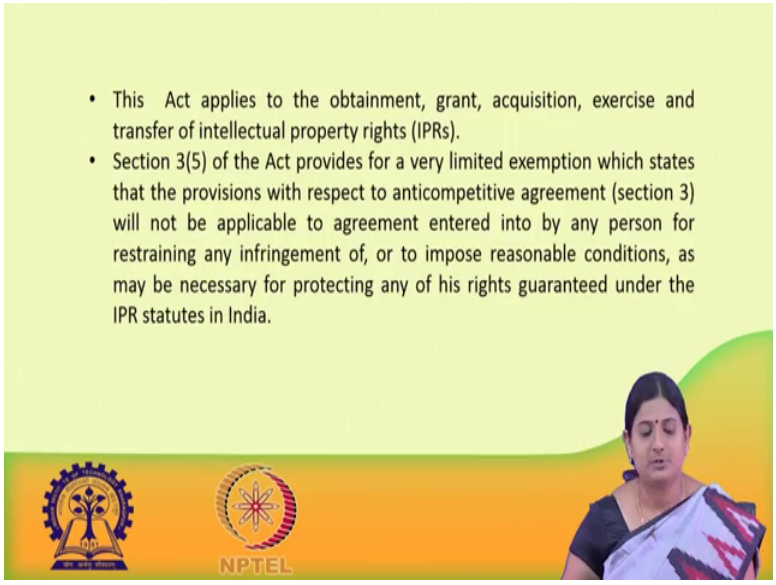

This act is applicable to the obtainment, grant, acquisition and exercise and transfer of intellectual property rights. Sub-section (5) of Section 3 of the Act provides a limited exemption, which states that the provisions with respect to anti-competitive agreement under Section 3, will not be applicable to the agreements entered into by a person for restraining infringement or to impose reasonable conditions, as may be necessary for protecting any of his rights guaranteed under the IPR statutes in India. This is one of the important provisions with respect to intellectual property and interplay of intellectual property and competition law. It states that, any of the rights which are guaranteed by various intellectual property laws in India, will be said to impose reasonable conditions.

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This act also specifies, what are the exceptions to anti-competitive agreements. It says that, the right of any person to restrain any infringement or to impose reasonable condition as may be necessary for protecting any of his right which has been considered upon him under Copyright Act or the Patent Act or the Trademark Act or Geographical Indication of Goods Registration Act of 1999, Designs Act, Semi-conductor and Integrated Circuit and Layout Design Act of 2000, will be preserved and necessary reasonable condition may be granted and, it will not be considered as infringement or it will not be considered as anti-competitive agreement.

This is a one of the important provision with respect to intellectual property and competition law aspect, which we will discuss in more detail by analysis of case laws.

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It also says that, the right of any person to export goods from India to the extent to which the agreement relates exclusivity to the production, supply, distribution or control of goods or services for such export is also exempt from anti-competitive practices. This provision is with respect to anti-competitive agreements under Section 3.

In the next module, we will discuss about various provisions about the abuse of dominant position. Stay tuned.

Thank you.