Intellectual Property Rights, And Competition Law
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Lecture – 36

IP Licensing and Indian Competition Law (Contd.)

Hello all. We will continue our previous discussion regarding IP Licensing and Indian Competition Law. In the previous class, we dealt with the jurisdictional issues that were raised in different cases. Whether CCI: Competition Commission of India is having the power to deal with IP licensing cases or not, was the issue in several cases. We saw in the *Micromax case* that CCI has the power to deal with IP licensing cases. In today's module, we will deal with IP licensing cases, and how they are dealt under the Indian competition law.

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In this module, we will focus on few cases, such as *Shamsher Kataria case*, *ATIO versus Verifone case*, *Justicket versus Bigtree* and *K Sera Sera case*.

These case will give us a brief idea on how different aspects of an IP licensing agreement can create anti-competitive environment and how the competition commission of India deals with such problems.

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The first case was between Shamsher Kataria and the automobile players Honda, Volkswagen, Fiat and other major players in the automobile sector. This is one of the important case in private automobile industry, where the monopolistic power of these private vehicle companies were questioned by Shamsher Kataria.

Shamsher Kataria alleged that the companies like Honda, Volkswagen and Fiat, which are branded car companies particularly personal vehicle company, are creating a monopolistic environment in the automobile segment of India. Shamsher Kataria alleged that these companies are creating a monopoly over the supply of genuine spare parts, repairing and maintenance services.

They are creating monopolistic or restrictive environment, by restricting the sales and supply of genuine spare parts. Their diagnostic tools and various other equipments were required for the servicing of vehicles and that they were not providing the technical information required for maintenance service and repair of vehicles to other, unauthorised or private car repairing service centres.

According to the informant i.e. Shamsher Kataria, all these alleged anti-competitive practices are taking place and the companies like, Honda,Volkswagen and Fiat are taking higher charges for the maintenance of vehicles and they are indirectly determining the prices of spare parts as well as maintenance and repairing services.

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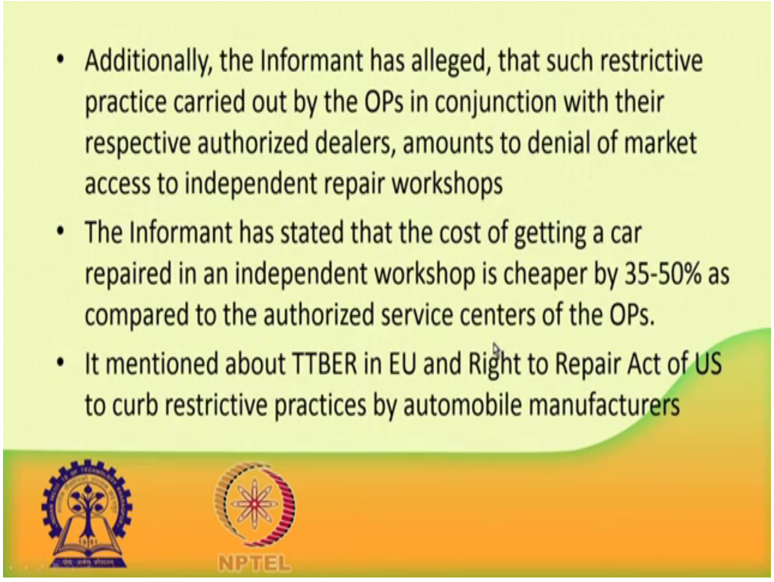

The informant Shamsher Kataria also alleged that, restrictive practices of not supplying genuine spare parts or not supplying information regarding servicing of vehicles, the company i.e. the Defendants are denying market access to independent repair workshops.

There are two segments: the companies which are Original Equipment Manufacturers (OEM) and their authorised service centres. By denying, independent repair workshops, which are not authorised from these companies, the companies have created a restrictive environment and they are denying market access to private players or small players in the Indian market. The informant has stated that the cost of getting a car repaired in an independent workshop is generally cheaper than 35 to 50 percent as compared to authorised service centres. The authorised service centre, since they are the only source of getting supplies, in terms of equipment's as well as services from OEM, charge higher prices. They cited the example of Maruti Suzuki cars because Maruti Suzuki has given access to their spare parts and other servicing requirements to private players.

So, a person can easily, at a cheaper price, get the car repaired or serviced in a private repairing station, but in these cases of Honda, Volkswagen and Fiat getting a car repaired or serviced costs more than 35 to 50 percent. Further, Shamsher Kataria also cited the examples of European Union and US. The creation of a competitive environment in the automobile sector has been given priority, in the European Union as well as the United States.

TTBER has given certain exemption and mentioned certain criteria under which automobile companies can give access to their spare parts or techniques. In some of the states of United States, *right to repair act* has been enacted which curbs restrictive practices by the automobile manufacturer.

The aim of the complainant was to bring to the notice of competition commission of India that these private players like Honda, Volkswagen and Fiat are creating a monopolistic as well as restrictive environment, by denying access to spare parts as well as servicing, to other private players.

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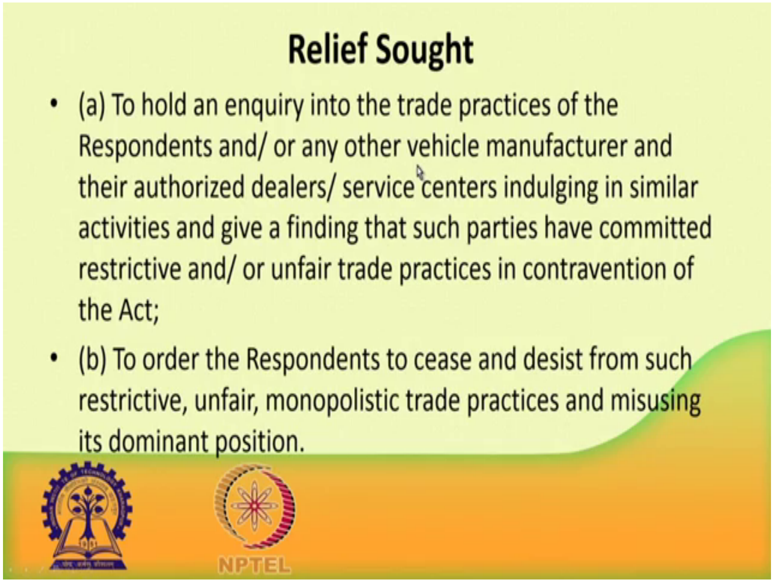

In this case, the informant has requested to hold an enquiry into the trade practices of the respondent and, any other vehicle manufacturers, their authorised servicing centres, which are indulged in similar activities, and to give a finding that such parties have committed restrictive and unfair trade practices in contravention of the Act. He also requested CCI to order a *cease and desist order* on such restrictive, unfair and monopolistic trade practices. He claims that the companies are having a dominant position, are misusing their power and abusing dominant position.

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He also requested to pass appropriate direction for the respondents and that CCI should ask the respondents to supply genuine spare parts and servicing manuals or ask them to make it freely available in the open Indian aftermarket.

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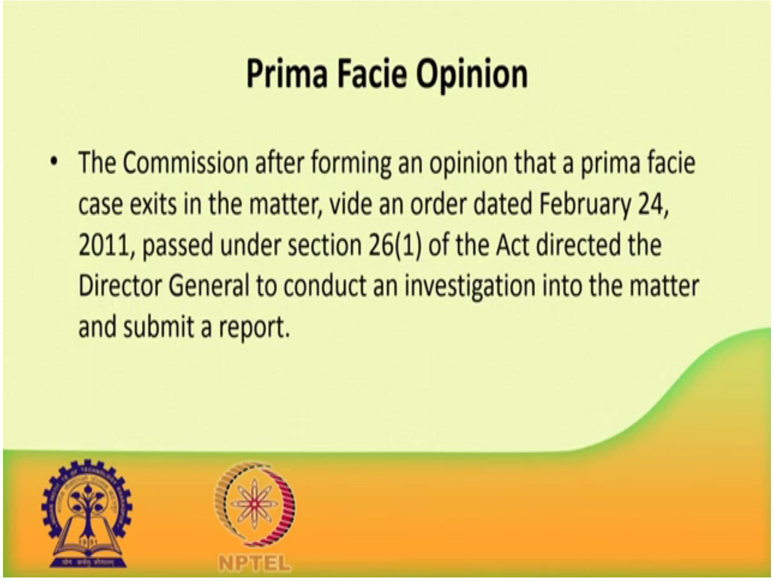

Taking cognizance of this case, the Competition Commission of India made a prima facie opinion that it seems that something is not clear. CCI passed an order in 2011 asking the director general to conduct an investigation into this matter. We have discussed the procedure for investigating a matter. After establishment of a prima facie case, the competition commission of India asked the director general to investigate into this matter. Meanwhile CCI also sought reports from the respondents as to why there should not be an investigation. After getting the two reports, the commission would give its decision.

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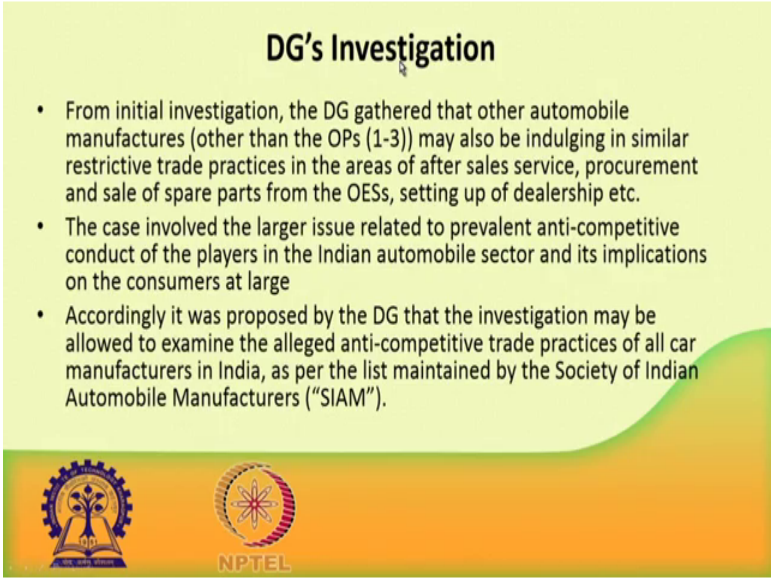

Apart from the three respondents, the director general found that there are other companies in the Indian automobile sector, which are involved in some such restrictive practices in the area of aftersale service, procurement or sales of spare parts from original equipment suppliers, setting up of dealerships.

Most of the automobile manufacturers do not allow private or third party repairers or servicing station to sell their original spare parts and other materials required for the maintenance and servicing of the vehicles.

This case involved a larger issue that there is a prevalence of anti-competitive conduct which is making an effect on the Indian consumer, because the automobile sector is one of the biggest industrial sector in India. The number of people using cars is increasing day by day. And, since the maintenance and servicing costs are very high; it is affecting the consumer at large. It was proposed by the director general that, there should be an investigation into the anti-competitive trade practices for all car manufacturers in India, maintained by the Society of Indian Automobile Manufacturers(SIAM). Not only these three companies named in this case, but the investigation against all the car manufacturers company part of SIAM was to be conducted.

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The competition commission of India tried to find out what is the relevant product market in this case and what is the geographical area in which the case can be dealt with? In this case, there were two separate markets identified for the passenger vehicle sector. First is the primary market, which is the manufacturing and sales of passenger vehicles i.e. direct sales of cars to the passenger. And, second one is the secondary market, otherwise known as aftermarket.

According to the Director General's report, aftermarkets are the market for spare parts, diagnostic tools, other technical manuals and after sales repair and maintenance services which are required after a car has been purchased by a consumer or after buying the primary product. So, primary market and secondary market are the two relevant product market sector in this case.

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The Director General classified these aftermarket segments into two sub-segments. They are first, the supply of spare parts which includes diagnostic tools, technical manuals, catalogues, and other things required for aftermarket usage.

The second sub-segment was the provision of after sale services, which includes servicing of vehicles, maintenance and repairing services. If after accident or normal repairing services are required by the vehicle, then the things necessary for servicing of the vehicle will come under the purview of after sale services.

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The next important criteria to investigate into any case is to find out what is the relevant geographical market? The DG noted that whenever a person buys a car of any brand, he can buy that car from any state of India, spare parts for that particular car brand will be available in all the states. So, it is not necessary that if a person buys a car from some state, he has to repair it or get the spare parts from that state only.

If the car can be repaired or serviced in any of the states, in that case, the relevant geographical market would be the whole country. Two things were identified, first, which is the relevant product segment? There were two market segments, the primary market i.e. the original equipment manufacturer or the car itself, and second, the aftermarket which includes spare parts and other technical manuals, which are necessary for repairing or maintaining the vehicle after sales. Even though, these car companies not located in India, still, since the products are sold in India, it was relevant to this case.

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Let us discuss about the Director General's report regarding the dominance of original equipment manufacturer, in the market, for the supply of spare parts. Since the cars are of a definite brand, these players who are selling them in the primary market are the dominant player.

In order to better understand their dominance in the spare parts sector, DG further investigated and found that, each of these original equipment manufacturer or the branded car companies are a monopolistic enterprise or dominant player in the relevant market of supply of spare parts. Not only spare parts, but also other diagnostic tools, technical manuals, software, etc., which are required for the maintenance and the repairs of a vehicle.

Apart from the original manufacturers, there are no other source from which a consumer can get the required repairing or servicing equipments. For these reasons, it was considered that the original car companies or the original equipment manufacturers are having a monopolistic, dominant position.

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The Director General concluded that the spare parts, diagnostic tools and manual etc. of each of these original equipment manufacturers would constitute an essential facility for independent repairers. In order to define or in order to label something as an essential facility, they have taken into consideration some factors.

They have looked into four factors; first, the control of the essential facility by the monopolist or the original equipment manufacturer. Is there any alternate source available apart from the original equipment manufacturer for the spare part. Second, the inability to duplicate the facility. Is there any other company which can duplicate the same spare part, which will fit into that car or that vehicle. Third, denial of the use of the facility. Can a consumer deny that he does not want to use the spare parts, and that he will use different spare parts. Is there any alternate provision available? Fourth, the feasibility of providing the facility. Is there any chance that any other supplier or spare part manufacturer, can fill the gap or supply the same thing without the original equipment manufacturer’s help.

These things were taken into consideration, and the Director General concluded that, the diagnostic tools, the technical manuals are constituting the essential facility for independent repairers. If the independent repairers are not getting those essential facility, they cannot repair or provide services to such vehicles.

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The dominance has been established, the relevant product market has been established, the relevant geographical market has been established; it has also been proved that several things constitute essential facility. The Director General looked into the implications of refusing to provide essential facilities.

It was contended that the original equipment manufacturers or spare part manufacturers or original equipment suppliers are having certain IPRs. Since IPR is involved, the original equipment suppliers cannot share several things with third parties. They need to get consent from original equipment manufacturers, in order to sell or give the product to any third party.

The respondents contended that, the spare parts are manufactured by the original equipment supplier, based on designs, drawings, technical specification, technology know-hows, which were provided by the original equipment manufacturer. The original equipment manufacturer or the brand or the companies are having certain intellectual property rights. There are technology transfer agreement between the branded company and the original equipment supplier, for that reason, they are prevented to share equipments or tools to any third party. They also claim exemptions on account copyright protection for the engineering drawings and technical manuals.

The technical manual and engineering drawings are a part of literary work and protected by copyright. Under Copyright provision, patents act and designs Act, the respondents claim exemption and express their inability to share these with any third party.

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OEMs further relied on the exemption provided in sub-section (5) of Section 3. The exemptions are thought of as blanket exemption by players. In this case also, they cited sub-section (5) of Section 3, as an immunity from sharing IP, or as a ground for giving reasonable restrictions to enjoy their monopolistic powers.

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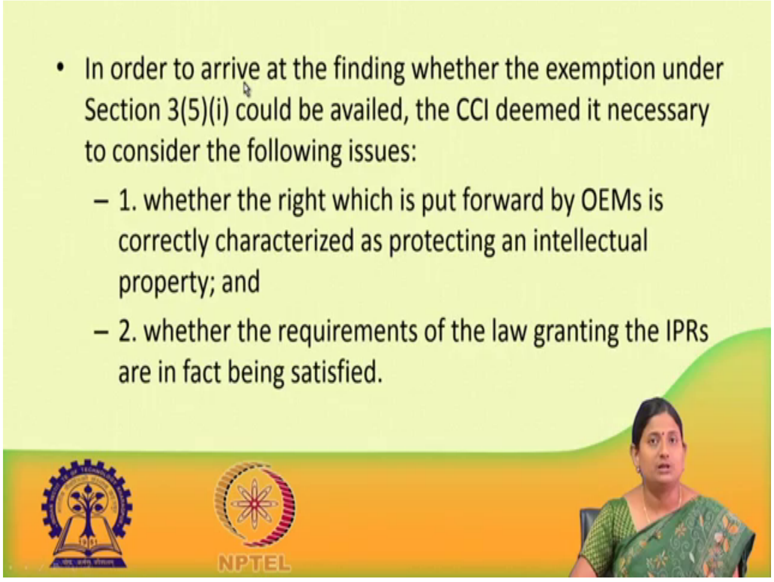

In this case, the competition commission considered two issues; first, whether the right which is put forward by original equipment manufacturers is correctly categorised as protecting an intellectual property. And, whether the requirements of the law granting IPR are in fact, being satisfied or not. CCI investigates into these two questions.

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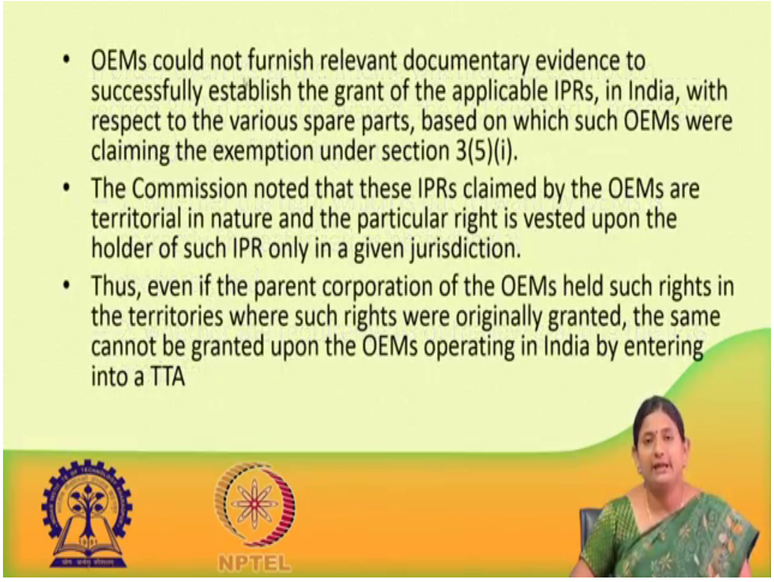

CCI asked the original equipment manufacturers to provide the necessary information regarding intellectual property rights, which they are claiming to have with them. It was found that, the original equipment manufacturers could not provide any relevant documentation, regarding their intellectual property right in India. As we know, patent rights or designs or copyrights are jurisdictional i.e. territory based right.

So, if a person is applying for a patent in India, he can claim those rights in India only. In this case, none of the original equipment manufacturers, could provide patent or any other IP related information which was valid in India. Further CCI found that, even though the parent corporation of the original equipment manufacturer is having certain rights in other territories, But, since IPR are territory based rights, those rights cannot be extrapolated to India i.e. they cannot claim of having those rights in India. Merely entering into a technology transfer agreement with the parent company does not render the intellectual property right to be valid in India.

The ground on which the respondents are arguing, that they are putting reasonable restriction or that they cannot supply those things to the third party because of IPR, proved to be wrong.

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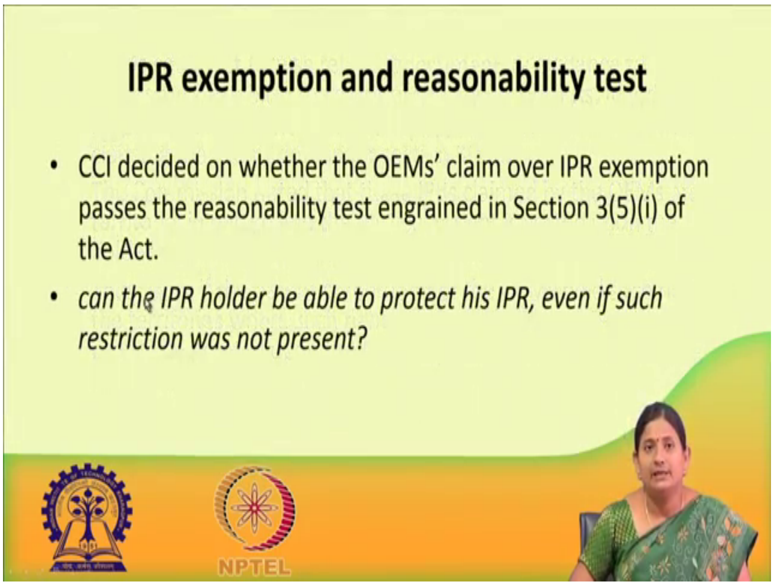

Further CCI decided whether original equipment manufacturer's claim over IPR exemption passes the reasonability test as engrained in the Section 3 sub-section (5)(i) of the Act. The CCI looked into, can IPR holder protect his IPR, even if no restriction to supply to third party existed.

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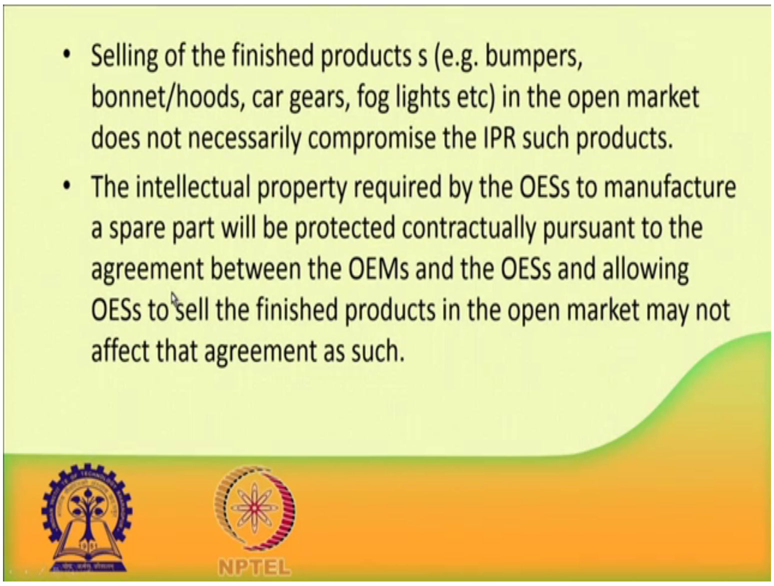

Selling finished product like a bumper or hoods or bonnet or fog lights etc., used in the cars, in the open market does not necessarily comprise IPR, because, the intellectual property which the companies are having, can be protected by any technology licensing agreement. In this case, if the original equipment manufacturers allow the original equipment suppliers to sell their finished product to third party, there would be no violation of any IP. This ground, on which the respondents relied for claiming immunity, was found to be baseless.

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It was proved that the branded companies like Honda, Fiat, or Volkswagen were behaving in a monopolistic was. They were showing monopolistic nature and restricting trade in the automobile sector. The competition commission of the India, directed the original equipment manufacturers to allow the original equipment suppliers to sell the spare parts in the open market i.e. now third parties can get spare parts from original equipment supplier and use those for their own business. In cases where the original equipment manufacturer had certain IPRs on parts, CCI allowed the original equipment manufacturers to charge minimum royalty or fees through contracts on such parts. Hence, IP can be protected by an agreement, they can claim royalty or fees for those.

However, competition commission of India did not decide what will be the quantum of royalty or what will be the exact amount of royalty, because CCI is not a price fixing authority. CCI only provides remedy, by which a problem can be solved and by which private service provider can get spare parts or tools from original equipment supplier.

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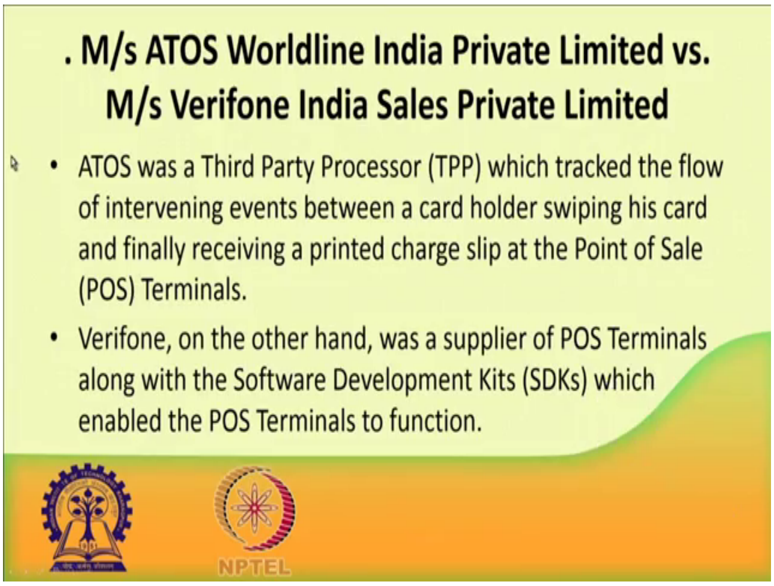

This is one of the important case, which showed that simply having an IPR does not mean that one can put any clause or that one's anti-competitive behaviour can be tolerated. The exemptions provided under Section 3 sub-section (5) is put to prevent infringements of IPR, so that one can enjoy intellectual property rights.

But, IPR does not mean that one can put any restriction which they want. Reasonable restriction under necessary conditions can be placed. That was one of the important case which dealt with IP aspects. But the case never concluded that technical manual or drawings or tools can be protected by IPR such as patent. The commission did not deal with those issues in detail, it only said that having an IP should not be the reason to stop the supply of things which are essential facilities to other third parties.

There was another case of *ATOS Worldline India Private Limited versus the VeriFone India Sales Private Limited*. ATOS was a third party processor, which tracked the flow of intervening events between a card holder swiping his card and receiving the printed charge slip at point of sales. Now-a-days when we go to any shopping mall, we can easily use our debit or credit card and in turn it gives us a receipt saying how much money has been spent. ATOS was a third party processor and the other company Verifone was a supplier of point of sales terminal along with software development kit or

SDK, which enables POS terminals to function. In sum, Verifone supplied POS terminal along with software which enables the third party processor to function.

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ATOS alleged that Verifone had abused its dominant position through restrictive and unfair conditions. Through the draft SDK agreement, it required a purpose clause imposed a restriction on the licensee to use any third party information, for the development of the application.

The application did not allow third party to develop any other application. Further, it was observed that the license restriction clause relating to the disclosure mentioned in the SDK agreement imposes three different disclosure requirement. The licensee had to disclose, to the licensor, from time to time, the activities related to the license software i.e. whatever activity licensee has done with the licensed software. Second: it had to reveal what value added software it has created, Third: it had to also explain what it intends to create using that software. These are the things which the licensee had to reveal to the licensor under the purpose clause.

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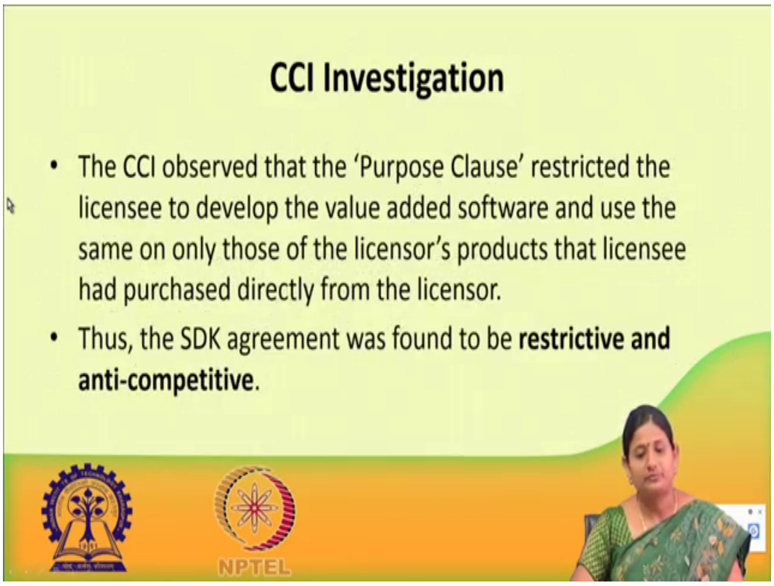

ATOS complained to CCI that these are unfair trade practices. CCI observed that, the purpose clause restricted licensees to develop value added software and use the same as those purchased directly from the licensor. In one way, it restricted the licensee's activity, thus the competition commission found that the SDK agreement was restrictive as well as anti-competitive.

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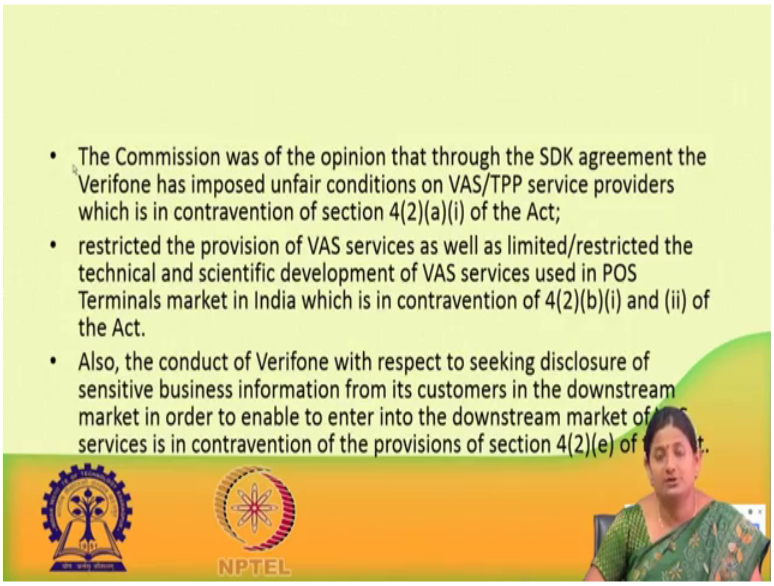

The commission was of the opinion that through thie SDK agreement, Verifone imposed unfair conditions on value added services or third party service provider which was in contravention of Section 4 sub-section (2) of the Act, and it also restricted technical and scientific development in value added service segment. The conduct of Verifone with respect to seeking disclosure of sensitive business information, such as the number of value added services developed, the purpose for which such services was developed, the consumer profiles, under purpose clause was a contravention of Section 4(2), because revealing all the information in the downstream market may create trouble for licensee company.

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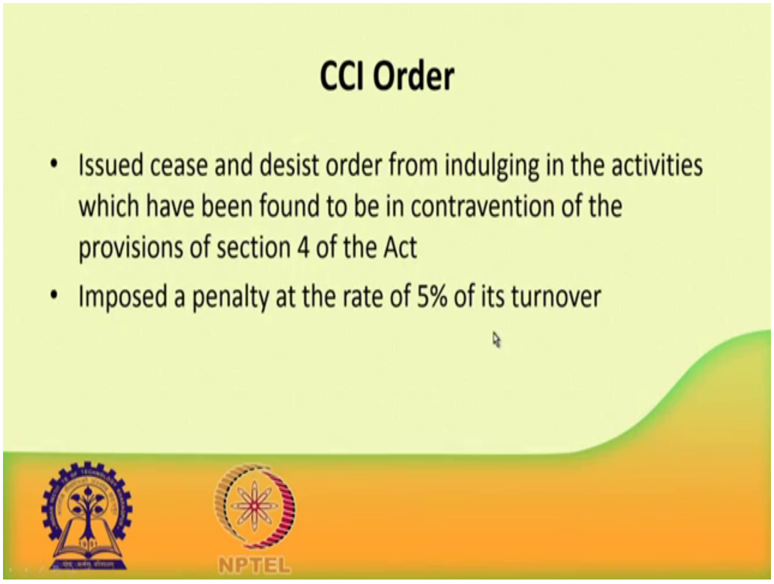

The competition commission of India, in this case, issued a cease and desist order from indulging in the activities which were found to be in contravention of Section 4. It imposed a penalty at a rate of 5 percent of the annual turnover of the company i.e. verifone.

In this case, it was established that one cannot impose unreasonable restriction by purpose clause or SDK agreement. The restrictions in the agreement, were unnecessary restriction clauses in contravention of Section 4 of Indian Competition Act.

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Another case is: *Justicket Private Limited versus Big Tree Entertainment/Vista Entertainment*. Two companies were involved in online ticketing system. Justicket alleged that big tree, which is another online ticketing system and a distributor of the vista program was abusing its dominant position by way of creating barriers for online movie ticketing portals in terms of getting access to vista API. The vista API is an application programming interface, which is created by vista to enable online ticketing portals to integrate with the vista software for data flow and information flow.

Vista API was necessary for creating online portal. It was submitted by Justicket that vista had an arbitrary policy of not granting access of vista API, the Application Programming Interface to another online ticketing portal. There was a denial to give market access in contravention of Section 4 sub-section (2) of Indian Competition Act.

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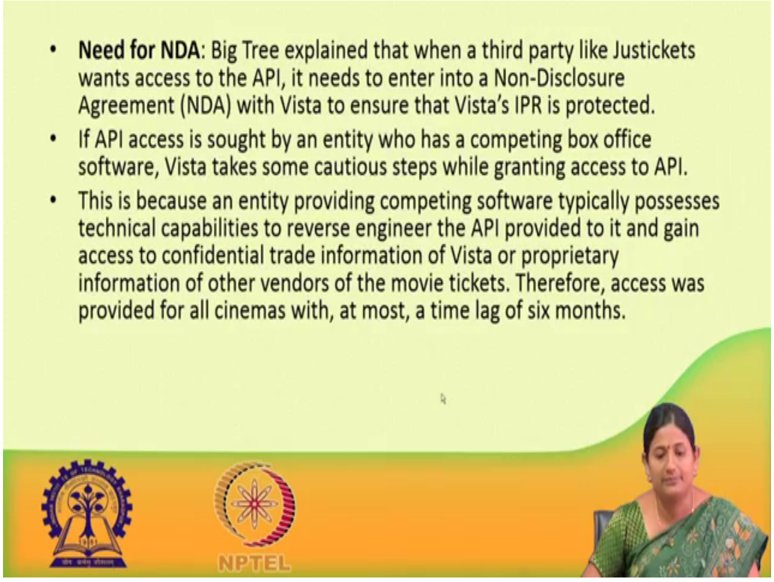

Big tree said that, when a third party like Justicket asks for access to the API, they must sign a non-disclosure agreement with the first informant, because with the help of non-disclosure agreement, vista can protect its IPR. As a supplier of vista, big tree entertainment asked to sign a non-disclosure agreement. They never denied the informant from giving access to the vista API. Both of the companies are having some technical capabilities. By revealing all the information, it is possible that the licensee company can develop more powerful tool by using the same API, which they have received as a license. In this case, vista was taking some time before it gave access to the relevant information. The access was provided, for all the cinemas, for at least with a time lag of 6 months, which was quite reasonable.

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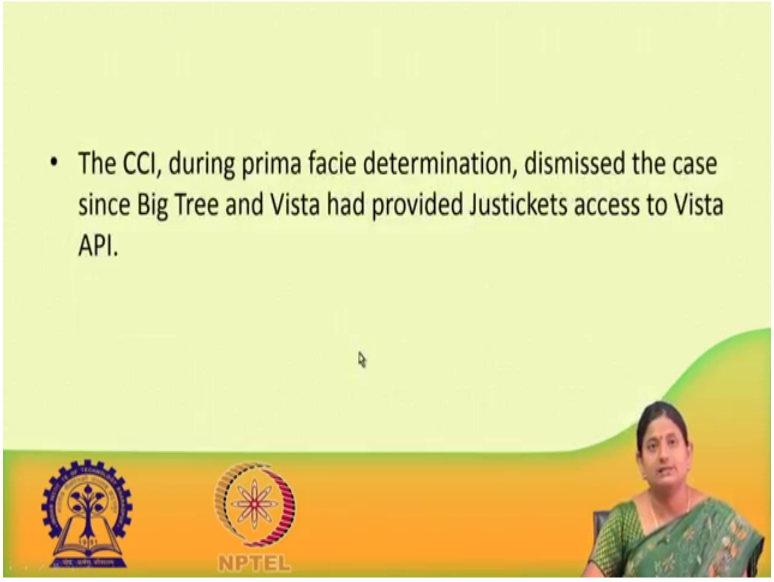

In this case, the CCI determined that the case prima facie does not hold a ground. It was not a violation of Section 4 sub-section(2), because big tree and vista provided Justicket with access to vista API. It is a fact that they asked Justicket to sign NDA, which Justicket did not want to sign. But there was no denial of access to the market. Hence, the case was dropped.

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One of the other important case was *the K Sera Sera digital cinemas limited versus pen India limited and others*. K Sera Sera, which is a digital cinema service provider, used to make movies into a compact digital form. It was alleged that the opposite parties, which are producers or presenters of movies entered into an anti-competitive arrangement with a view to only provide the content of movies to parties other than K Sera Sera. Several companies except K Sera Sera entered into the anti-competitive agreement.

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In the response to this allegation, pen India as well as other companies revealed that they entered into an agreement, because they have a concern that if a movie is released to K Sera Sera, it may result into a copyright violation. In this regard, they submitted evidence of a press release note. In an earlier instance, K Sera Sera was alleged of copyright violation for a movie produced by Viacom 18.

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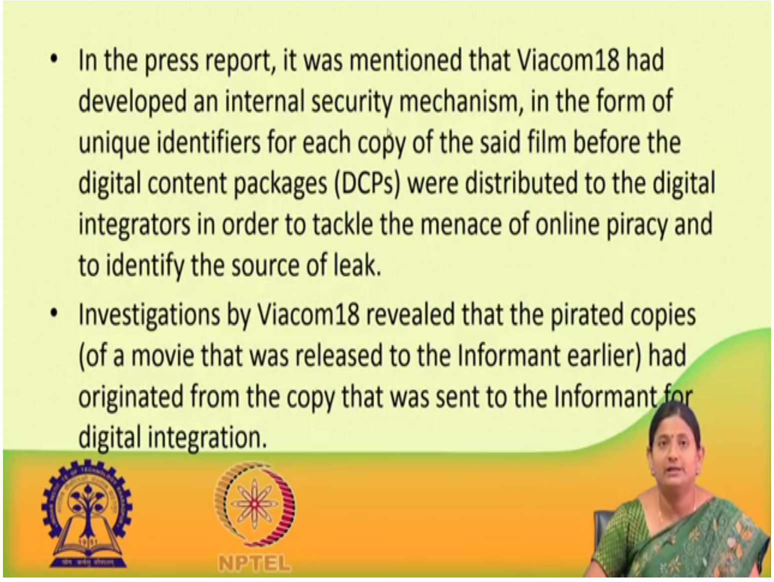

Viacom 18 had developed an internal security mechanism, in the form of a unique identifier for each copy of the movie. Before the movie is made into digital content package, it is distributed to digital integrators in order to stop online piracy and to identify the source of leakage. One of the movie package leaked. When the case was investigated, Viacom 18 revealed that, the pirated copies of the movie had originated from the copy which was given to K Sera Sera. K Sera Sera was accused of giving the copy for piracy and for copyright violation of the digital cinema. For this reason, they thought of excluding K Sera Sera from giving digital cinema content.

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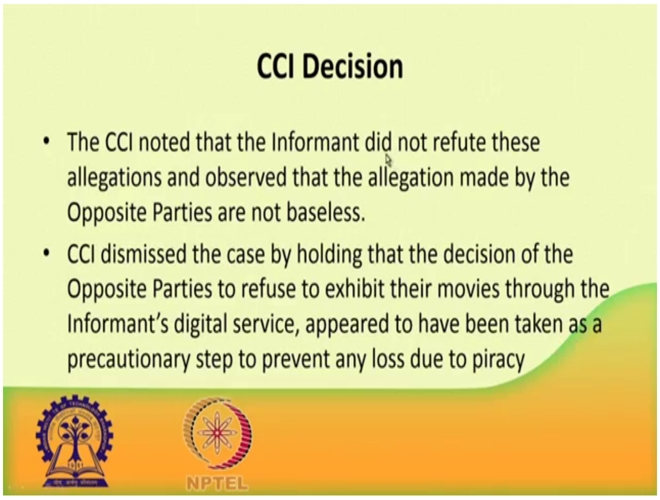

In this case, the competition commission noted that, the informant i.e. K Sera Sera did not refute the charges made against him i.e. the piracy of the movie by Viacom 18. The allegations made by the opposite parties are not baseless, they had certain substance in their allegation. The commission of India dismissed the case, by holding that the decision of opposite parties to refuse to exhibit their movie from the informant i.e. K Sera Sera's digital service was a precautionary step to prevent any loss due to piracy. The so-called anti-competitive agreement as alleged by K Sera Sera was not in contravention of Section 3 of the Indian Competition Act. It was a precautionary measure as they did not want to give their digital cinema content to K Sera Sera. But this was not a violation of Section 3 of the Indian Competition Act.

All these cases, give us an insight on how the competition commission is dealing with different aspects of intellectual property licensing. The reasonable restrictions put in a licensing agreement, are they necessary or reasonable? The competition commission of India, in each case, individually, depending on the merit of the case, tries to find out reasonable conditions or the necessity of a restriction so that, the agreement cannot be termed as an anti-competitive agreement and in cases where it is found to be anti-competitive, CCI has given penalty or tried to modify the agreement or given applicable directions to the parties involved.

These were few examples. In the next few classes, we will also deal with more interesting cases.

Thank you for watching this video.