Intellectual Property Rights, And Competition Law
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Lecture - 11
Bid - Rigging

Dear students, we already talked about cartelization-one of the anti competitive practice, and in this class we are going to talk about Bid Rigging. You may have heard about bid rigging. Presently all the government purchases or other purchases use online bidding.

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Bid rigging is again considered to be anti-competitive in nature; and we will see How it is anti-competitive? Why it is anti-competitive in nature? And what is the purpose of these bidding? The purpose of bidding is to get best prices. You purchase on best prices and that is why bidding is required so that different producers can offer different prices for the similar goods which you want to purchase. And the bid rigging, the entire bid rigging process vitiates the entire process of these bidding itself. The bid rigging means that, any agreement between enterprises or persons engaged in identical or similar production or trading of goods of provision of services which has the effect of eliminating or reducing competition.

So ultimately, bid rigging has a direct impact on eliminating competition or reducing competition in the market and is considered as anti-competitive in nature. And there are different forms of bid rigging i.e. one is bid separation i.e. all the people are refrained from bidding so that any one of them can bid for the same. And Secondly, complementary or cover bidding in which you are submitting bids at too high prices with unacceptable terms. So that, you go to the negotiating table and negotiate with them and fix the prices.

And thirdly bid rotation where competitors agree to take turn, one by one as the lowest bidder. So, this time I will be the lowest bidder the next time you will be the lowest bidder; there is an arrangement like cartel, there is an arrangement between the suppliers for supplying the lowest bid. Then subcontracting, i.e. there is a collusion between the competitors and they get sub-contracts from the successful bidder. So, you go for the bidding and we will also get a pi of the entire cake that is subcontracting. And all these are considered to be pernicious to the market and also to the price of it.

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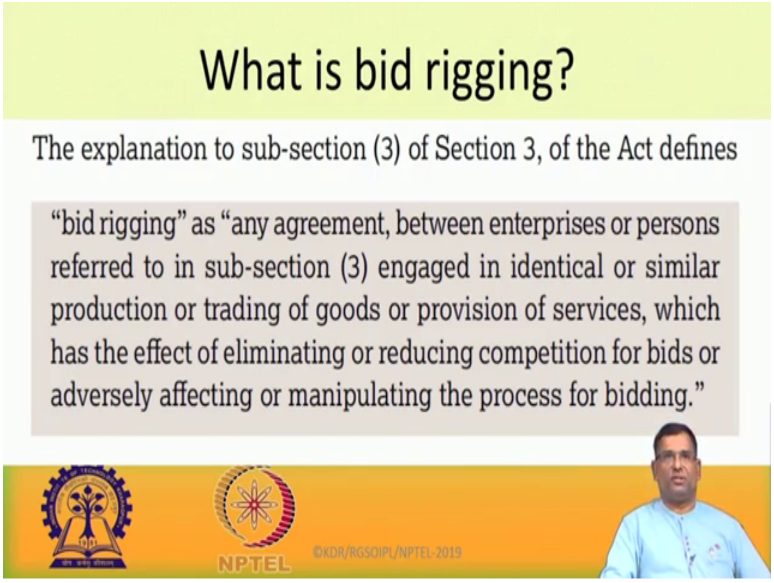

And bid rigging is explained in section 3 of the Act, it is defined as any agreement between enterprises or persons referred to in sub-section 3 engaged in identical or similar production or trading of goods; provision of services which has the effect of eliminating or reducing competition for bids or adversely affecting or manipulating the process of bidding. So, the definition simply says that it is an arrangement between a group of people for fixing the prices.

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So, bid rigging or collusive tendering is the practice where the firms agree amongst themselves to collaborate or co-operate with each other for the tender. So, you can see that again like cartel there is a collaboration or agreement between the participants of the bid. We are not going to the cases.

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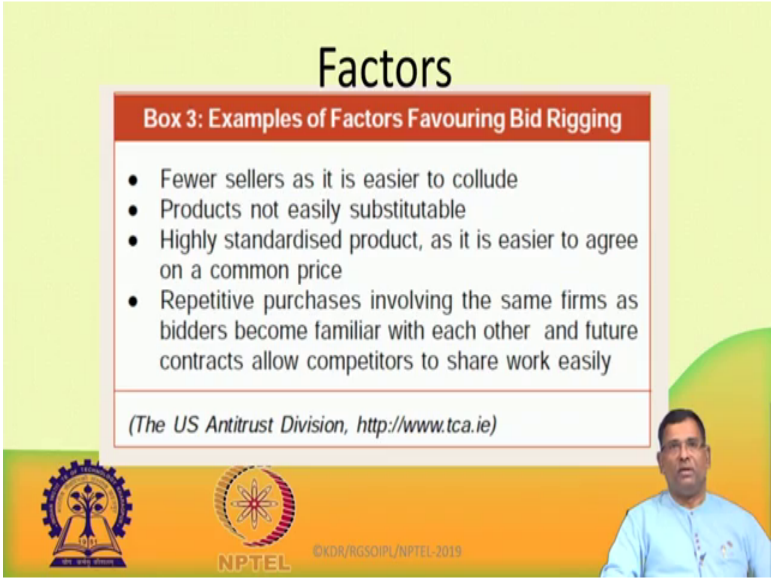

And some of the factors are mentioned by the US Antitrust Division very clearly i.e. fewer sellers as it is easier to collude, if you know few number of sellers then it is easier to collude in bed rigging. And then if the products are not so easily substitutable they can rig the bid. Then highly standardised product easier to agree on a common price. Then again repetitive purchases involving the same firms as bidders, they become familiar with each other and in future contracts allow competitors to share work easily. So, these are some of the examples of factors favouring bid rigging, favourable to the bid riggers.

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Again the US Antitrust division has set some illustrative indication of this. So, the same company always wins a particular procurement contract, then they can go for rotation or they can go for subcontracting and the same suppliers submit bid on each company seems to have taken turns.

We talked about this that they take turns. And then on the higher prices from time to time. Then, the bid prices drop whenever a new infrequent bidders submits a bid, so that they can eliminate that new bidder and they can continue with the bid rigging process.

And then there are irregularities for example, identical calculation or spelling errors, handwriting. But now you see computer is used. So, there is no question of identical handwriting but the same kind of forms used, all these give a suspicion on the bid rigging. These are the evidences of bid rigging to look upon.

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How the process of bid rigging takes place? The bid rigging are always an agreement between a group of bidders to eliminate competition in the procurement, the entire procurement process of any goods. And to ultimately fix the prices, so definitely the prices will be going high because then only they can make the maximum profit.

So, one competitor submits the bid and the another one agrees to submit a non-competitive bid which is too high or which is unacceptable to the buyer. Then competitor agrees not to bid or to withdraw a bid from the consideration and this is also part of a bid rigging.

Then the competitors agree to submit bids only in certain geographical areas or only to certain public organizations so that they can divide the public organisations. You submit in these public organizations and I will submit on these public organizations. They divide amongst themselves these particular organizations so that they can always fix the prices. They have one thing in common: the bidders agree to eliminate competition and fix the prices these are the two conditions which is always present in any kind of bid rigging.

It is illegal in most of the countries. The price fixing and market allocation is illegal in almost all the jurisdictions. And the collusion of firms in procurement and bidding is always in a predetermined level and they collude with each other.

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If you look into the forms of bid rigging, you can see the bidding may take in different forms, they may be bid suppression. Bid suppression schemes include one or two bidders who are supposed to submit their bid or have previously bided and who has the most chance of getting the bid, he agrees to the refrain from the bidding or withdraws from previously submitted bid so that the designated winning competitor's bid will be accepted so that means, even though the lowest bid is submitted, later on they can come to an agreement that the other person will withdraw from the bidding process so that a particular bidder can get the bid in his favour and so that they can fix the prices.

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The second category is the complementary bidding, and complementary bidding is for cover up, it is courtesy bidding. It is to cover up the main bid; that means the competitors agree to submit bids, but actually there is no competitor. Because, even though he submit the bids, he will put very high prices which would not be acceptable to the buyer. It is not a genuine bidding. So, the complimentary bidding is not going to be genuine at all, it is always going to be very high prices, which are not acceptable to the purchaser.

This is one of the most common type of rigging, because it seems to be that there are bidders but actually these are bid rigging and so they can defraud the purchasers by putting, creating various barriers to the competition and inflate the prices. So simply there is a group of bidders but there is actually one designated bidder because of these complimentary bidding or bid rigging.

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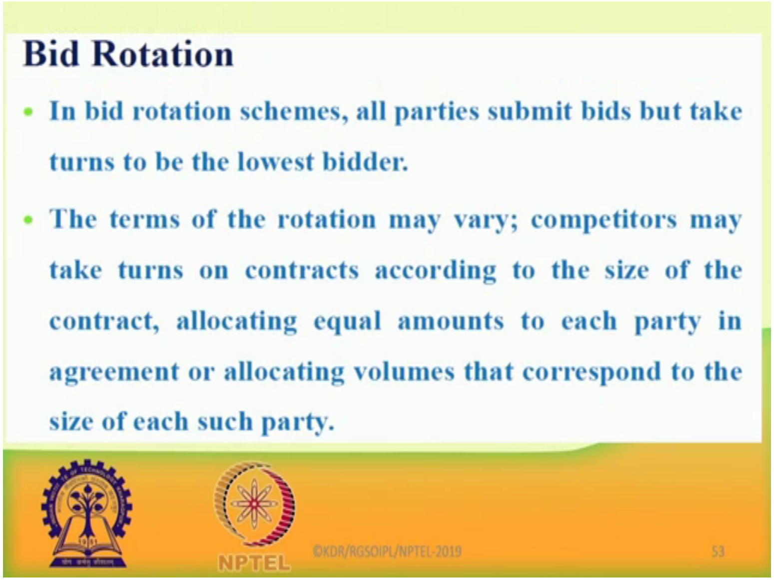

And then bid rotation which I already talked about. In rotational schemes all parties participate in the bid, but always the lowest bidder will be the designated person. So, that the next time another person can be given on rotation basis. The objective is very clear, it is fixed whom to be given the bidding, who is going to be the bidder and also to fix the prices.

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Then another form is the market allocation. The market allocation can be territorial allocation or a particular market allocation. So, for example, the entire market is divided into maybe south, north and east and west. And one company is designated for one region and another company is designated for another region. And market allocation is also considered to be a bid rigging process.

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And market allocation can happen. Basically it is sheltering from competition. Because, in this particular market I have various kind of advantage so you do not bid in this, you give me this particular region and you operate in that another region.

So, he may not have any production of goods in that particular area. And also he is not going to sell that particular product in other particular geographical territories and not soliciting or selling to the existing customers of each other, not to disturb the customers by the competitors. So, there is an agreement amongst the suppliers not to disturb the market, not to disturb the regionality, not to disturb the existing customers and this is known as market allocation.

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And market allocation is also considered to be, it is a part of bid rigging. Then another form is the output control and limiting production, absolutely considered to be illegal as per the ***per se rule***.

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The exemptions you can find is joint ventures. And all horizontal agreements are considered per se to be a harm to the competition and illegal. So, the exemption is offered to one category of association that is known as joint venture in order to enhance efficiency. But, this is not an exception actually and they have to show certain advantages to the society and benefits to the society, ultimately benefits to the consumers then only these exemption will be applicable.

So if the enterprise can show certain advantages, then only it will be exempted from this kind of anti-competitive practices.

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Then, usually intellectual property protection, which we will discuss when we discuss about intellectual property versus competition, under section 3 is exempted from the competition provisions.

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And export cartel exemptions; so, here again the Act provides restrictions relating to anti-competitive agreement cartels. So, in the case of exporting goods from India the agreements relate exclusively to production supply, distribution and other things; because, other countries will take care of the competition issues in their markets.

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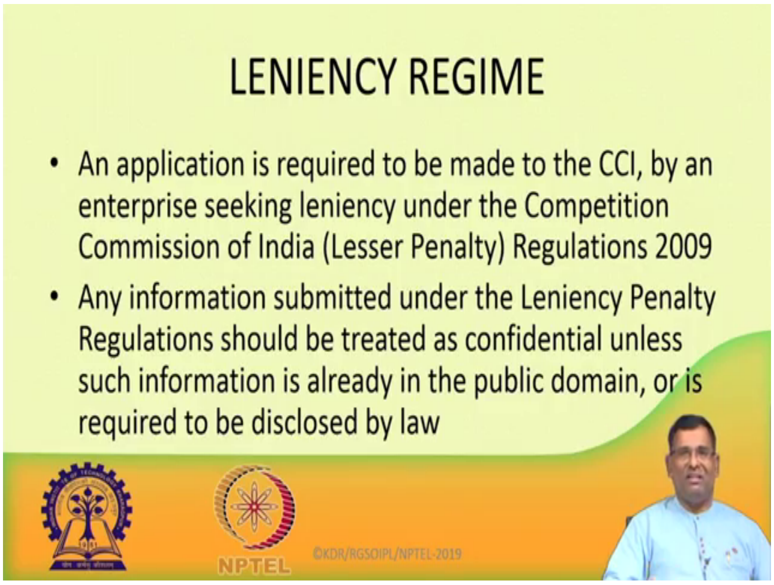

And the leniency regime: there is a prohibition in the Indian Act. The CCI provides leniency regime for the enterprises. This is nothing but that the competition commission imposes a lesser penalty, based on the regulations in 2009, for those who co-operate and those who share confidential information and data to the competition commission. According to this provision any one of these cartel participant can co-operate with the competition commission of India and provide information. So, they will be punished less under these leniency regime or leniency regulations of 2009.

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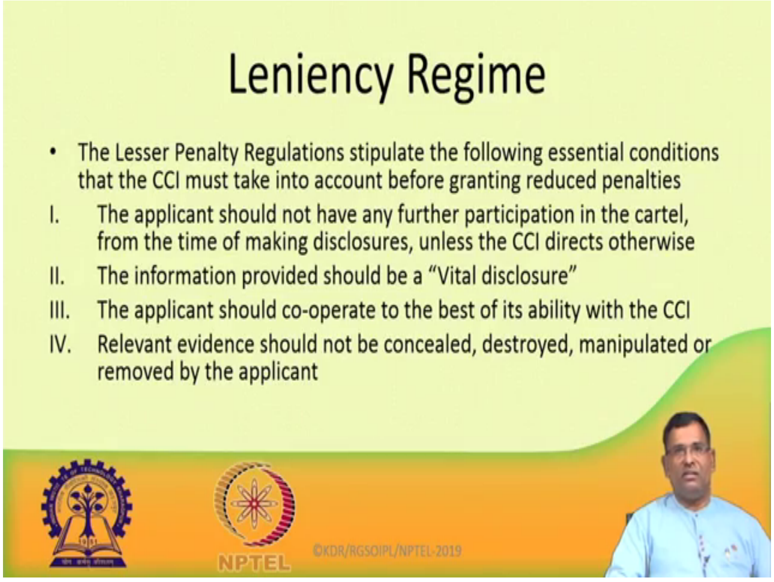

In the leniency regime, the applicant should not have any further participation, that means certain conditions to be fulfilled for participating in this particular program. They should not be any more with the cartel and the second condition is that the information provided by the member of the cartel should be vital disclosure. And thirdly, the applicant should completely cooperate to the fullest extent with the Competition Commission of India.

And the relevant evidences should not be concealed, destroyed or manipulated nor removed by the applicant after they participate in the leniency program. If all these conditions are fulfilled, they can participate in this program and get a lesser penalty when compared to the other participants in the cartel program.

So, in this particular class I tried to explain what is bid rigging as another common anti-competitive practice. First we discussed about cartelization, different cartelization, this class is on various forms of bid rigging in a common form, which are adopted by the business enterprises.

Ultimately the purpose of bid rigging is to fix the grant of bid as well as fix the market, fix the prices based on markets, regionality and other conditions. So, this will always affect the market and ultimately it is harmful to competition, it is harmful to the consumer interest. So, it is anti-competitive in nature. And so, the anti-competitive agreements which we discussed is complete. And in the next classes we will go to the abuse of dominant position and other activities which are prohibited under the Competition Act.

Thank you.