



FACULTY OF JURIDICAL SCIENCES

COURSE: B.B.A.LL.B. IX th

Semester

SUBJECT: COMPETITION LAW

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LECTURE 18

TOPIC: ANTI-COMPETITIVE AGREEMENTS AND IPR EXEMPTION UNDER SECTION 3(5) OF THE ACT

Section 3(5) of the Competition Act envisages that nothing contained in Section 3 (prohibiting anti-competitive agreements) shall restrict the right of any person to prevent infringement or imposing of reasonable conditions that may be necessary for protecting his/her intellectual property rights i.e. copyright, trademark, patent, designs and geographical indications.

In the aforesaid context, CCI states that any 'reasonable condition' imposed for protection of IPR would not attract Section 3, however, imposition of 'unreasonable condition' to protect IPR would contravene Section 3 of the Act. The CCI provides an illustrative list of practices/agreements which though entered into for protection of IPR may contravene Section 3 of the Act. Such practices/agreements are:

- **Patent pooling-** may be a restrictive practice if pooling firms decide not to grant license to third parties;
- **Tie-in arrangement-** If under the tying arrangement, licensee is required to acquire particular goods solely from the patentee then it may be a restrictive practice;
- Agreement to continue payment of royalty even after the patent has expired;
- Clause restricting competition in R & D;
- Licensee may be subjected to a condition not to challenge the validity of IPR in question.
- Licensor fixes the price at which the licensee should sell.

- A licensee may be coerced by the licensor to take several licenses in intellectual property even though the Licensee may not need all of them.
- Condition imposing quality control on the licensed patented product beyond those necessary.
- Restricting licensee's right to sell the product of the licensed know-how to persons other than those designated by the licensor.
- Undue restriction on licensee's business could be anticompetitive.
- Limiting the maximum amount of use the licensee may make of the patented invention may affect competition.
- Condition imposed on the licensee to employ or use staff designated by the licensor.

Shamsher Kataria's case elaborately dealt with provision of IPR exemption under Section 3(5) of the Act. In the case the OPs had claimed IPR exemption under Section 3(5) of the Act and stated that the restrictions imposed upon the OESs (original equipment suppliers) from undertaking sales of their proprietary parts to third parties without seeking prior consent would fall within the ambit of reasonable condition to prevent infringements of their IPRs. The Commission observed that in order to determine whether an exemption under Section 3(5) of the Act is available or not, it was necessary to consider:

a) Whether the right which is put forward is correctly characterized as protecting an intellectual property?

b) Whether the requirements of the law granting the IPRs are in fact being satisfied?

The CCI in view of the facts and circumstances prevailing in the case held that the exemption enshrined under Section 3(5) of the Act was not available to those OEMs (original equipment manufacturers) who had failed to submit the relevant documents evidencing grant of the applicable IPRs in India, with respect to the various spare parts.

The CCI also stated that the OEMs had failed to show that the impugned restrictions amounted to imposition of reasonable conditions, as may be necessary for protection any of their rights.

The CCI in the case also rendered the clarification that though registration of an IPR does not automatically entitle a company to seek exemption under Section 3(5)(i) of the Act and the essential criteria for determining whether the exemption under Section 3(5)(i) is available or not is to assess whether the condition imposed by the IPR holder can be termed as “imposition of a reasonable conditions, as may be necessary for the protection of any of his rights”.

Exercise:

1. Which agreement is treated as Anti Competition arrangement in most of situations?
 - a) Horizontal
 - b) Vertical
 - c) Straight
 - d) Triangular

2. _____ arrangement affects the price, production and sales
 - a) Vertical
 - b) Horizontal
 - c) Straight
 - d) Triangular

3. Vertical agreements are treated more _____ than horizontal agreements as prima facie
 - a) Liberally
 - b) Leniently
 - c) Equally

d) None

4. Horizontal agreement is more likely to _____ competition than an agreement between firms in a buyer seller relationship

a) Reduce

b) Increase

c) Enhance

d) add

5. Who is said to be Competition Watch dog in India?

a) CCI

b) SEBI

c) DGFT

d) Union Government