Intellectual Property Rights, And Competition Law
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Lecture – 33
Introduction to Competition Law in India (Contd.)

Hello. Earlier, we discussed about the various anti-competitive agreements related prohibitions; anti-competitive agreements related clauses vis-a-vis Indian competition act.

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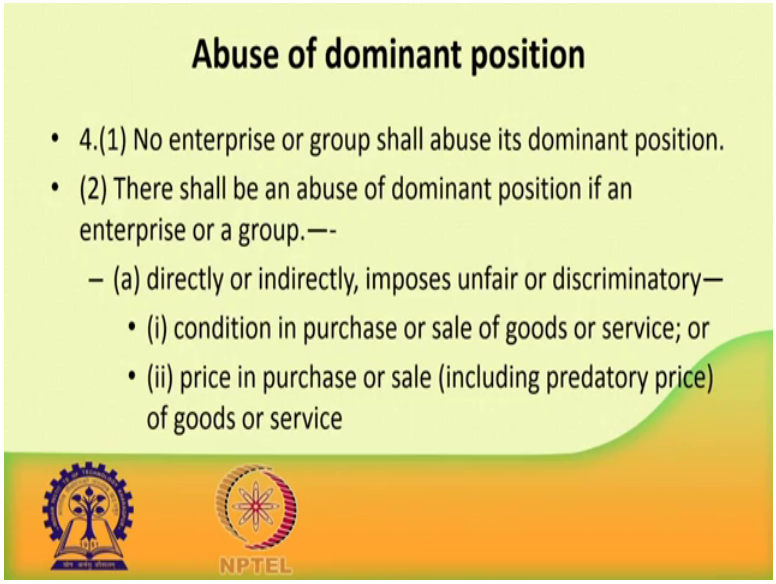

In this section, we will discuss about the provisions regarding the abuse of dominant position. As you know, Being in a dominant position per se is not anti-competitive, the anti-competitiveness comes into picture when someone abuses their dominant position. Section 4 of the Indian competition act per se prohibits the abuse of dominant position and it has categorised what behaviour can be considered as an abuse of dominant position and what practices can lead to abuse of dominant position.

The first thing is imposing any unfair or discriminatory price. These unfair or discriminatory pricing can result due to the condition in purchase or sales of the goods or services or they may also result due to following a predatory pricing for the goods and

services. Predatory pricing means placing the product at such a low price that it eliminates the competition. So if there is a company which is having dominant position in the market and it starts selling the goods at a predatory price, then it may also lead to abuse of dominant position. So, imposing unfair or discriminatory pricing, either directly or indirectly, may lead to abuse of dominant position.

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The second point specified in sub-section (b) of section 4 is the abuse of dominant position. It may result by limiting or restriction of the production of goods or provision of production of goods or provision of services or market thereof. So, if there is a condition by production of the desired product or service is limited, it will also be a kind of abuse of dominant position. If the condition has prevented the development of a new scientific or technical advancement or new goods or services to the consumers, it may also be considered as an abuse of dominant position.

The practices which may result in the denial of market access to other market, access to other consumers or other competitors are also a kind of abuse of dominant position. Conclusion of the contract subject to acceptance by other parties of supplementary obligations which by their nature or according to the commercial usage have no connection with the subject of the contract, are abuse of dominant position. So, if there are certain conditions in the contract which has nothing in relation to the commercial

usage and does not have any connection to the product or the process in question then they are a kind of abuse of dominant position.

If the dominant position is used to enter into or to protect the relevant market, then it also a kind of abuse of dominant position. These are the five clauses, which have been specified in sub-section (4) of the Indian competition act, which gives us an idea of when enterprise or a group of enterprise and what behaviour can be considered as an abuse of dominant position.

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They have defined what is a dominant position. In the European context, we have gone through TTBER agreements and their provisions regarding market players having market share less than 20 percent or when the market players are in similar kind of goods or services and also when they are producing different goods and services and the market share is less than 30 percent in total, then they are exempted from any scrutiny regarding anti-competitive behaviour.

In India, so far, we have not defined any kind of guidelines; however, there is a definition of dominant position. As per the definition, the dominant position means a position of strength enjoyed by an enterprise in the relevant market in India which enables it to operate independently of the competitive forces prevailing in the relevant market or it is

able to affect its competition or consumers or the relevant market in its favour. The behaviour of the player has allowed to operate independently or affected his competitors or they have affected the consumers in the relevant market in their own favour, then it may be considered as a dominant player.

And also, the inclusion of predatory pricing, which means the sale of goods or provision of services at a price which are below the cost; as may be determined by the regulations of production of goods or provision of services, with a view to reduce competition or eliminate competitors, may also allow the company to operate independently.

If something is sold at a very low price or cheaper price, by virtue of the player having a dominant position, which is not possible on the behalf of other players, then it is a kind of predatory pricing. It eliminates the competition because of the predatory pricing. Predatory pricing and other behaviours are specified under which a company's behaviour or a dominant company's behaviour can be considered as an abuse of dominant position.

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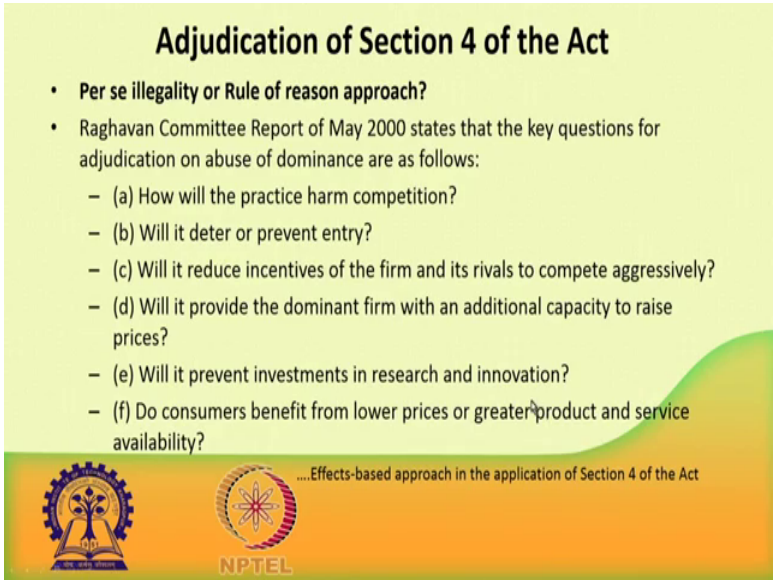

Earlier, it was not specified for example, what kind of approach should be followed to judge whether a company's behaviour is abuse of dominant position or not, whether one should apply the per se rule or the rule of reason approach. Since it was not clear and not clearly specified, the Raghavan committee set in 1999 gave a report in 2000 and stated

that there are certain key questions which needs to be asked before deciding how the behaviour can be adjudicated to be an abuse of dominant position.

They have listed six questions which should be taken into consideration; first: how is the practice is harming the competition i.e. reducing the competition either through predatory pricing mode or by restriction on further innovation or restriction on sales of goods and services? So, which is the practice that is hampering the competition needs to be looked at?

Second: Is the practice adopted by the dominant player really deterring or preventing the entry of new player in the market? Third: Will it reduce the incentives of the firm and its rivals to compete aggressively? Is the practice adopted by the player in dominant position preventing other competitors from making similar products in a level playing competition or not? Fourth: Will it provide the dominant firm with an additional capacity to raise the prices? i.e. does the dominant firm has certain added advantage such as in terms of IP or any technical advancement. Does it enable them to raise the price of a product which is not possible on part of the other players, do they have monopoly over a particular technique or a product by which they can raise the price of that thing or not?

Fifth: Will it prevent investment in research and innovation? i.e. Is the dominant player in such a powerful position that other players are not willing to enter into that product segment thereby preventing the research and innovation in that area or is the dominant player applying certain clauses that are restricting further innovation by the licensee? These things have to be questioned before adjudicating on whether the dominant player is abusing its position or not.

Sixth: Do the consumers benefit from the lower prices or greater product or services availability? Is the behaviour of the dominant player helping the consumers in terms of price or nature or quality of the product or not? All these six questions must be taken into consideration before deciding whether it is an abuse of dominant position or not. All these are *effect based approach* under section 4 of the act.

These are the recommendations of the Raghavan committee. In the Indian competition act, there are certain provisions or certain conditions already laid down by which the

competition commission follows those clauses to determine the abuse of dominant position.

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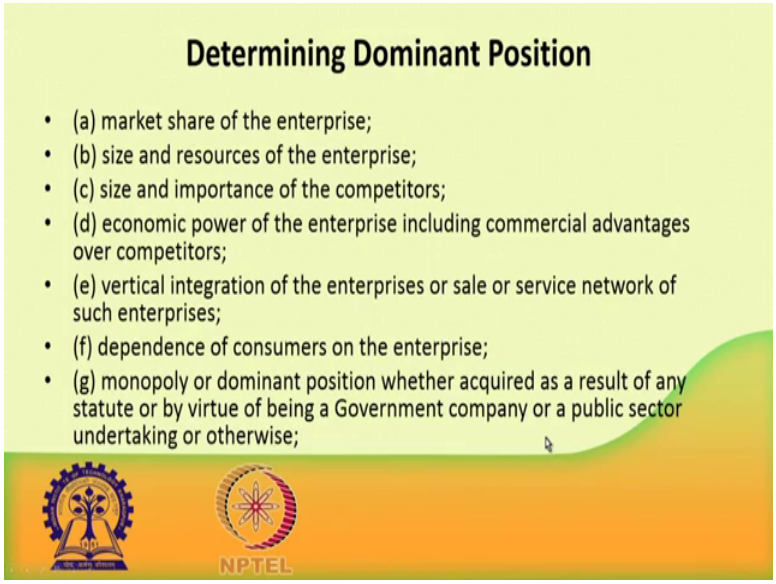

As per the Indian competition law, the competition commission looks into the market share of the enterprise to determine whether a player is a dominant player or not. They first look into the market share of the enterprise. Then the size and resources of the enterprise, then size and importance of the competitor, how the product market is spread by virtue of the firm or the entity in question or the surrounding competitors.

Then the economic power of the enterprise including the commercial advantages over competitors, what extra advantage the competitor is having in terms of IP or know-how or technical advancement. Then vertical integration of the enterprise or sales or services networks of such enterprise. Then dependent consumers on the enterprise, how many consumers are dependent on the enterprise, whether they would shift their loyalty to other company or not. These are looked into to determine whether it is a dominant player or not.

Earlier, we have discussed that if a company A is selling a product at 10 rupees and company B is selling the product at 12 rupees or 8 rupees. Whether a consumer may change base from company A to company B or not, what percentage or what is the

probability that a consumer will purchase things from the second competitor or second firm.

Then vertical integration of the enterprises or sales, monopoly or dominant position whether acquired as a result of any statute or by virtue of being a Government company or public sector undertaking or otherwise, what kind of enterprise is it. These things should be taken into consideration to understand the economic power and what added advantage a competitor is having.

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These are the things which are to be taken into consideration, primarily to determine whether a company is a dominant player or not. Further the entry barriers, regulatory barriers, financial risk of the product, marketing, technical and economical factors, substitution of the goods for the consumer, is also looked into determine the dominant position. Then people's purchasing power, how many consumers are willing to buy the product if it is available at certain price.

Then market structure and size of the market, what are the additional competitive product in that category to which people may get attracted. Then social obligations, social cost, relative advantage by the way of contribution to the economic development. These are the few parameters which have been listed, but may vary.

The commission may take into account all these provisions or may take few of these which are relevant for the product in question or the company in question. These are variables. All these are taken into consideration to determine whether a company is having a dominant position or not. So, first thins is to prove that the company is having a dominant position and second is to analyse whether there is an abuse of dominant position or not.

This is similar in line with the European commission's competition policy, where first step is to establish the dominant position and then to establish the abuse of dominant position. In both the country, European Union and in India the structures remain the same. Depending upon the nature of the market, the considerations may vary, but the basic analysis remains the same in both the cases.

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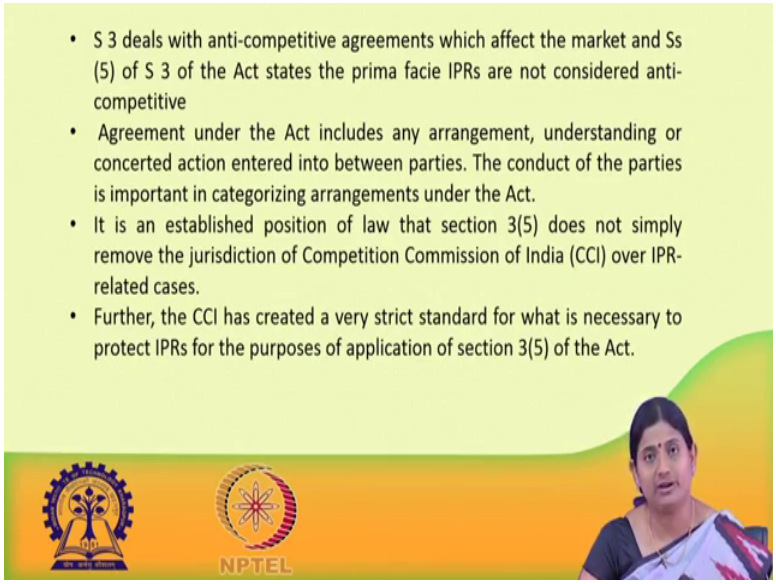

We have dealt with section 3 and section 4. Section 3 specifically dealt with the anti-competitive provisions and various agreements which may affect the competition in the market. And also, it has stated that prima facie intellectual property rights are not anti-competitive, even though they give monopoly power to the owner of the intellectual property right, but it is not anti-competitive. And it has mentioned all the intellectual property laws which are giving certain rights to the owner and by virtue of the competition act it will not be considered as anti-competitive.

As per subsection (5) of section 3, it removes the jurisdiction of the competition commission of India over IPR related cases. So, when any case is related to IPR, the competition commission of India does not directly come into picture unless there are specific conditions. And further, the competition commission of India has created very strict standards so as to consider what kind of arrangement is necessary to protect the intellectual property rights for the purposes mentioned under section 3 sub-section (5) of the act.

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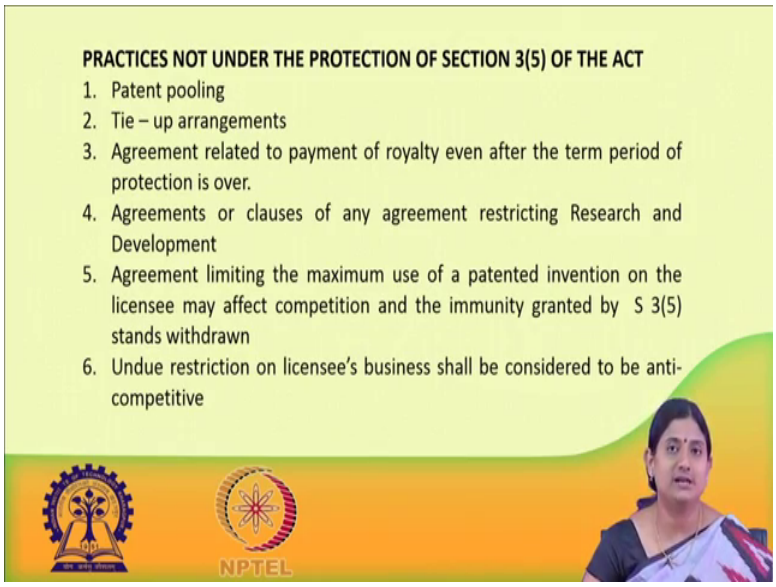

The particular provisions which are not falling under the protection per se given by section 3 sub-section (5) are patent pool agreements, the tie-up arrangements, the agreements related to payment of royalty after the term period of the agreement is over, the agreements on restricting research or development such as when the licensor puts the condition that licensee perform research and development on the technology transferred to them.

Or when there is an agreement which limits the usage of the patented invention such as the number of times or how many numbers of product can be prepared using the technology which has been licensed. All these things are out of the purview of the section i.e. out of the protection per se.

Undue restrictions on the licensee's business shall be considered to be anti-competitive. All these provisions, even though there are immunity related to intellectual property rights, are not immune from the provisions laid down under sub-section (5) of section 3.

So, these are the basics of section 3 and 4, in line similar to the European Union. In the next section, we will discuss about various mergers, acquisitions and combination agreements which can be considered as anti-competitive and what is the status of those kind of mergers or acquisitions in the Indian competition law. Stay tuned.

Thank you.