

TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL
NEW DELHI

DATED 17th JANUARY, 2006

(a)Petition No. 32(C) of 2005

(M.A.No.84 of 2005)

1. Hotel Association of India
(an Association of Hotels incorporated
under the Societies Registration Act)
and having its Registered Office at
4/1-D, Taj Aptt., Rao Tularam Marg,
Delhi-110022

2. Eastern International Hotels Ltd.,
(a Public Ltd. Company within the
meaning of Companies Act, 1956) and
having its Regd. Office at
4, Mangoe Lane, Calcutta-700 001
and Corporate Office at
7, Shamnath Marg,
Delhi-110 054.

...Petitioners

Versus

1. SET Discovery Pvt. Ltd.
23, Shah Industrial Estates,
Off Veera Desai Road
Andheri (West),
Mumbai-400 053.

2. ESPN & Star Sports & Software India Pvt Ltd.,
Building No.22, Pushp Vihar
Community Centre,
New Delhi-1100 062.

3. Zee Turner Ltd.,
5th Floor, Radisson Plaza,
N.H. No. 8, New Delhi-110 037

...Respondents

(b)Petition No.80(C) of 2005

(M.A.No.239 of 2005)

1. Hotel & Restaurant Association
(Western India)
4, Candy House
Mandlik Road
Colaba, Mumbai – 400 001.

through its Secretary General
Shri S.M. Korde

2. Eastern International Hotels Ltd.,
Balraj Sahni Marg
Juhu Beach
Mumbai-400 049
through Vice President(W)
Shri Vikram Thakural

...Petitioners

Versus

1. Star India Private Limited
Star House Off Dr. E. Moses Road
Mahalaxmi
Mumbai – 400 011
2. SET Discovery Pvt Ltd.,
23, Shah Industrial Estates
Off Veera Desai Road
Andheri(West)
Mumbai-400 053
3. Zee Turner Ltd.,
5th Floor, Radission Plaza,
N.H. No. 8, New Delhi-110 037
4. ESPN Software India Pvt Ltd.,
Building No.22, Pushp Vihar
Community Centre,
New Delhi-1100 062.

...Respondents

BEFORE:

HON'BLE MR. JUSTICE N. SANTOSH HEGDE,
CHAIRPERSON
MR. VINOD VAISH, MEMBER
LT.GEN.D.P.SEHGAL(RETD.),MEMBER

Petition No. 32(C) of 2005

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- For Petitioners : Mr.Raju Ramachandran,
Senior Advocate with
Mr.Ravi Sikri,Advocate
- For Respondent No.1-SET
Discovery Pvt.Ltd. : Mr.Aditya Narain,Advocate
- For Respondent No.2-ESPN &
Star Sports & Software India
Pvt.Ltd. : Mr.N.Ganpathy,Advocate
- For Respondent No.3-Zee Turner
Ltd. : Mr.Maninder Singh with Mr.Yoginder
Handoo and Mr.Tejveer Singh Bhatia,
Advocates

Petition No.80(C) of 2005

- For Petitioners : Mr.Manmohan,Senior Advocate with
Mr.Syed Naqvi, Ms.Smieetaa
Inna,Advocates for Mulla & Mulla &
Craigie Blunt & Caroe
- For Respondent No.1-Star India
Pvt. Ltd. : Mr.Gopal Jain, Ms.Ruby Singh Ahuja,
Ms.Kanika Agnihotri, Mr.Ashish Jha,
Advocates for M/s Karanjawala & Co.
- For Respondent No.2-SET
Discovery Pvt.Ltd. : Mr. Ashok Desai,Senior Advocate,
with Mr.Aditya Narain,Advocate
- For Respondent No.3-Zee Turner
Ltd. : Mr.Maninder Singh with
Mr.Yoginder Handoo and
Mr.Tejveer Singh Bhatia, Advocates
- For Respondent No.4-ESPN
Software India Pvt.Ltd. : Mr.N.Ganpathy,Advocate

For Respondents No.5&6-S& S : Mr. Jay Salva and Ms.Reena
Electronics Inc.and Novex Bagga,Advocates
Communications Pvt. Ltd.
respectively.

ORDER

Petition Nos. 32(C)of 2005 and 80(C) of 2005 were heard concurrently since both the petitions pertained to the same cause of action and similar prayers. The petitioners in one petition being Hotel Association of India along with Eastern International Hotels Ltd and in the other Hotels and Restaurants Association (Western India) along with Eastern International Hotels Ltd and the respondents in both are the broadcasters and their distributors.

2. In petition No. 32(C) of 2005, the member hotels are all Five-Star Hotels whereas in petition No. 80(C) of 2005, the members comprise all categories of hotels and restaurants.

3. In petition No. 32(C) of 2005, the member hotels are taking feed directly from the broadcasters at the head-ends at each hotel and are subsequently providing the same to the rooms in their hotels. There are agreements in place between the broadcasters and the member hotels for provision of this service. In petition No. 80(C) of 2005, most of the hotels and restaurants are taking these signals from the cable operators providing service in their respective areas. The cable operators have entered into agreements with respective hotels in this regard and are charging them different rates depending on the percentage occupancy of the hotels and the location of hotels. The charges are not uniform for all the hotels/restaurants.

4. In both the cases, the agreements are between the individual hotels and service providers, i.e., Broadcasters and Cable Operators respectively and not between the two Petitioner Associations and the service providers.

5. The dispute basically pertains to the fact that according to the respondents in both cases these hotels and restaurants cannot be equated with domestic consumers for the provision of cable TV service. Since this service is being used by petitioners as a public service for commercial purposes, the rates for this service have to be different than those laid down for the domestic users. Accordingly, the respondents had increased the subscription rates of the cable connections being provided at hotels and had either disconnected some subscribers or had

threatened to disconnect the others. The petitioners therefore approached TDSAT with the following prayers:-

Petition No. 32(C) of 2005 :

- i) Direct the respondents to charge fair, non-discriminatory, non-arbitrary and cost based rates by the respondents;
- ii) Direct the Respondents to provide the detailed working of the final rental charged and submit supportive documents and other details as may be necessary to ascertain that the final rental charged is fair, cost based, non-arbitrary and non-discriminatory;
- iii) Direct the respondents not to deactivate channels of the Member-Hotels of the petitioner No. 1 Association until the final disposal of the present petition.
- iv) Pass ad-interim, interim, ex parte orders in terms of the above prayers;
- v) Pass such other or further directions or orders as this Hon'ble Tribunal may deem fit in the facts and circumstances of the case.

Petition No. 80(C) of 2005 :

- a) Declare the actions of the Respondents in requiring the Petitioners and its members to execute fresh agreements with the broadcasters and / or their authorized distributors subject to payment of increased subscription fees beyond that was prevalent on 26.12.2003, as clearly illegal, arbitrary and violative of the applicable provisions of the Telecommunications (Broadcasting and Cable) Services Order, 2004 read with the Interconnection Regulations.
- b) Set aside the demand letters issued by the Respondents, either directly or indirectly, that are contrary to the agreements between the Petitioners and its Cable Operators.
- c) Direct that the respondents are liable to continue to provide signal to the petitioners and its members, in the same manner that were being provided by the erstwhile Cable Operators and that the respondents are not entitled to charge any amounts

other than what was prevalent on 26.12.2003, in terms of the written / oral agreements between the petitioners and its members and the existing Cable Operators except such lawful increases as are permissible under the TSTO dated 01.10.2004 and 01.12.2004 for the provision of new channels on the proportionate basis as also an increase of 7% to reimburse the costs of inflation.

- d) Direct the respondents to restore signals to all such members in whose premises the respondents have unilaterally and arbitrarily disconnected supply of signals.
- e) Quash all criminal proceedings initiated against the members of petitioner No. 1 Association / or their representatives by the respondents and / or their Agents and representatives allegedly on the ground of piracy and / or violation of Copyright and unauthorized transmission of signals.
- f) Direct the respondents to refund all amounts paid by the members of the petitioner association, in excess of what was actually due and payable as on 26.12.2003.
- g) Award exemplary costs to the petitioners against the respondents, and
- h) Pass such further / other Orders as this Hon'ble Tribunal may deem fit and proper in the facts and circumstances of the case.

6. When the cases were listed on 16th August, 2005, this Tribunal had ordered status quo as prevailing on that date. It implied that members of petitioner associations were to pay subscription at the rate at which they were paying immediately prior to the passing of the said order and to such persons to whom they were making payment. On 20th September, 2005, when the case came up for directions, the learned Counsel for the Respondents submitted that though the members of the petitioner associations are enjoying the signals of the respondents, the respondents are not being paid their share of the subscription amount which the petitioners claim that they are paying to the cable operators supplying signals to them. It was also brought to our notice that as per the status quo order the respondents were suffering monetary loss. The respondents also submitted that they were not aware of the details of Cable Operators providing service to the petitioners. In that background the following order was passed by us:-

“To balance the equities between the parties, we direct the petitioners association to file an affidavit showing the particulars of the cable operators from whom each member of petitioners association is receiving the signals and the subscription amount that is being paid to such cable operators. This will be filed along with the rejoinder within ten days.

In Petition No. 32(C) of 2005, we direct the members of the petitioner association who have contract other than with the respondent broadcasters or their authorized representatives to file the particulars as well as the quantum of subscription amount paid to those cable operators.

List on 6th October, 2005 for hearing.”

7. The matter was finally heard on 16th December, 2005.
8. Mr. Manmohan, Learned Senior Counsel for the Petitioners in case of Petition No. 80(C) of 2005 stated that vide Department of Telecommunication (DoT) Notification dated 9th January, 2004, the broadcasting and cable services were also notified as telecom services and therefore this petition falls within the jurisdiction of TDSAT. He further said that first tariff order was notified by TRAI on 15th January, 2004. He said that vide this tariff order the charges payable by subscribers to cable operators and cable operators to MSOs/Broadcasters and MSOs to Broadcasters were frozen as prevalent on 26th December, 2003. Vide second tariff order issued by TRAI on 1st October, 2004, this ceiling was reiterated. Subsequently, on 1st December, 2004, vide second amendment to second tariff order, 7% increase on this tariff was promulgated.
9. The learned senior Counsel stated that para 4 of the second amendment lays down procedure for disconnection of TV signals. This procedure stipulates notice to be given to cable operators before the disconnection of TV signals. He stated that members of his Association have been taking feed from the cable operators and making regular payments as per the agreements arrived at between them and the cable operators.
10. He said that on March 17, 2004, Star India Pvt Ltd appointed S&S Electronics Inc as their distributor and authorized them to collect the subscription fee from the hotels/cable operators in terms of and in pursuant to the written agreement to be entered into between S&S Electronics Inc and such hotels/cable operators. Similarly, Novex Communications Pvt Ltd was appointed

as the distributors by M/s ESPN Software India Pvt Ltd pertaining to ESPN and Star Sports channels. He brought to the notice of this Tribunal a letter written by Novex Communications Pvt Ltd to one of the members of the Association giving notice for cable transmission stating that hotels were not authorized to receive signals from cable operators. Similarly, the Set Discovery Pvt Ltd had also written to the same hotel stating that cable operators are not authorized to provide signals to hotels. Mr. Manmohan said that all the hotels and restaurants had entered into individual agreements with the respective cable operators providing service in their respective areas of operation and that they had no grievance against them and were quite happy about this arrangement and they were willing to continue on the same basis. He said that it was between the cable operators and the broadcasters to resolve their differences and they were willing to give all the details of the cable operators to them.

11. Mr. Manmohan also stated that the authorized distributors are asking them to pay on rate card for commercial establishments which is higher than the tariff laid down by the TRAI. He said that the TRAI has not set any such tariff for commercial establishments and public viewing areas as is being shown in the rate card sent by Novex Communications to them and the said rate card is reproduced as under:-

	Rate Per Room Per Month
THE ONE ALLIANCE BOUQUET	
All 8 Channels (SET, MAX, DISCOVERY, HBO, ANIMAL PLANET, AXN, NDTV 24x7, NDTV INDIA)	200/-
Any 6 Channels of '8' above.	190/-
Any 4/5 Channels of '8' above.	185/-
Any 1/2/3/ Channels of the '8' above.	180/-
ADDITIONAL CHANNELS	
MTV/NICK	20/-
MTV AND NICK TOGETHER	25/-
<u>ESS CHANNELS BOUQUET</u>	
ESPN AND STAR SPORTS	150/-
<u>ZEE TURNER BOUQUET</u>	
ZEE TV, ZEE ENGLISH, ZEE NEWS, ZEE MGM, ZEE CINEMA, CARTOON NETWORK, CNBC, TREND, POGO, REALITY TV, CNN and all ALFA channels.	185/-
Any 15 Channels of '18' above	170/-
PUBLIC VIEWING AREA per bouquet	5000/-

12. He said that this is contrary to the tariffs laid down by TRAI and therefore the said demand should be struck down by this Tribunal.

13. In Petition No. 32(C) of 2005, the Learned Counsel for the Petitioners stated that in their case, they have the head-ends for each hotel where the TV signal is being received from the Broadcasters and is re-transmitted to all the rooms. He said that in their case, the cable operators are not involved and the feed is taken from the broadcasters. He said that their grievance pertains to unilateral increase in rates by the broadcasters, the new rates being stated as commercial rates as against the tariffs laid down by TRAI. He said that the agreements arrived at between the members of the Association and the Broadcasters were on negotiated Terms and as per the Tariff Order of TRAI. He said that the new rates were violative of the TRAI's Tariff Order.

14. Learned Senior Counsel for the Respondents, Shri Ashok Desai, responded to the submissions made by the petitioners and stated that the basis of petitions filed by the petitioners is itself questionable. He said that petitioners are asking for the same rates for using the cable services as for residential/home users whereas hotels are using this service of the respondents for commercial purposes as part and parcel of the package of services offered to their customers. He said that even electricity boards have different rates for commercial users vis-à-vis residential users and therefore the subscription fee for the users of petitioners cannot be equated to the subscription fee of home cable users.

15. He said that petitioners are indulging in forum shopping in as much as their own association had filed a petition before MRTP Commission, New Delhi being RTPE No. 225 of 1998. He said that the petitioners ought to have withdrawn this petition before MRTP Commission before coming to this Tribunal.

16. He further went on to say that in case of Petition No. 32(C) of 2005, the broadcasters had asked for revision of tariffs but based on the interim order of this Tribunal, the petitioner members are paying the same old rate which has resulted in financial loss to the broadcasters.

17. Mr. Desai said that in case of Petition No. 80(C) of 2005, despite the directions of this Tribunal, the petitioners have not been able to produce the list of cable operators and the subscription being charged by them from the respective hotels. In the absence of the same, no payment is being made to the MSO's/broadcasters since the respondents are not aware of the details of these cable operators. He further said that most of these cable operators are giving the feed / signals to these hotels/restaurants in a clandestine manner and that some of these cable

operators are not even authorized cable operators. He said that the respondents were agitated on this since the information was kept by the petitioners themselves and respondents were in dark about the details of the payments and the source of service being provided.

18. Mr. Desai stated that his main argument is on the applicability of the tariff. He said that Tariff laid down vide 26th December, 2003 notification is only for domestic consumers and not commercial users of this service. He said that the increase made by the respondents is within the parameters laid down. He brought to the notice of the Hon'ble Tribunal para 10 of the Petition No. 32(C) of 2005 where petitioners themselves have stated that the agreement with petitioner No. 2 was to expire on 31st March, 2005 and the respondent No. 1, M/s Set Discovery Pvt Ltd had asked the petitioners No. 2, EIH Ltd., to pay at the revised rates at Rs. 225/- per room per month and for public viewing area Rs. 5,000/- per TV per month. He said that the petitioners themselves have accepted that they are taking feed directly from the broadcasters through their own head-end at each hotel for transmission to the rooms which they term as "value-add-on" facility for the guests. He further said that as per para 17 of the petition the petitioners have accepted that rates for these channels are directly negotiated for each individual hotel annually on per room per month basis for a specific number of rooms. He said that the negotiations on expiry of agreement for renewal of the same is permissible. The respondents were well within their rights to negotiate the Terms for the next year on expiry of the previous Term and that is what was done. He reiterated his stand that while doing so the tariff for domestic use cannot be applicable for the use in hotels.

19. Mr. Ashok Desai said that the consumers in hotels cannot be equated with domestic consumers. He said that TRAI Act Section 14(a) lays down the charter of the Appellate Tribunal wherein it is to adjudicate any dispute:-

- (i) *between a licensor and a licensee;*
- (ii) *between two or more service providers;*
- (iii) *between a service provider and a group of consumers.*

20. He said that this Section does not cover the hotel associations since they do not come within the definition of consumers. He said that the Consumer Protection Act, 1986 defines a consumer. As per Sec. 2(1)(d), ***"the consumer means any person who—***

(i) buys any goods for a consideration which has been paid or promised to be paid and partly promised, or under any system of deferred payment includes any user of such goods other than the person who buys such goods for consideration paid or promised or partly paid or partly promised, or under any system of deferred payment when such use is made with the approval of any person, but does not include a person who obtains such goods for resale or any commercial purpose; or

(ii) *[hires or avails of] any services for a consideration which has been promised or partly paid and partly promised, or under any system of payment and includes any beneficiary of such services other than the one who hires or avails of the services for consideration paid or promised or partly paid and partly promised, or under any system of deferred payment when such services are availed of with the approval of the first mentioned person.

****[Explanation.—For the purposes of sub-clause (i), “commercial purpose” does not include use by a consumer of goods bought and used by him exclusively for the purpose of earning his livelihood, by means of self-employment.]”***

21. As per this definition, the resale / commercial use of such goods is not permitted and is not included in the definition of consumer as per the said Act. If a consumer hires / avails of service or buys goods for a consideration / promise to be paid it is meant to be used by him. The commercial aspect is an exception from definition of consumer. Mr. Desai also referred to TRAI’s Notification dated 31st December, 2004 where consumer is defined in para 2(viii), which is re-produced as under:-

“Consumer means any person who is subscriber of any broadcasting service(s) in the country.”

22. Mr. Desai cited the following judgment of Delhi High Court [Ballarpur Industries Ltd. Vs. D.G.I. & R., MRTP Commission & Ors reported in (1988) 64 Company Cases 884 decided on September 16, 1988] in justification of his definition of consumer:-

“.....It is not clear to us as to how this judgment supports Mr. Dua. In the present case, the distributors/dealers of paper do not convert the paper into any other commodity but they merely sell the paper to retailers who would again sell the same to

purchasers for ultimate consumption. The word “consumer” has not been defined in the Act. It is defined in the Consumer Act. “Trader” has been separately defined in the Consumer Act. To some extent, the Act and the Consumer Act have much in common with one another. In a way, they are cognate legislation when it comes to unfair trade practices. They would appear to form one code and should be taken together as forming one system. It would perhaps be more appropriate to adopt the definition of consumer as given in the Consumer Act.”

23. He further said that in view of this since the hotels and restaurants are using the feed of cable operators for viewing by other users in the rooms and also in petition No. 32(C) of 2005 the feed from a direct head-end is being directly re-transmitted for viewing by the customers, the definition of consumers does not apply in this case and therefore the tariff laid down by TRAI also is not applicable to these consumers.

24. The petitioners in both the cases are virtually re-selling their signals and are therefore neither themselves users nor the consumers. The consumers are other than those who are entering into agreement with the cable operators and broadcasters.

25. Mr. Desai also referred to Cable TV Network Regulation Act where subscriber is defined in Section 2(i) on page 138:-

“ ‘subscriber’ means a person who receives the signal of cable television network at a place indicated by him to the cable operator, without further transmitting it to any other person.”

26. In view of the above definition, he said that the subscriber cannot be a person who further transmits the signals.

27. The Learned Counsel for Respondent-II in his reply supported the stand of Mr. Ashok Desai and said that there is a clause in their agreement with petitioners in Petition No. 32(C) of 2005 whereby commercial use of their signals is prevented. The Counsels for the other respondents also supported the arguments given above by the Counsels of Respondents 1 & 2.

28. The Learned Senior Counsel, Mr. Raju Ramachandran, for the petitioners said that the definition of consumer as per TRAI Notification of 31st December, 2004 is quite loose and as in

the definition, consumer means any person who is a subscriber of any cable and broadcasting service and there is no difference between domestic and commercial consumer. He said that the reliance of the respondent on Consumer Protection Act is totally misplaced. Section 14 of the TRAI Act was quite clear and the petitioners were well within their rights to come to this Tribunal. He said that the petitioners come under the category contemplated in Section 14 (a) (iii) of TRAI Act, i.e., "Group of Consumers" and unilateral and unjustified hike in Tariff by the broadcasters falls within the scrutiny of this Tribunal. The Act and the Regulation do not make any distinction between the domestic and commercial consumers nor has it fixed different rates for domestic and commercial consumers. Mr. Manmohan also said that the case before the MRTP Commission was filed by another organisation which also has similar members like the petitioners. On this, the Learned Counsel for the respondents brought to our notice that in the petition itself the petitioners had mentioned this body who has gone to MRTP Commission as the parent body of the association.

29. Having heard the arguments of both the sides, the following issues stand out for consideration:-

- (a) Whether the hotels fall in the category of subscriber;
- (b) Who is the consumer - the hotels or the occupants of the rooms;
- (c) Is there a distinction between the domestic and commercial consumers and if so, whether the tariff fixed by the TRAI would apply to commercial establishments like the members of the petitioner associations.

30. The petitioners in Petition No. 32(C) of 2005 have admitted that they have their own head-ends where the signal is received from the broadcasters and from that head-end it is further transmitted to the rooms for viewing of the same by the occupants/users of the rooms. As per the Telecom (Broadcasting & Cable Services) Interconnection Regulation 2004 (13 of 2004) dated 10th December, 2004, any person who receives a broadcasting service from a broadcaster and / or their various agencies and re-transmits the same to consumers is termed as Multi System Operator (MSO). Even though the petitioners contend that they have entered into agreement with broadcasters as users/subscribers, in reality the activity of the petitioners members in receiving the signals at their head-ends and retransmitting to other consumers (guests) in our opinion classifies them into a multi system operator. It is also a fact that the hotels are not registered as multi system operators and therefore do not qualify to be so. Neither are the hotels

using the signals at the place of reception of the same from broadcasters thereby not qualifying to become direct subscribers/consumers. It, therefore, stands out that the hotels are getting the feed on the head-end and are retransmitting the same for the rooms which they are saying as 'value added service' for use by various consumers in the hotel which does not classify them as subscribers.

31. We, therefore, quite easily conclude that members of Petitioner Associations are not subscribers as contemplated under the Cable TV Network Regulations Act.

32. In Petition No. 80(C) of 2005, the hotels/restaurants have entered into agreements with various cable operators for provision of the service in various rooms. The feed from the cable operators is taken centrally and the same is re-fed by using amplifiers or other technological tools to various rooms. Each room, therefore, of the hotels/restaurants can be called a subscriber. Since the management of the hotel is entering into the agreement as a composite package for number of rooms, we cannot accept that the hotel management entering into the agreement can be termed as a subscriber since it is not that the management is using this service for themselves; the service is being used for other consumers.

33. In view of the above, we are of the considered opinion that the management of the hotels in Petition Nos. 32(C) and 80(C) cannot be termed as subscribers. Similarly, various restaurants using cable service for public viewing cannot be treated as consumers. There is no gain saying that this use is entirely different from the domestic use of cable service. The use of cable service at a public viewing place is to attract more customers / clients which gives it the colour of use of its service for commercial purpose.

34. On the question of true consumers of the cable service, it will be worthwhile discussing as to who are the consumers - the hotel managements or the occupants of the rooms. The actual use of the cable service is being made by the occupants of the rooms. As per para 2(viii) of the TRAI's Notification dated 31st December, 2004, "***Consumer means any person who is subscriber of any broadcasting service(s) in the country.***"

35. In the above background, we will now have to decide as to who actually is the consumer as contemplated under the TRAI Act on the facts of this case.

In the case of Ballarpur Industries Ltd (supra) Delhi High Court, following the judgment of the Apex Court in Anwarkhan Mahboob Co. Vs. State of Bombay (AIR 1961 : SC 213) held that in a given trade at a given stage there could be technically different consumers but all those persons cannot be treated as the ultimate consumers unless goods purchased by such persons are finally consumed.

In the case of Morgan Stanley Vs. Karthik Das (1994 SC AIR page 225) the Apex Court held that *“the consumer as a term implies as the one who consumes.”* Apart from the judicial definition of the word “consumer”, if we consider the dictionary meaning of the word, then it is seen from Black’s Law Dictionary (Sixth Edition), consumer is defined as the one who consumes.....consumers are to be distinguished from manufacturers (who produce goods) and wholesalers or retailers (who sell goods).

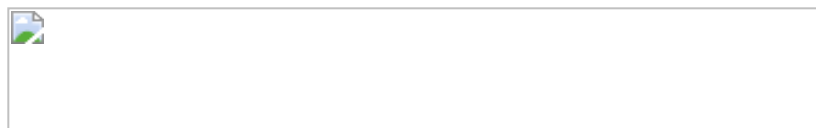
Thus, on conjoint reading of the judicial and dictionary definition of the consumer it shows normally consumer is an ultimate user of the goods and not an intermediary between the producer and the ultimate consumer like the wholesaler and the retailer.

If we apply that definition to the facts of this case, it can be seen that in the cable sector in the vertical hierarchy there are the following players:

Broadcasters

Distributor

MSO



Cable Operator

Ultimate Consumer

In the technical sense, when the agent, the broadcasters, the MSO, the Cable Operator receive signals from the broadcaster for onward transmission to the ultimate consumer, these players may also be termed as consumers in that sense because the signals received by them get consumed by retransmission to another player in the hierarchy but that is not consumption contemplated under the TRAI Act and Regulation. To become an ultimate consumer that retransmission cannot be treated as consumption because consumption contemplated in this situation gets completed with the viewing of the signals without further transmission, which can only happen when the ultimate subscriber uses the signals for his viewing purposes. All other intermediaries as stated in the Anwarkhan Mehboob case (supra) as also Morgan Stanley (supra) cannot be either subscribers or consumers. On facts, we have noticed that the hotel managements, who are members of the petitioner associations, receive signals either from the broadcaster or their agents directly or from the cable operators directly which is further transmitted to rooms and parlours for the purpose of viewing by their guests or clients, it is at that stage that the signals actually get consumed. Therefore, as per the judicial and dictionary definition of the consumer referred to hereinabove, we have no doubt that the members of the petitioner associations are not the end-users of the signals received by them. Hence, these members of the petitioner associations on the facts of this case cannot be treated as either subscribers or consumers for the purpose of relief sought in this petition.

36. Now we come to the question whether the tariff laid down by the TRAI notification of 26th December, 2003 is applicable to the members of the petitioner associations. The said Tariff order covers the following in its ambit – the charges payable by (a) Cable subscribers to cable operator; (b) Cable operators to multi service operators/broadcasters (including their authorized distribution agencies); and (c) Multi service operators to broadcasters (including their authorized distribution agencies). In the petition before us we find that the commercial relationship is between the members of the petitioner associations (viz., hotels, restaurants etc.) on the one hand and either cable operators or broadcasters on the other. We have already concluded that the members of the petitioner associations cannot be regarded as subscribers or consumers. As such we are of the view that the above tariff notification of the TRAI would not be applicable. It seems that TRAI has found it necessary to fix the tariff for domestic purpose. We think the Regulator should also consider whether it is necessary or not to fix the tariff for commercial purposes in order to bring about greater degree of clarity and to avoid any conflicts and disputes arising in this regard.

37. In view of the above, we are of the opinion that the respondents are well within their rights to demand the members of the petitioner associations to enter into agreements with them or their representatives for the receipt of signals for actual use of their guests or clients on reasonable terms and conditions and in accordance with the regulations framed in this regard by the TRAI.

38. During the pendency of the above petition, vide Order of this Tribunal dated 20.9.2005, we made the following interim order in order to protect the interests of both the parties:

***“To balance the equities between the parties, we direct the petitioner associations to file an affidavit showing the particulars of the cable operators from whom each member of petitioner associations is receiving the signals and the subscription amount that is being paid to such cable operators. This will be filed along with the rejoinder within ten days.*”**

In Petition No. 32(C) of 2005, we direct the members of the petitioner associations who have contract other than with the respondents broadcasters or their authorized representatives to file the particulars as well as the quantum of subscription amount paid to those cable operators.”

39. But till date, complete particulars as directed to be produced have not been produced by the petitioners. Therefore, it is not possible for us to allow relief to the respondents which they may be entitled to for the receipt of signals of the respondents by the members of the petitioners association for which the respondent broadcasters have not received any consideration. Therefore, we leave upon the respondents to proceed against the petitioners association and its members for the recovery of the legitimate amount due to them for the receipt of the signals by the members of the petitioners association. If the members of the petitioners association have paid the subscription to the authorized agent/distributor/MSO of the respondent broadcasters, then that will be treated as legitimate payment but wherever such subscription has been paid to unauthorized distributor or MSO's or cable operators, it will be open to the respondent broadcasters to raise demands directly from the members of the petitioners association.

40. Thus, with the above observations, these petitions are disposed of.

.....J
(N. Santosh Hegde)
Chairperson

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(Vinod Vaish)
Member

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(D.P.Sehgal)
Member