Intellectual Property Rights, And Competition Law

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Lecture - 38

IP Licensing and Indian Competition Law (Contd.).

Hello again, let's continue with our previous discussion on IP Licensing and Indian Competition Law, we will today focus on one of the major challenging areas in the recent time, which is SEP litigation or the Standard Essential Patent litigation. So, we have already discussed the *Samsung, Motorola* as well as the *Huawei case* in European Union.

India is also not immune to SEP litigations. Ericsson case is one of the prominent cases in the area of standard essential patent litigation. Today we will see how the competition commission has analysed and looked into the standard essential patent litigation in India.

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Today our discussion would focus on SEP licensing and Indian competition law, where we will look into three cases which are related, as all these cases are against Ericsson. We will discuss the aspects of *Micromax versus Ericsson*, *Intex versus Ericsson* and *Best IT world versus Ericsson* or *the iBall case*.

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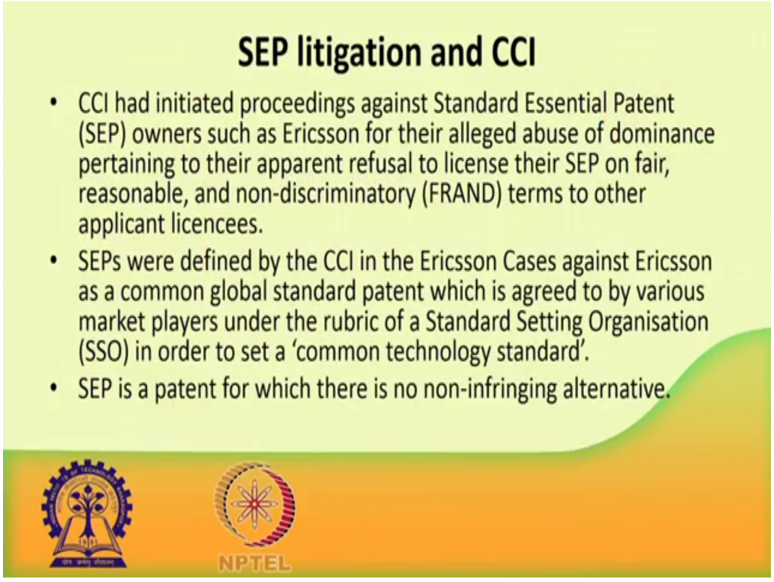

The competition commission of India has initiated its proceeding against standard essential patent owners in Ericsson case for their alleged abuse of dominant position pertaining to the refusal to license under *FRAND* terms or *fair, reasonable and non-discriminatory terms* to the other applicant licensees.

So, the Competition Commission of India has defined standard essential patents in this Ericsson case. SEPs are the common global standard patent which are agreed by various market players under the rubric of a standard setting organization, in order to set a common technology standard. When a technology becomes a standard it means the technology becomes indispensable for the development of a product.

So, in order to stop *patent holding* or the *royalty stacking*, the standard setting organization has lead the development of standard essential patents by virtue of which patent would be available to all the like applicant who wants to use the technology. So, once a patent is declared as a standard essential patent, the patent owner cannot refuse to license the technology under FRAND terms.

FRAND terms are *fair, reasonable and non-discriminatory terms,* a sort of terms and condition which are mutually beneficial to both the parties, both the parties should agree to the conditions for that technology. The standard essential patent is a patent for which there is no alternative non infringing technology available.

And it becomes obsolete only when some new technology comes in or the product is no more in use. Standard essential patents are burning topics these days, because these are used for telecommunication or internet or the latest things which we are using these days like gadgets and everything else.

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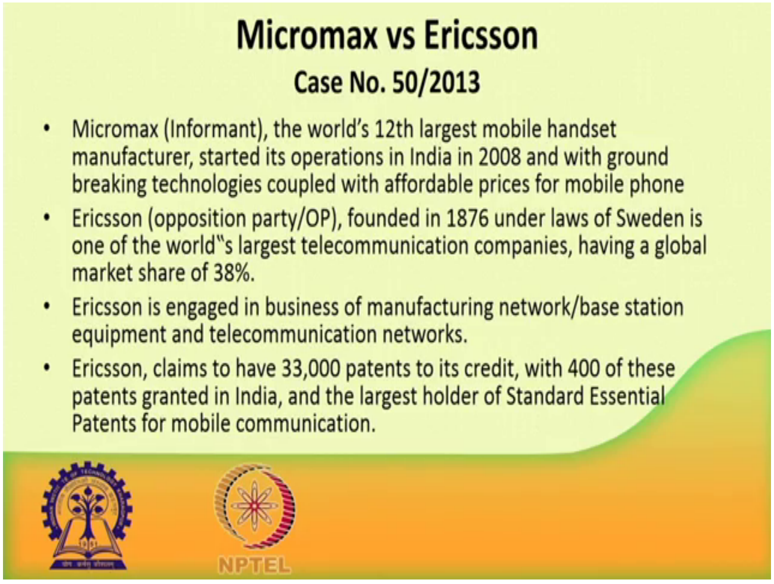

One of the important and one of the first litigation in the SEP area in India was *Micromax versus Ericsson*. So, Micromax is an Indian company, world's 12th largest mobile headset manufacturer company and it started operation in India in the year 2008 and prepares affordable mobile phones for consumers and also prepares regulated mobile accessories.

Whereas Ericsson is an older company which was established in 1876 in Sweden and is one of the largest telecommunication companies in the world and has a global presence of 38 percent in terms of market share. Ericsson is engaged in the manufacturing of network, base station equipments and telecommunication networks.

Ericsson claims to have nearly 33,000 patents out of which 400 patents are granted in India and it claims to be the largest holder of standard essential patents. So, it is one of the major player which is providing SEP technology. It has standard essential patents in 2G, 3G, 4G, GPRS technology, related things in the telecommunications sector.

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In this case, Ericsson gave a notice to Micromax in the year 2009 for its alleged infringement of the essential GSM patents. Ericsson demanded that Micromax should secure the licenses for those technologies under *fair, reasonable and non discriminatory* terms.

In the reply to this notice, Micromax asked the details of the patents, which Ericsson thinks that Micromax is infringing but Ericsson did not reply and in the notice also it did not mention the patents which they thought Micromax was infringing. First notice was sent in 2009, second notice was sent in 2011.

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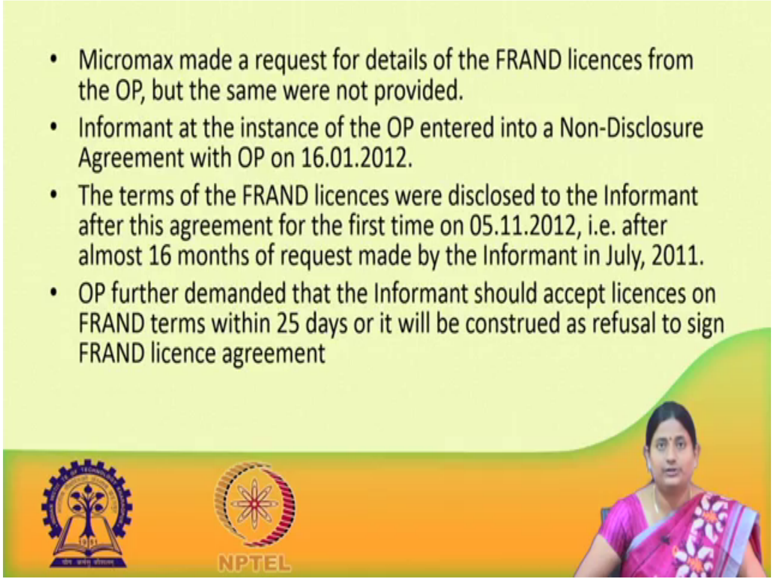

Micromax again asked for the details of FRAND licensing terms from Ericsson or the opposition party(OP), but Ericsson again did not provide any of the details of FRAND licences, which he had entered earlier or which they want Micromax to enter into. Ericsson said they will reveal the conditions of FRAND licensing negotiation only after Micromax signs a non-disclosure agreement with them and the conditions of the non-disclosure agreement were also very stringent and cannot be revealed to any third parties.

Finally, Micromax agreed to sign this non-disclosure agreement and the terms of the FRAND licensing were revealed to Micromax nearly after 16 months i.e. in November 2012 the conditions of FRAND license were revealed to Micromax, but the request was in place since July 2011. Ericsson further said that Micromax has to sign the agreement within 25 days of this notice or else it will be construed as a refusal to sign FRAND agreement. There were very stringent conditions associated with the license.

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In the FRAND licensing terms, the royalty rates imposed by Ericsson were quite high, for GSM it charged nearly 1.25 percent of the sales price of the product, GPRS 1.75 percent of the sales price of the product, for edge technology 2 percent of the sales price, for WCDMA and for HSPA for phones and tablets 2 percent of the sales price, for dongles USD 2.5 per dongle.

So, you can see Ericsson asked the royalty in terms of the sales price of the product, the royalty is not set up on the technology itself. This is one of the important thing in this case.

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Even after signing the NDA, Ericsson instituted a civil suit against Micromax in 2013, before the high court of Delhi, alleging that Micromax has infringed eight of its standard essential patents. Since Micromax signed the NDA but did not agree to pay high rates of licensing fees, Ericsson filed a civil suit in the high court of Delhi.

A single judge bench recorded the interim arrangement between the parties as per which Micromax started the payments of royalties to the opposition party, i.e. Ericsson, from 2003 at the demanded rates. So they agreed to pay the royalty, then in the order passed in 2013 by the high court an arbitrator was appointed and it directed the parties to enter into a kind of mediation talk.

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But during this mediation, Ericsson was asked to show all the other agreements, which it had entered into with their other competitors, other parties, other licensees and the terms and condition of such agreements should be revealed, which it had placed in other jurisdiction should also be brought to the notice, during mediation talk.

However, Ericsson did not show any of their brand licensing agreements during mediation talk. Hence, the mediation proceedings failed and the high court directed that interim arrangement would continue, for the interim period, until the disposal of the application. So, as per the interim arrangement, Micromax paid nearly 29.45 crores as a royalty in the year 2013.

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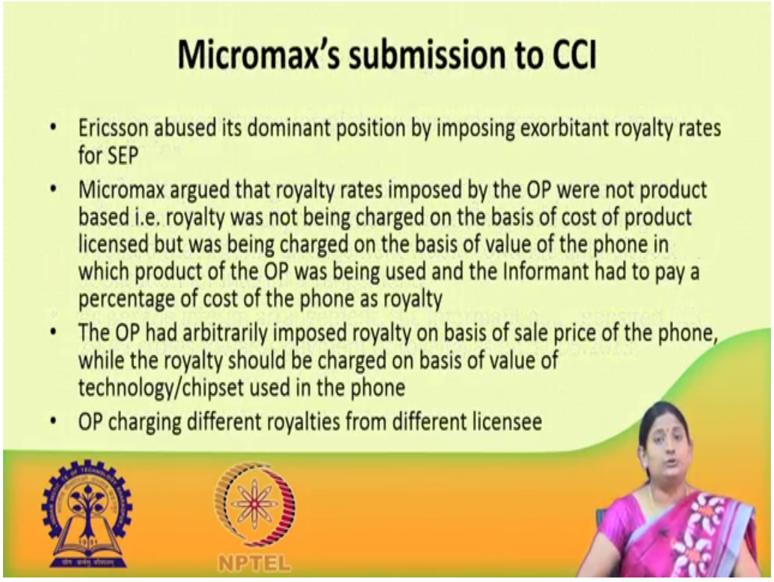

Even though they were paying the case was still going on. During this time, Micromax complained to Competition Commission of India. In its complaint Micromax alleged that Ericsson is abusing its dominant position by imposing high royalty rates for the SEPs and Micromax argued that the royalty rates which Micromax is imposing were not product base, were not charged on the basis of the cost of the product licensed. But, charged on the basis of the value of the phone in which the technology is being used.

For example, if Micromax is selling a phone in 100 rupees, then as per the contract it had to pay 1.25 percent of the royalty. But if the Micromax is selling the phone in 1000 rupees then it has to give 12.5 rupees to Ericsson. So, Micromax alleged that Ericsson is charging the royalty on the price of the final product which Micromax is selling. So, it is not a technology licensing fee per se it is getting a share of the product which is sold.

As per Micromax, Ericsson is arbitrarily posting royalty on the basis of sales price of the phone, while the royalty should be on the basis of the value of the technology or the chipset used in the phone, but not on the price of the phone per se and Micromax alleged that Ericsson is charging different licensing fee from different licensee. So, these submissions were made to competition commission of India.

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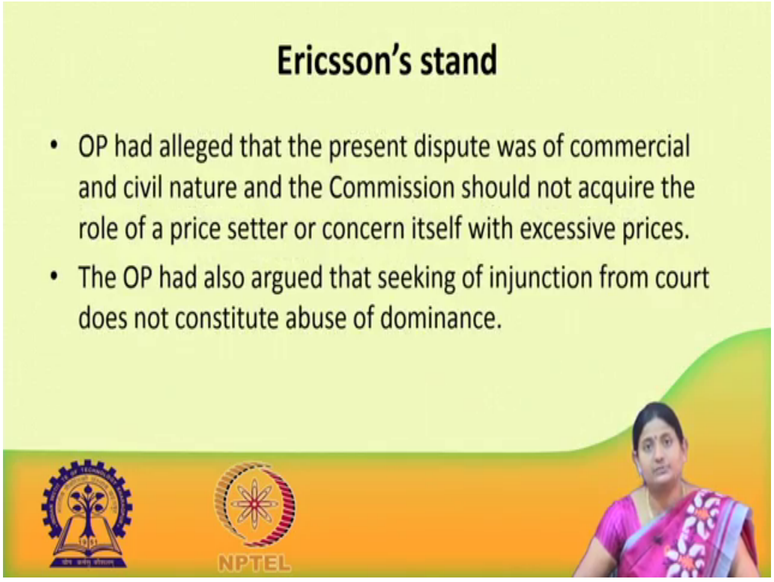

Replying to it, Ericsson said that Micromax is already paying royalty to Ericsson, and yet they have complained to commission. This was one of the stand. Ericsson replied to competition commission of India arguing that the present dispute is commercial and civil in nature and the competition commission should not acquire the role of a price setter or concern itself with excessive pricing.

Basically, they wanted to say that it is not in the purview of competition commission of India to decide the price or the nature of this conflict. Ericsson also argued that seeking injunction from the court does not constitute abuse of dominant position. So, these were the two grounds on which Ericsson replied to competition commission of India.

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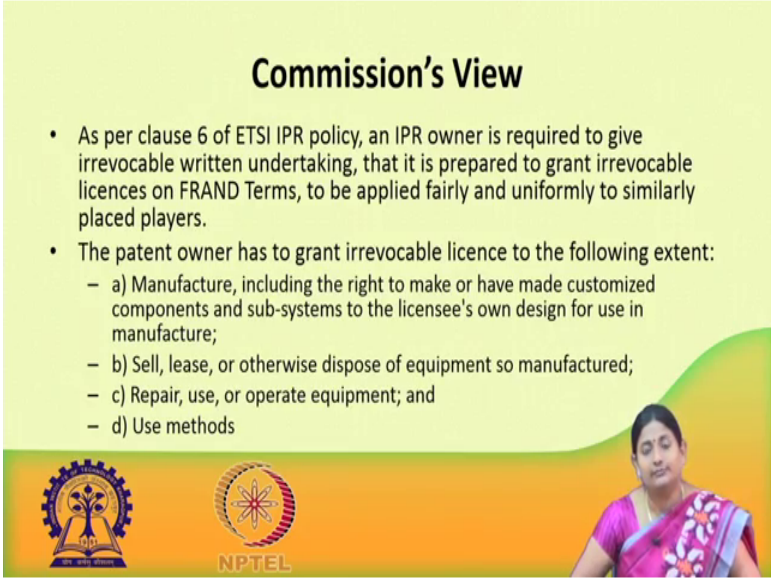

While taking cognizance of the case, commission said that when any company, when a patent owner declares its patent as standard essential patent they have to abide by certain clauses and rules mentioned by the standard setting organisation. As Ericsson had the SEPs declared by ETSI, as per clause 6 of ETSI IPR policy, an IPR owner is required to give irrevocable written undertakings that they are prepared to grant irrevocable licences on FRAND terms, to be applied fairly and uniformly to similarly placed player.

Once ETSI has declared a patent to be a standard essential patent, then as per the IPR policy clause 6, the patent holder should give the licence on fair, reasonable and non-discriminatory terms and it should be uniform for all the competitive players placed and the patent owner has to grant irrevocable licence to the following extent, to manufacture including the right to make or to have customised components, subsystems or the licensee's own design for using, manufacture, sell, lease or otherwise dispose off the equipment so manufactured, repair, use or to operate equipment and use methods.

So, once the license has been given now the licensee has the independence or freedom to use it for different purpose, which are already mentioned in the IPR policy of ETSI.

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As shown Ericsson was not abiding by all these clauses. So, the competition commission of India wanted to analyse what is the relevant market in this case. The SEPs held by, owned by Ericsson are in the 2G, 3G, 4G as well as GSM technology which falls in the GSM technology domain.

Prima facie the relevant product market is the GSM compliant mobile communication devices and Ericsson was considered to be a dominant player since there are more than 400 patents which were granted in India out of the total 33000 patents that it held, out of which maximum number of patents are declared as standard essential patent. So, Ericsson was considered to be a dominant player in the relevant market i.e. GSM compliant smart phone devices and the relevant market was India.

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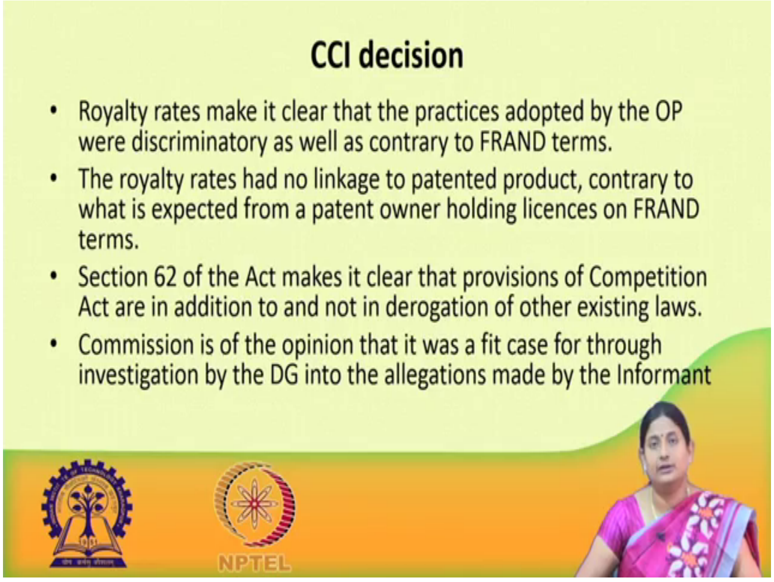

Finally, the competition commission decided that the royalty rates make it clear that the practices adopted by Ericsson were discriminatory as well as contrary to the FRAND terms, because it was not charging the same price from all the similarly placed competitors/licensees. Also, the royalty has no linkage with the patented product since it had charged royalty on the basis of the final price of the product sold, not on the technology per se and also answering to the stand by the Ericsson, competition commission of India mentioned that section 62 of competition act makes it clear that the provision of the competition act are in addition to, not derogation to other existing laws.

So, the competition commission of India has the jurisdiction to decide all these cases, even though it is a patent litigation or a civil suit. The commission was of the opinion that there is a prima facie anti-competitive behaviour and it had asked for an investigation by the DG. In the earlier classes we discussed about this case, for example analysing the jurisdiction of IP cases in competition commission of the India and here we now focused on both the jurisdictional aspect as well as the anti-competition clauses in an agreement looked from the point of view of competition commission of India.

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One of the related case is *Intex technology versus Ericsson*. It was filed in 2013. Intex technology is an Indian company, which supplies various desktops, LED, LCD, CPUs and computer accessories. Intex technology alleged that Ericsson, by the way of its term sheet for a global patent license agreement or the GPLA licensing agreement, demanded exorbitant, royalty rates and unfair terms of licensing for its patent from Intex technology.

In licensing agreement Ericsson made it clear that the jurisdiction and the governing laws for licensing agreement would be Sweden and Ericsson also required Intex technologies to enter into a non-disclosure agreement as a necessary precondition for letting them know about the details of the alleged infringement. So, when Ericsson notified Intex technology of their alleged infringement of certain standard essential patents, then they sent a notice to Intex technology to sign the GPLA licensing agreement.

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One of the clause in GPLA licensing agreement was that it would be governed by the laws in the Sweden and that it had to enter into a non-disclosure agreement, before it can know what kind of patents it had infringed.

Ericsson refused to share the commercial terms and royalty payments on the ground of non-disclosure agreements. Intex asked about the general FRAND terms, which it was entering into with Ericsson, but Ericsson did not provide any prior information and denied to share any commercial terms, royalty rates and royalty payments.

That lead to the fact that different royalty rates are being charged by Ericsson from potential licensee, also because Ericsson refused to share the commercial terms and royalty payments on the grounds of non-disclosure agreements.

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Intex technology filed a complaint with the competition commission stating that they repeatedly requested for the terms and condition of the licensing agreements, the royalty rates, but Ericsson refused to give any details of the infringement or the details about the royalty rates unless and until Intex technologies signs an NDA.

The commission held that, in similar line with the Micromax case, Ericsson is in a dominant position as well as the relevant market is the GSM mobile technologies, related technologies, relevant geographical market was India and the case can be looked along with the Micromax case.

Therefore, competition commission of India, in this case also, found a prima facie case and asked the DG for a further investigation and to submit a report in 60 days.

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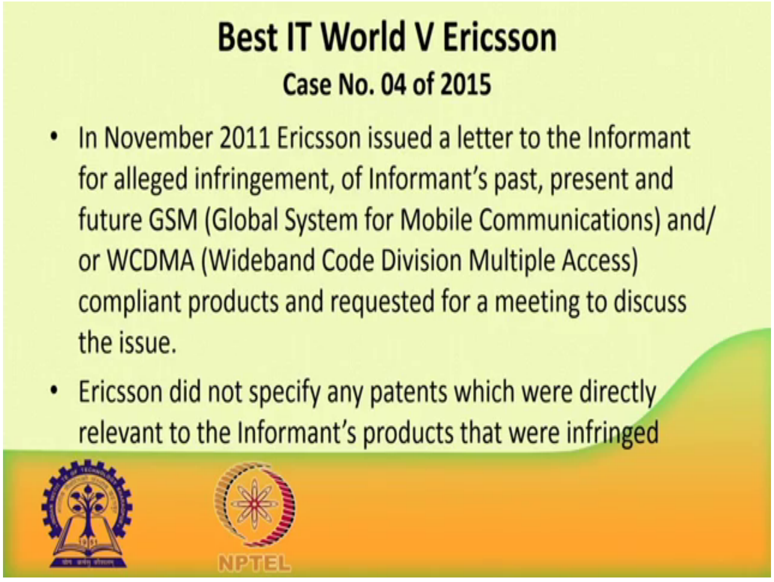

The third related case is *Best IT world* versus Ericsson which is popularly known as *the iBall company*. This was a litigation in 2015, but it first started in 2011, when Ericsson issued a letter to iBall or the best IT world company for its GSM and WCDMA technology and requested *Best IT World* to discuss for the possible infringement of its standard essential patent. In this letter again, Ericsson did not specify the number of patents which were directly infringed by *Best IT World* or the probable patent that can be licensed.

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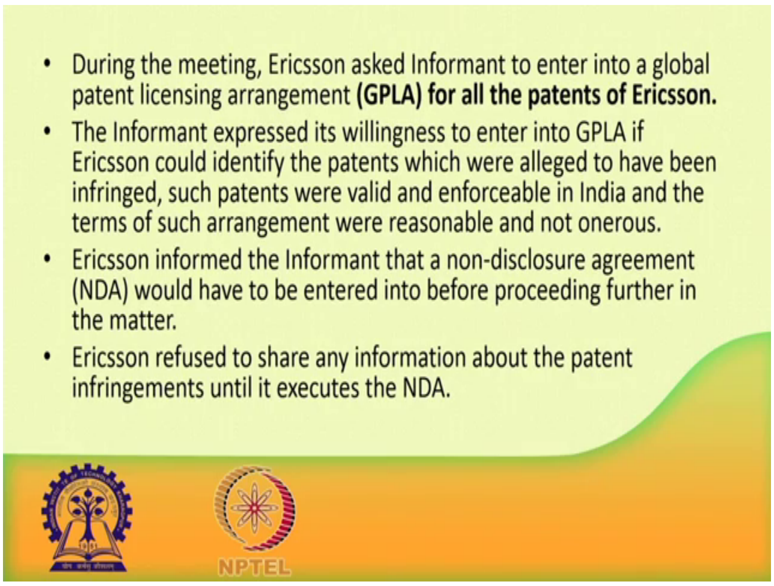

They asked for a meeting. During the meeting Ericsson asked the iBall company to enter into GPLA agreement for all of its patents. Initially they said that iBall had infringed some of the patents, but during the discussion Ericsson asked iBall company to enter into the GPLA licensing agreement for all of the patents which Ericsson was holding or owning. The iBall company expressed their willingness to enter into GPLA, if Ericsson could identify the patents which were alleged to have been infringed and such patents were valid and enforceable in India.

So, they asked for the list, which are the patents that were infringed, what are the patents that were valid. They did not want Ericsson to stack up the royalties or hold the patents. So, they asked the details first, then iBall was willing to enter into the negotiation, but Ericsson has to give the details of the patent. Like the earlier cases Ericsson asked iBall to enter into a non-disclosure agreement, then only they can proceed further in this matter, however Ericsson would not share any information about the patent infringement unless and until NDA is executed.

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In 2011, another mail was sent by Ericsson to iBall with a draft of the NDA for further discussion and in that draft Ericsson imposed very strict conditions. First, ten years of confidentiality in relation to the disclosure of any information by either party, confidentiality information is to be shared only with the affiliated company and all disputes will be settled by arbitration in Stockholm, Sweden.

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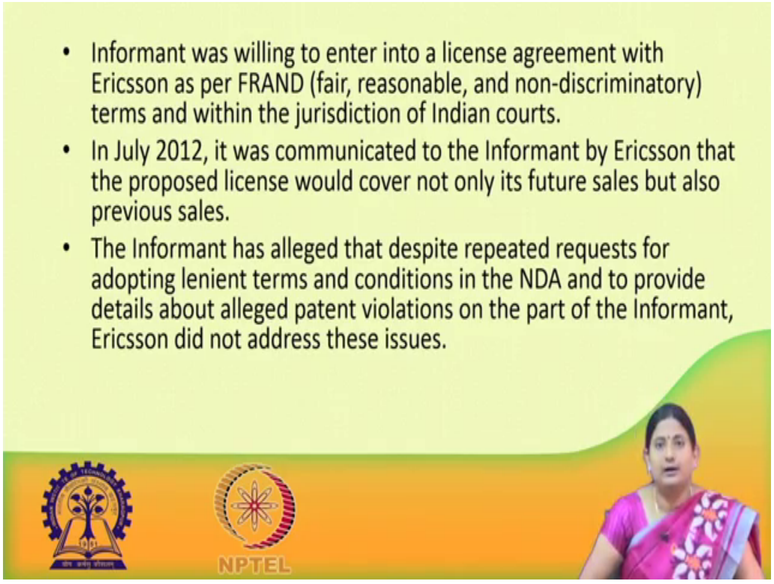

These are very restrictive for any Indian company, but iBall was willing to enter into FRAND licensing agreement with Ericsson, provided the jurisdiction be India and in July 2012 Ericsson communicated to iBall that the proposed license would not only cover the future sales, but also the prior sales which the company had notified to iBall earlier.

So, now, iBall company alleged that despite repeated request for adopting lenient terms and conditions in the NDA and to provide details about the alleged patent violations to iBall company, Ericsson did not reply to any of these queries.

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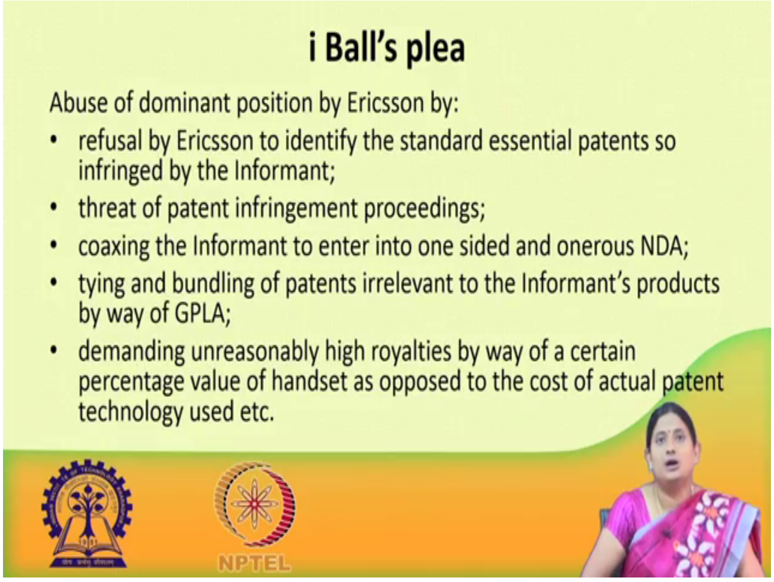

iBall pleaded to competition commission of the India, regarding the abuse of dominant position of Ericsson and said that Ericsson is abusing its dominant position by refusing the license to iBall, by refusing to identify the standard essential patents infringed by the company iBall and by giving threats for patent infringement suits and coaxing the informants to enter into one sided and onerous non-disclosure agreements.

And, they are trying to tie and bundle patents irrelevant to informant's product by way of *global patent licensing agreement* and they are charging unreasonably high royalty rates for all these patents, which is a value of percentage of the handset other than the actual cost of the patented technology, as was in the case of Micromax as well as world’s best technology case.

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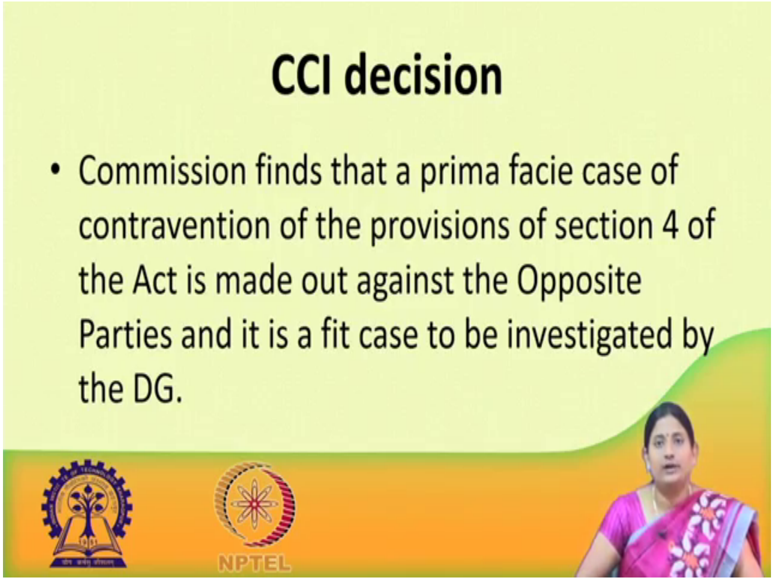

The competition commission found that there happens to be a prima facie case of contraventions of the provision of section 4, and abuse of dominant position exists and that this case is a fit case for investigation by the director general. So this case was also placed in reference to the earlier two cases and the competition commission of India held that these three cases should be dealt with reference to each other.

Cases are still pending, final decision has not come out yet, but this discussion would help us to understand how the terms and conditions by a SEP holder may be considered as anti-competitive fo example by not disclosing the allegedly infringed patents or by not disclosing the terms and conditions, by charging excessive high royalty rates which are not based on the product or the technology itself but based on the final sales price of handset or other final product

All these activities would come under anti-competitive practices and the competition commission of India is taking a very stiff position to all these behaviour since the competition commission of India is very new in comparison to the European Union.

Still with cases like Micromax, India has already entered into the litigation of standard essential patent and with the advent of technology many such litigation are likely to come up. Competition Commission of India is keeping a close watch on all these technology area, not only the anti-competitive behaviour or abuse of dominance, but also the combination of various big enterprises, which are holding major technologies.

So, for your reference, you may go to the competition commission of India website, where you can find all these relevant case documents, the decision by competition commission of the India. Please, go through it, it would give you a clear idea, how the competition commission is looking into these IP licensing cases. Hopefully, this would be helpful to you and if you have any query please let us know in the comment sections.

Thank you very much.