

EMERGENCE OF ESSENTIAL FACILITIES DOCTRINE VIS-À-VIS MARKET STRUCTURE IN INDIA

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ABSTRACT

This essay elucidates the market structure of India, the monopoly situation in the market before pre-liberalization and the effect of policies to market players post liberalization. The discussion then focuses on the emergence of essential facility doctrine in the purview of competition law in India, the origin of the doctrine and its essentials. The applicability of this doctrine in various market competitions are discussed. It is concluded that there is a possibility of application and existence of the doctrine in the competition laws in various sectors.

The political, economic and social milieu of India is quite distinct from the western world and this is relevant when such a doctrine is applied to the Indian context.¹ The preamble of the constitution of India defines its economic structure as Socialist, implying that any economic activity especially secondary will be undertaken by government for the benefit of the masses. India chose a mixed economy model – a model that was a mix of capitalist as well as socialist economy. This left the market with sole players in different ventures of the market. Pre-liberalisation, the players in the market being the sole provider for the goods created a monopoly like circumstances in different industries.

The enactment of LPG Policies in 1991 led to introduction of the concept of competition in different sectors of the market making consumers the king of the market and making the survival of the players not so easy in the market. The race for the highest market share hence the higher profit became inevitable. The player who was the sole price maker in the market now had to compete with different players changing the structure of that particular industry. It

¹ Sundar Ramanathan, “The destiny of essential features in India “(Lakshmikumaran and Sridharan Attorneys,2 June 2012) <<http://www.lakshmisri.com/News-and-Publications/Archives/Publication/The-destiny-of-essential-facilities-in-India> > accessed on 26 September 2017

is obvious that the sole player who had all the resources accumulated with him earlier, now has to share all the facilities with new players. This process of competition is expected to result in lower price, higher output and innovation. An organization in order to survive in such market conditions would require some basic necessities for its regular smooth functioning.

This competitive process faces obstacles when a market player doesn't have access to certain facilities without which it cannot compete effectively. These are known as 'Essential facilities'. Essential Facility Doctrine also referred to as Third Party Access or Open Access, requires a monopolist party to allow access to the facility that it controls and that is necessary for effective competition. Such liability on the monopolist firm is against the right of a firm to carry out economic activities for its own profit.

Cases related to the doctrine arise when a natural monopolist firm in one market refuses to provide access to the monopolized input to a competitor in the same/adjacent market.² Such instances can also be regarded under refuse to deal cases. But refuse to deal cases may arise when there is already a previous business transaction between the two parties. Whereas in the case of essential facility doctrine, it may arise even if there was no previous business transaction. The issues under essential facility doctrine must be addressed for the sake of the effective functioning of the market.

The issues over which the cases revolve are whether to allow the shared use of resources and whether the granting of such use will enable the party to compete profitably in the market and which are those exceptional circumstances that may justify the competition authority's intervention, without undermining the objective justifications by a dominant undertaking in refusing to allow such access.³ To determine the legal background for granting essential facilities, the following questions need to be answered:

- Is the access to the essential facility doctrine necessary to compete in the market with other competitors?
- Are the present resources sufficient to provide access to the essential doctrine?
- Does the owner of the essential facility prevent other competitors to compete in the market?

² J. Singh, 'Is there a Case for Essential Facilities Doctrine in India?' [CIRC Working Paper Series, 11, Working Paper No. 04, Cuts Institute for Regulation and Competition], (2013).

³ Chiriþă, Anca Daniela. "Access to Essential Facilities: A Comparative Competition Law Perspective of Shared Use and Recent Margin Squeeze Cases", *Competition Survey: Studies, Researches and Analysis*, Vol. 1: 32-41[2011]

- Is the company demanding access ready to pay a reasonable access fee?

For the party who owns such essential facilities, the duty to share the facility doesn't turn into an obligation if the answers to the above questions are not affirmative.

The doctrine has been in practice for around 100 years now and originates from the American anti-trust law. Its origin and development can be traced back to the enactment of Sherman Act in the US. It can be said that there was no link of this act with the essential facilities doctrine. The doctrine came up for consideration for the first time in 1912 before the Supreme Court of US in the case of *US v. Terminal Railroad Association of St. Louis*⁴. The railroad terminals and the only bridge to the terminals were owned by certain companies which connected Mississippi and Illinois. A new player, intending to provide competition to the existing players, was denied access to both the bridge as well as the railroad terminal. The existing players argued that the new player needed to build similar facilities and incur the relevant cost to be able to compete. The US Supreme Court held this as a case of monopolization, and directed the existing players to provide access to essential facilities - namely, the bridge and the railroad terminal - to enable the new player to compete effectively.⁵

The conditions to invoke essential facility doctrine include denial to effectively compete due to lack of access to the facility, the chances of providing access on reasonable grounds, the existence of technical feasibility to provide access. The conditions and essentials required to invoke this doctrine were cited in a famous US case of *Hetch vs. Pro Football Inc.*⁶ when a rival football club was denied the right to access the only football stadium in the city by the respondent. The Court held that it was not possible to construct another stadium in a reasonable timeframe and denial of such access would violate the Sherman Act.

From various precedents of the court, it can be connoted that this doctrine is widely recognized in the European Union. In the case of *B&I vs. Sealink*⁷, the issue was to grant permission for the access of seaport by a third party. The court held that the owner of the seaport must play under fair rules while granting access to essential facilities. In this case, the third party which had smaller vessels needed permission for loading and unloading of its vessels without being interfered by the larger vessels of the owner of the seaport. The third party took the matter to

⁴ *US v. Terminal Railroad Ass'n*, [1912] 224 U.S. 383

⁵ Amitabh Kumar, 'The essential facilities doctrine' *The Financial Express* [New Delhi, March 23, 2007]

⁶ *Hetch vs. Pro Football Inc.* (1978) [436 U.S. 956]

⁷ *B&I vs. Sealink (1912)* [5 CMLR 255]

the competition agency, the timing of access to the facility were determined and the essential facility doctrine was successfully invoked.

Even though the essential facilities doctrine has not yet been explicitly invoked in India in the context of competition law, the doctrine is, by no means, a tabula rasa in the Indian legal system.⁸ Many sectoral laws explicitly recognize this doctrine in India. Different sectors have found the applicability of the doctrine affected by factors such as market structure, technological advances, ownership structure and regulatory experiences.

The doctrine has found its applicability in the field of intellectual property rights. On the other hand, the essential facilities doctrine can also be viewed as a broader concept because it can be invoked to mandate the sharing of a large array of assets, not just intellectual property.⁹ The compulsory licensing provision has been used by the Indian patent regulator to take corrective steps against the actions of patent holders that are inconsistent with the interest of the public at large. This is best evidenced by the recent *Natco Pharma Ltd. v. Bayer Corporation*¹⁰ case in which Bayer refused to provide Natco Pharma, a generic drug manufacturer in India, access to its patented anti-cancer drug Nexavar which Bayer was selling in the market at an exorbitant price. Natco filed an application to the Controller General of Patents and Designs for the grant of a compulsory license. After reviewing the pertinent facts, the Controller General granted Natco a compulsory license to sell the drug in the market at a comparatively cheaper price. The Intellectual Property Appellate Board reaffirmed the decision of the Controller General.

The idea of open access has greater importance in the telecom sector because of the peculiar features of the sector that necessitate collaborative efforts among different undertakings in order to ensure that the fruits of innovation and progress reach the last man in the line. As a result, Section 11(1) (b) (ii) along with Section 11(1) (b) (iii) of the Telecom Regulatory Authority of India Act, 1997 impose an obligation on the TRAI to ensure interconnection and technical compatibility between the services that are provided by various players in the telecom sector.¹¹

In the pre-liberalization era, the gas transmission grid in India did not extend beyond the western, northern, central and north-eastern regions due to lack of participation of private

⁸ Rahul Bajaj & Chiranjeevi Sharma, 'THE ESSENTIAL FACILITIES DOCTRINE - A POTENT TOOL FOR MITIGATING THE RIGOURS OF SOCIALLY PERNICIOUS BEHAVIOUR OF MONOPOLISTS' (2016)

⁹ *Ibid* 7

¹⁰ *Natco Pharma Ltd vs Bayer Corporation* (2012) [Controller of Patents]

¹¹ *Ibid* 8

players. In addition, the Gas Authority of India Limited owned 70% of the market share.¹²Therefore, it was necessary to develop a framework to provide new entrants access to essential facilities in order to solve the access problem. The PNGRB Act was enacted that empowers the Petroleum and Natural Gas Board to declare any pipeline for the transportation of petroleum, petroleum products or natural gas a “common carrier” which allows multiple entities to access such pipelines on a non-discriminatory basis.

As the competition law regime in India is still in a nascent stage, the essential facilities doctrine has not been explicitly invoked by the CCI in any case so far. A close inspection of the Indian Competition Act, 2002 clearly shows that the legislation is broad enough to bring the essential facilities doctrine within its fold. More specifically, Section 4 (2) (c) unequivocally prohibits dominant firms from engaging in any activity that results in the denial of market access in any manner. In addition, Section 4 (2) (e) prevents an undertaking from using its dominance in one market to establish a footing or to protect its position in another market. Another provision into which the essential facilities doctrine can be read is Section 3 (4) (d) of the Act which prohibits the refusal to deal by dominant undertakings when it can create an appreciable adverse effect on competition.¹³

After having analyzed different sectors in the economy, the doctrine has its relevance in shade and the act is wide enough to allow the application of the same. There exist arguments against and for the doctrine. At the heart of any thriving liberalized economy lies a robust and flexible competition law regime. If such a regime is not suitably modified to meet contemporary challenges, monopolistic structures would continue to go unchecked which would have a large array of corrosive effects on the health of the economy.¹⁴It is a known fact that resources are scarce. The non- existence of the doctrine may lead to accumulation of the resources with one entity which may discourage investment in the market that drifts from the main focus of inviting more cash flow in the economy. Also, Article 39(b) of the Indian Constitution makes the state obliged to ensure that the ownership of the material resources of the community be

¹² *Supra* 2

¹³ *Supra* 9

¹⁴ K. Vaishali, ‘Competition issues in the infrastructure sector- with special reference to Indian electricity sector, Internship report for the Competition Commission of India’, (2012), <
http://cci.gov.in/images/media/ResearchReports/Competition%20Issues%20in%20the%20Infrastructure%20Sector_With%20Special%20reference%20to%20the%20Indian%20Electricity%20Sector>, accessed on 26 September 2017

distributed equally. Therefore, the doctrine would and should find its applicability in the context of Indian market.

