

**THE MAHARASHTRA REAL ESTATE REGULATORY AUTHORITY,
MUMBAI.**

Suo Moto Enquiry. No. 17/2018.

Between

Mumbai Grahak Panchayat.

Represented by - Adv. Mr. Darius Khambata. a/w Dr. Abhinav Chandrachud. i/b Adv. Mr. Shailendra Singh. & Adv. Mr. Shirish Deshpande.

Magicbricks -

Represented by - Adv. Mr. Sudip Mullick a/w Mr. Harsh Parikh i/b Khaitan & Co.

99acres.com -

Represented by - Adv. Mr. Girish Godbole.

Makkan.com -

Represented by - Adv. Mr. Jai Kanade, Adv. Mr. Amaresh Singh, Adv. Ms. Divya Ved, Adv. Ms. Ankita Bhugra.

Housing.com-

Represented by- Adv. Ms. Alpana Ghose, Adv. Mr. Amaresh Kumar Singh, Adv. Ms. Ankita Bhupra, Adv. Ms. Divya Ved. i/b L& L partners law offices.

Naredco (Intervener) -

Represented by - Adv. Mr. Anwar Landge. a/w Adv. Ms. Sonam Singh.

CREDAI-MCHI (Intervener)

Coram: - Dr. Vijay Satbir Singh,

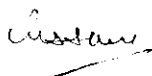
Member I, MahaRERA.

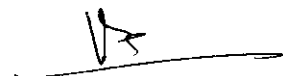
B.D. Kapdnis,

Member II, MahaRERA.

Major Issue.

Whether the web portals dealing with real estate projects facilitating sale/purchase of real estate plots, apartments, are 'real estate agents' as





defined under Real Estate (Regulation and Development) Act, 2016? (for short, RERA), is the important legal issue involved in this suo-moto enquiry initiated on the application of Mumbai Grahak Panchayat (for short, referred to as MGP) addressed to MahaRERA.

1 Since, the important question of law having bearing on the real estate business of the state is involved, we have minutely studied the law points and factual aspects brought to our notice by the learned advocates of the parties. Some issues regarding policy have also been touched and therefore, we have taken somewhat longer time to decide this matter.

Pleadings and submissions of parties.

2. We prefer to reproduce the pleadings of the parties as they are and their submissions to make this order compact.

Application of Mumbai Grahak Panchayat.

Mumbai Grahak Panchayat (MGP) informed the Authority that web portals like Magicbricks.com, 99acres.com, Makaan.com, Housing.com etc. advertise real estate projects on their web portals and thereby facilitate sale/purchase of real estate plots and apartments. MGP relies upon the definition of real estate agent defined by Section 2 (1)(zn) of RERA to contend the web portals act as real estate agents for the promoters as they negotiate for the sale/purchase transaction of the plots/apartments of the real estate projects by introducing the prospective buyers to the promoters/sellers through digital media, the advanced information technology easily available through internet. They receive remuneration for their services. Online property portals have lot of applause from the consumers due to ease of operation and convenience compared to the

traditional way of purchasing a house through an agent or broker or dealer. MGP contends that the style of traditional property brokers is different from the digital portals in following manner-

Sr. No.	Traditional Property Agent/Broker/Dealer	Online Property Portal
1.	Generally, the agent is known face in the locality. Personal touch can be established for buying selling or renting property.	Agent is available through the online portal. One can directly post an advertisement for buying, selling or renting property.
2.	Fees are fixed at a certain percentage of the agreement value.	Commission or fees are charged separately depending upon the type of service needed. Certain services are offered free of cost.
3.	Agent will assist in getting the documentation and registration process.	Some portals provide for online registration of documents. Legal documentation may be available at an additional charge.
4.	Agent with local expertise would be the best placed person to generate relevant leads and will be able to help out with formalities.	There will be various options available considering intensity of the online platform. As such to choose the right buyer/seller may be time consuming.
5.	Negotiation of the Property price has to be done through the Agent.	Buyers and sellers can directly negotiate the price.

classin

[Signature]

6.	A broker helps buyer because he is aware of the market trends.	Online property portals also give trends, but their information is often back dated and therefore, misleading.
7.	One has to meet his broker in the given time frame.	One can go online as per his convenient time. Need not depend on anyone.

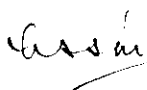
MGP further contends that these portals are not simply advertising the projects but they have been providing various other services relating to the listed properties. They provide advisory services, financial services, regulatory/registration services, verification of licenses and also give virtual treat. The online portals have come out with solution called Virtual 3D tour. It provides the property seeker a 360-degree view of the rooms and gives the feel in terms of space, lighting and ambience. The portals also provide sky view feature to get an aerial view of property and its surrounding area without visiting the location in person. Some portals provide a cab at the choice of time and date of the prospective buyers and picks him up to the location of the project of their choice promoted on their web portals. Some portals have also introduced builder pages on the site to give users a sense of track record of the builders. The web portals have algorithms to simplify the decision making process by providing price hit maps, visibility index, inventory demand and supply, housing lifestyle rating. Therefore, though the style of web portals is somewhat different than the traditional property broker/dealer, the portals have been using the information technology for reaching to the buyers for their clients namely

the promoters and they facilitate the transaction of sale by introducing, negotiating, acting for the promoters through the digital medium. They introduce through internet, prospective buyers and sellers to each other for negotiation for sale and purchase of the plots or the apartment and they charge fees for the services provided by them. Hence, these web portals come under the clutches of the definition of real estate agent defined under RERA. In order to make them responsible and to achieve transparency in the real estate sector, it is necessary to ask them to register themselves as real estate agent and if they are not ready then to prevent them from acting like real estate agent.

3. After preliminary hearings given to the parties, the Authority has taken a decision that the interest of other web portals, other than the four web portals mentioned in the letter of MGP is also involved in the matter and the promoters are also the important stake holders. The Authority took the decision for issuing a public notice allowing all those who are interested to appear and make their representations.

NAREDCO's Reply.

4. National Real Estate Development Council - NAREDCO, the Association of the promoters which is autonomous self-regulatory body established in 1998 under the aegis of Ministry of Housing and Urban Affairs, Government of India appeared. NAREDCO contends that the Real Estate Websites/portals for buying and selling properties are internet portals dedicated to meet every aspect of consumers' needs of Real Estate Industry. They advertise the projects by representing area of an apartment, amenities being provided, rates per sq. ft. or lump sum prices, pictures of the projects, their locations as to the proximity of the public and prominent



areas. This information is exchanged with the prospective buyers very often without the consent of the promoters whose properties are not listed with them. The grievance of NAREDCO is that the internet portals are meeting the needs of the consumers without taking consent of promoters. Real Estate Web Portals facilitate the sell or purchase of plot, apartment or building. They act on behalf of the promoters to facilitate the sale or purchase of real estate project or part thereof. According to them, the Real Estate Web Portals are covered under Section 2(zm), Section 9(1) of RERA and Rule 17 of the Maharashtra Real Estate (Regulation and Development) (Registration of Real Estate Projects, Registration of Real Estate Agents, Rates of Interest and Disclosures on Website) Rules, 2017 since these portals are facilitating the sale or purchase of an apartment or building registered under Section 3 of RERA. The Council states that the Real Estate Website Portals should make an application for registration as prescribed as per the provision of Section 9(2) of Real Estate (Regulation & Development) Act, 2016. They contend that the Real Estate Web Portals are performing the function of Real Estate Agent and therefore all the Real Estate Web Portals may be directed to register themselves in pursuance to Section 9(1) of Real Estate (Regulation & Development) Act, 2016.

Reply of Credai-MCHI-

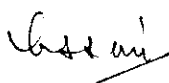
5. Credai-MCHI another association of developers appears and highlights the difficulties the Developer Members faced due to such unscrupulous brokers whose aim is only to create a ruckus and thereby gain a price advantage. It is reported that a wide canvass of developers is facing a huge problem from the local brokers who create micro-webpages advertising various projects, supposedly on "behalf of the developer" at a

deep discounted rate. While these brokers are not registered with the developers, they do not have any permission, written or verbal, to advertise the property or to claim a specific price point. They bring customers to these project offices and then try all tactics to arm twist the project team to agree to their advertised price point. This menace has come to a stage where it has now become a raging issue which needs to be curbed; especially in the post MahaRERA regime, where the developer is likely to be held responsible for all such marketing and sale activities, over which he has no control at all. Hence they suggest: -

- a) mandate all Real Estate Websites to accept advertisements only from those brokers who are registered under MahaRERA and have a bonafide registration number.
- b) the websites need to ensure, these MahaRERA registered brokers are also individually registered with the developer for the specific Project for which he wants place an advertisement or create a micro-webpage.

Reply of National Association of Software & Service Companies (NASSCOM) -

6. NASSCOM appears and highlights that these portals are listing websites and deal in online classifieds and are not carrying out negotiation or final sale / transfer of the property nor do they derive any kind of remuneration linked to the closure of the transaction. The fees charged are purely for space sold for advertising just like in any other advertising medium such as TV/Radio/Newspaper/Magazine etc. Hence, they should not be classified as real estate agents. According to it, treating them as agents would pose lot of operational and practical challenges on the web portals.



Further, it would also act as an entry barrier for new players and would stifle competition in this domain. They highlight the key differences between print media and other media such as web portals which is only related to areas such as the readership, space, portability, interactivity etc. The internet provides the opportunity to develop a new way to present information as it is a much more interactive toolbox. Interactivity is one of the things that makes Internet different from newspaper. Newspaper print editions do have limitations of space; which online versions do not have. In an online platform, bulk of the advertisements is posted by the advertiser himself without the intervention of the web portal. A web portal is more interactive as compared to the Print media. However, these interactions take place on the initiation of the users of a web portal, besides every newspaper also has a web portal. As a matter of fact, an interactive newspaper has existed for some time now.

Further, a print advertisement with a QR code may be scanned to take the buyer to a video etc., this makes a print ad interactive too. Print and other media, where advertisements may be placed by promoters or real estate agents, have been treated at par by RERA and no differentiation has been drawn by the statute between online/offline or any other form of media.

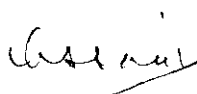
In addition to internet portals and newspapers, other forms of advertising are also employed by property owners and real estate agents to advertise sale of properties such as radio broadcasts and commercials on television. In addition, Real estate builders/agents also uses other medium such as hotels, clubs, as venues for property fairs/expos to meet prospective buyers. Since these forms of communication or mediums result in

introducing prospective buyers and sellers to each other, the rationale for holding certain online platforms liable under RERA, would have to be extended to all such mediums i.e. radio channels, television channels, hotels etc.; this would result in an anomaly that was not intended under RERA. Hence, treating other media such as web portals as 'Real Estate Agent' would be unfair and incorrect.

Reply and submissions of Magicbricks

7. Magicbricks Realty Services Limited ("Magicbricks") is a limited company incorporated under the Companies Act, 1956 having its address mentioned in the cause title. Magicbricks runs a popular and trusted website which allows for posting of advertisements regarding property listings and real estate project (as defined under Real Estate (Regulation and Development) Act 2016 ("Act")). Magicbricks does not participate in the negotiation, facilitation and consummation of any transaction relating to real estate projects and hence are not Real Estate Agents as defined under the Act.

Magicbricks denies all the allegations, averments, and submissions contained in the Representation dated 4 July 2018 made by MGP addressed to the Chairman of MahaRERA. It contends that MGP does not have a cause of action for its Representation. MGP has not narrated the exact nature of grievances except frivolously seeking registration of web portals to cause harassment to Magicbricks with an intent to stifle competition and transparency. The Representation filed by MGP is, frivolous, misconceived and devoid of any merit, and ought to be dismissed. It contends that it is merely a forum amongst others for property advertisement listings and does not perform activities of a Real Estate Agent as alleged or at all. Further,



being a conduit for mere advertisement by itself cannot be considered an activity performed by a Real Estate Agent. It submits as under: -

A. The Preamble to the Act aims to establish an authority which regulates the "...sale of real estate projects in an efficient and transparent manner". Hence, the act and the scope of authority relates to matters arising out of 'sale'.

B. Section 9(1) of the Act states "*No real estate agent shall facilitate the sale or purchase of or act on behalf of any person to facilitate the sale or purchase of any, plot, apartment or building, as the case may be, in a real estate project or part of it...*". Therefore, Section 9 (1) of the Act prohibits Real Estate Agents from facilitating sale or purchase of a plot, apartment, building or real estate development project that requires registration, if not registered.

It can therefore be conclusively stated that the matter for which a Real Estate Agent requires registration relates to sale or purchase, i.e. ultimate consummation / conclusion of a transaction in a Real Estate Project.

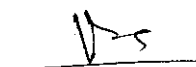
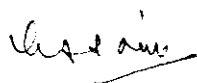
C. Section 10 (d) of the Act which deals with the functions of a Real Estate Agent, requires the real estate agent to "...facilitate the possession of...at the time of booking of any plot..." Hence it is clear that the Real Estate Agent needs to be present/visible/available at the time of booking i.e. sale of plot, apartment or building. (Emphasis supplied in bold)

Section 10(d) clearly supports the argument with respect to a Real Estate Agent's involvement at the time of booking i.e. consummation of the transaction between the Developer and Purchaser. Magicbricks is neither aware nor has any role to play whatsoever, when consummation / completion of transaction is done between Developer and Purchaser.

D. Section 2 (zm) of the Act defines "real estate agent" *"to mean any person, who negotiates or acts on behalf of one person in a transaction of transfer of his plot, apartment or building, as the case may be, in a real estate project, by way of sale, with another person or transfer of plot, apartment or building, as the case may be, of any other person to him and receives remuneration or fees or any other charges for his services whether as commission or otherwise and includes a person who introduces, through any medium, prospective buyers and sellers to each other for negotiation for sale or purchase of plot, apartment or building, as the case may be, and includes property dealers, brokers, middlemen by whatever name called"*;

The words *"...and include... whatever name called..."* would have to be read with first part of the definition. The principle embodied in such linkage of the two parts of the definition is referred to as *ejusdem generis*, which "confines what follows, to what has gone before".

The first part of the definition starts with the words *"...to mean any person..."* *"...any person who negotiates or acts on behalf of one person in a transaction of transfer..."* which clearly narrates in an exhaustive manner the functions of the Real Estate Agent. The second part simply starts with



the words “...and includes the person who introduces, through any medium, prospective buyers and sellers to each other for negotiation for sale or purchase...” cannot be read in isolation and will have to be read with the preceding set of words. They have to be read in accordance with the principal definition of Real Estate Agent and cannot in any manner destroy and violate or overreach the nature of the definition of the Real Estate Agent.

Further, where a statutory definition uses the words ‘means... and includes’ such as in the case at hand, the interpretation will afford an exhaustive explanation to the meaning which for the purposes of the Act must invariably be attached to the word or expression’.

The words “...and includes...” relates clearly to the previous part of the definition which requires consummation of a transaction.

To be a Real Estate Agent a person should fulfil the following:

1. There has to be an act of negotiation or action on behalf of one person;
2. There has to be a transaction of transfer;
3. There has to be a purchase or sale, in a real estate project (as defined under the Act);
4. The person should necessarily receive a remuneration, fee or charge for his service should be arising out of the transaction for his services;
5. The remuneration, fee or charge would be like commission or otherwise.

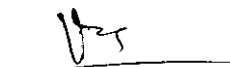
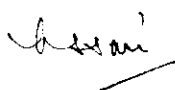
Magicbricks submits that only if there is a specific introduction of a specific buyer to a specific seller regarding a specific project which

culminates in a transaction, can a person be deemed to be a real estate agent under Section 2(zm) of the Act. Magicbricks states that neither does it negotiate, act or introduce or have any visibility of the ultimate transaction of transfer of plot, apartment or building in a Real Estate project (as defined in the Act) hence it does not fall within the definition of Real Estate Agent as stated in Section 2 (zm) of the Act. Further, Magicbricks states that unlike a Real Estate Agent who promotes, selects properties and earns a commission, Magicbricks on the other hand advertises all properties on its website which includes properties of thousands of developers and thousands of real estate agents and few lac end consumers.

Another important word is "*commission*". It is well known that the remuneration, fee or charge as commission or otherwise is linked to consummation/fructification of a transaction. Black's *Law Dictionary* (Eighth Edition, South Asian Edition) defines "*commission*" as a "fee paid to an agent or employee for a particular transaction, as a percentage of money received from the transaction". Essentially, it is in the nature of recompense or reward i.e. a percentage on the price or value of the amount involved in any transaction.

The meaning of the word "*negotiate*" is also pertinent to note. Black's *Law Dictionary* (Eight Edition, South Asian Edition) defines "*negotiate*" as act "to bring about by discussion or bargaining". "*Negotiation*" is "a process of submission and consideration of offers until an acceptable offer is made and accepted."

On careful reading of the definition of Real Estate Agent it would be evident that a person who introduces "...*through any medium...*" is included in the definition of Real Estate Agent. Magicbricks is the



medium/conduit for advertisement to world at large and it does not do any activity which is private / limited between two individuals / persons / parties.

The word "*introduces*" in the definition would necessarily mean that the person who introduces should have knowledge, familiarity, acquaintance or some relationship with the person whom he introduces. Magicbricks does not participate in any transaction between two parties. Magicbricks only publishes information made available by a Developer and it has no visibility or knowledge about the person who visits the website. There is thus no introduction of buyers and sellers "*...to each other...*".

Thus, it is submitted that the definition does not contemplate that the conduit through which advertisement is made, to be a person, acting on behalf of any person, or introducing buyers and sellers for the purposes of negotiation.

The fact that the second part of the definition starts with the *words* "*...and includes a person who introduces...*" has to be necessarily read with the first part because the first part deals (i) transaction of transfer, (ii) by way of sale and (iii) with receipt of remuneration, fee, charges for the services of the Real Estate Agent. Mere introduction without having the abovementioned ingredients cannot make a person a Real Estate Agent.

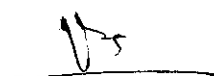
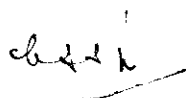
The second part if read in isolation does not have those words. It would be peculiar if the second part is read in isolation which would mean an introduction by one party to another which leads to a conclusion of the transaction without compensation to the person who introduces would also make such a person who introduces the two parties to one another a Real Estate Agent.

Magicbricks' Portal is a forum of advertisement only. Magicbricks does not negotiate or act on behalf of the Developer or visitor of the site. Magicbricks is not aware whether or not the visitors of the site actually connect with the Developer who advertises on Magicbricks' Portal. Magicbricks is not made aware by either the Developer or any visitor to the site whether any transaction is consummated between them relating to any plot, apartment or building advertised.

It is important to note that the second set of words also states negotiation "... *for sale or purchase...*" Therefore, an action of introduction must culminate in sale or purchase. The sale or purchase must also yield a compensation to the person who introduces. The first set of words ropes in a person who negotiates or acts on behalf of one party; the second ropes in a person who may not act for any particular party but merely introduces. However, in all cases there has to be a consummated transaction of sale or purchase and party acting or introducing has to be a party to or be aware of it and receives compensation. In the instant case, Magicbricks is not even aware of the transaction.

It is clarified that the activities of Magicbricks do not constitute those of a real estate agent. Magicbricks' website is open and free for public viewing. Magicbricks' website is merely a platform through which real estate developers, real estate agents and sellers / end users may post advertisements to the public at large.

The allegation made by MGP as stated in the Impugned Notice is baseless and unfounded. Each and every allegation, statement and contentions made by the MGP in the referred paragraph of the Representation is denied and disputed.



Magicbricks states that it appears the entire case which is being attempted to be made out by MGP for seeking registration of web portals such as magicbricks.com, 99 acres.com etc., is on the basis that they “facilitate” sale / purchase of apartments etc.

Black’s *Law Dictionary* (Eighth Edition, South Asian Edition) defines “facilitation” as “the act or instance of aiding or helping”. Further, MGP has itself in its Representation narrated the meaning of “facilitate” which is as follows:

“To help people with a process to reach an agreement without getting involved.

To make it easy

To reach an agreement is to conclude”.

Magicbricks submits that, it does not help people with any process to reach an agreement. Magicbricks has no visibility of the agreement being concluded.

Magicbricks does not endorse any particular project nor does Magicbricks in any manner whatsoever indulge itself in any of the aforesaid activities which result in “facilitation”.

Further, Magicbricks does not in any manner involve itself in any decision-making process of a prospective purchaser as is alleged or at all. If providing informative material is construed as participating in a decision making process, then all reports, study materials, thesis, articles, quotes given by various experts in the real estate industry which is made available in the public domain, would also have to be regulated as one would not be able to publish any of the above, without seeking registration as a real estate agent under the provisions of the Act. In Magicbricks’

humble submission, the aforesaid contemplation of the MGP is preposterous and liable to be dismissed.

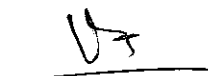
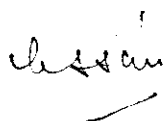
The allegation that some portals have the right to use data of a visitor without their permission. Magicbricks denies that it uses any information of its visitor without the approval and consent of such visitor as alleged or at all.

Magicbricks states that any visitor of the website of Magicbricks if he does consummate a transaction in an ongoing project shall always have the protection of MahaRERA under the provisions of the Act. Therefore, the entire argument made by MGP that such visitors must be protected by making it compulsory for Magicbricks and other web portals to seek registration with MahaRERA, is misleading and made with an intent to misguide this Hon'ble Forum which would lead to drain of resources of MahaRERA being utilized for insignificant matters. The rights of the visitors are well protected by the Act and MahaRERA.

On careful reading of the functions of real estate agents it would be evident, that the intention of the legislature was to curb, unfair trade practices, which primarily were done in a manner where record/evidence was not easily available.

Magicbricks states that it merely publishes content provided by the advertisers/developers. It does not make any statement or representation of its own relating to any Real Estate Project. Magicbricks' role is like that of a traditional advertisement medium like a newspaper, magazine, billboard, hoarding, television, etc. it only passes on information as has been prepared and submitted by the advertiser.

On reading of Section 10 (c) (ii) of the Act, it would be clear that the legislature contemplated publication of advertisement through newspaper



or otherwise. The word 'otherwise' is of great significance. It puts the newspapers and other mediums of advertisement (like that of Magicbricks) in a separate basket from real estate agents.

The fact that there is a RERA website which has all required details of a Real Estate Project, it would be incumbent on a prudent purchaser to verify the same before making an investment in any project which is registered with MahaRERA.

In light of this, it is submitted that Magicbricks plays no part in the process of ultimate consummation of a transaction. Magicbricks has no visibility or knowledge regarding any subsequent interactions between the persons who visit the website and the persons whose advertisement is posted on the website. Magicbricks receives no compensation for consummation / completion / culmination of any transaction.

Magicbricks does not participate in any prospective or actual transactions in any manner whatsoever and has no role to play in assisting in or bringing about any negotiation or consummation / completion / conclusion of sale.

Magicbricks does not charge any remuneration from the visitors who browse/use the website. Therefore, the function served by Magicbricks' website cannot be considered a service.

Consumer Organization has suppressed a material fact regarding the scope of activities performed by Magicbricks. Further, the Consumer Organization itself is not a consumer of Magicbricks, and therefore has no *locus standi* to be filing a Representation against Magicbricks.

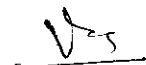
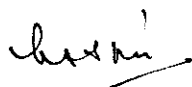
Magicbricks have various options which are available on the Magicbricks website like Propworth, forum, advice. The Propworth application can also be downloaded on one's mobile. The information

available in these applications are not based on any monetary consideration from any advertisers but are information based on market research. For e.g. any person can use Propworth by plugging in all the necessary parameters like nature, size or area, locality, floor, number of bedrooms, car-parking, etc. to either rent or buy an apartment and they will get details of market practice, rates available in a particular area. More information on these aspects can also be found in the Forum section. These are not advertisements that are published but these applications have been developed for the purpose of educating and informing people amongst others who are interested in the property.

Magicbricks' website is not designed only to cater to sellers and purchasers. The website is free to all to access and use such as researchers, policy-makers, their own competitors, as well as property buyers and sellers. Hence, it is not a case where Magicbricks can control viewership or use the information published therein.

Curtailing the actions of such websites viz Magicbricks would throttle transparency and would not allow the interests of prospective buyers to take informed decisions as is contemplated to be the main objective of Act for which it is enacted.

The website of Magicbricks amongst others is a forum or a platform for advertising. The Consumer Organization seems to have made an absurd indication that even platforms/websites such as Google, Amazon and Instagram be brought within the ambit of the Act, as Real Estate Agents. Magicbricks states that by bringing such parties including Magicbricks within the ambit of the definition of Real Estate Agent would entail exercise of powers on parties outside of MahaRERA's jurisdiction and drain on MahaRERA's resources.



In light of the above, it is submitted by Magicbricks that the representation filed by the MGP be dismissed in its entirety and it is further prayed that the Impugned Notice be withdrawn or disposed of as being satisfied that Magicbricks is not a Real Estate Agent within the meaning of the Act.

PARA-WISE REFERENCE TO MGP REPRESENTATION

That the MGP's allegation on Page 3 regarding Magicbricks being an 'agent' is denied. MGP has defined an agent with reference to Section 182 of the Indian Contract Act, 1872. However, Magicbricks is neither employed by the Developer to (i) do any act on behalf of the Developer or (ii) to represent the Developer in dealing with visitors.

That the allegation in unnumbered Paragraph 1, 2 and 3 of Page 3 of the Representation is misleading, speculative and is not applicable to Magicbricks as alleged or at all. While MGPs have referred to the role of a real estate agent (as stated in the definition under Section 2(zm) itself) as that of negotiating and acting on behalf of one person, Magicbricks performs no such function. MGP has defined the term 'negotiate' to mean to obtain or bring about by discussion, to involve a "bargaining process between two or more parties seeking to discover a common ground and reach an agreement to settle a matter of mutual concern". From its own reliance on the definition it is evident that two parties must reach an agreement. Magicbricks has no visibility of any agreement reached between the parties.

With respect to paragraph 4 of unnumbered page 4 of the Representation, the MGP has rightly stated that "consideration is a must to avail the services". Magicbricks repeats and reiterates, that no remuneration

is taken i.e. no consideration is taken by Magicbricks from the visitors visiting its website to view the advertisements or listings. Magicbricks does not get any remuneration arising out of any transaction of sale.

With respect to paragraph 5 of page 5 of the Representation, Magicbricks does not participate in any transaction between two parties. Magicbricks only publishes information made available to it. There is thus no introduction of buyers and sellers by Magicbricks. Magicbricks denies all statement and contentions made in the paragraph under reply by MGP.

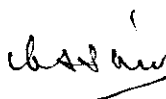
That the applicability of Sections 9 and 10 of Act to Magicbricks as alleged on Pages 5 and 6 of the Representation is denied as they are only applicable to those parties who qualify as Real Estate Agents as defined under Act. Notwithstanding, it is further denied that Magicbricks 'facilitates the sale or purchase or acts on behalf of a person to facilitate the purchase or sale'. While Magicbricks has indeed stated that it facilitates transactions, MGP must not misconstrue the nomenclature to mean facilitation in the manner envisaged by the Act and functions performed by an actual Real Estate Agent. Facilitation by Magicbricks is strictly limited to communication of information as provided by the Advertiser.

That the applicability of pages 7, 8 and 9 of MGP's Representation to Magicbricks' scope of activities as explained above, is denied in toto.

Second reply of Magicbricks

This Authority during the hearing on 29 October 2018 sought clarifications from Magicbricks in respect of its business model. Magicbricks has filed written submissions.

Magicbricks contends that Magicbricks is merely a medium / platform for advertisement of real estate properties. The clients of

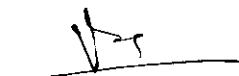
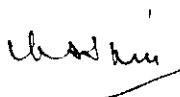


Magicbricks range from real estate agent, developers and owners of property. These clients approach Magicbricks for posting advertisements on the website of Magicbricks. Magicbricks earns its revenue from these advertisements.

The business model followed by Magicbricks is as follows:

1. For advertisement that are paid for are hereinafter referred to as "Sponsored Advertisement". Person who posts advertisements on the website of Magicbricks be it Sponsored Advertisement or free advertisement are referred to as "Customers". Magicbricks offers various packages for advertisement to its Customer. Developers, and Real Estate Agents are required to sign a physical order form which stipulates the applicable terms and conditions including site terms and conditions. Owners of property subscribe to the website terms and conditions before posting the advertisement with Magicbricks;
2. A developer or a real estate agent or an owner of a property approaches/visits the Magicbricks website, for advertising property, which may be either residential or commercial;
3. A Visitor of website gets to explore a bouquet of properties, some of which are advertised for an advertising fee paid to Magicbricks, some of which are posted for free of cost (by individual owners of property). In addition, Magicbricks posts properties basis its own research, only for the purpose of information (such properties do not have any value indicated nor the contact details of owners/agents are indicated and hence are not advertisements);

4. It is pertinent to note here that Magicbricks does not charge any fee from the any visitors on its website;
5. For Sponsored Advertisement a Customer (only Developer/Real Estate Agent) is required to fill in a physical order form and also endorse online terms and conditions including Privacy policy forming part thereof, a copy whereof is attached hereto and marked as Exhibit "A". The Visitors to the website have two options. Under the first option a Visitor logs on and simpliciter browse the site checking their requirements, educating themselves with the information available and exits the website. In such circumstances Magicbricks has no means to identify such users. Such Visitors are not required to provide any information or contact details to Magicbricks.
6. Under the second option Visitors while browsing the Website may want to know more details of a particular property, for which the Visitors may request for the contact details of the advertiser. For such request the Visitors are not required to pay any consideration to Magicbricks. Once the Visitor clicks the tab / button, User need to submit his contact details i.e. Name, Email, Mobile, and user mobile number is authenticated by sending an OTP to the mobile number as has been provided by the Visitor. The Visitor has to put in that OTP and the system checks the OTP to verify the phone number. Once the veracity is checked, the mobile number or any other phone number or contact details that the advertiser may have put on the website is made available on the screen of the Visitor.
7. In the said two options stated above, Magicbricks has no visibility or any knowledge whether any contact was made between the

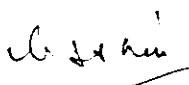


Visitor to the Website and the Customers who posted properties on its Website.

8. Under second option stated under paragraph 4.6 hereinabove, providing of the phone number is of importance because in most of the cases there is skeletal information about the property. Since large number of the properties are advertised by real estate brokers who do not want to divulge all details of the property. Simple information would not really lead to identification of the property and the skeletal information would be in the abstract form which is equivalent to no information. This is akin to newspaper advertisement where skeleton details are provided together with mechanism of identification of the property. Further, Magicbricks being an advertisement portal, generating revenue from developers/real estate agents posting their property on its website needs to record and enable the Customer to know how many visitors sought information or evinced interest on an advertisement listed by such Customers;
9. Magicbricks states that the objective is, the Visitors on the website should feed in their mobile number and email id to ensure that the website is not hacked and that the information available on the website is not scraped.
10. The Customer is also provided with the phone number of the Visitor making an enquiry of a particular property to enable them to know the number of responses they get against their advertisement on Magicbricks Website. In the modern internet world there is no other or better mechanism by virtue of which the

advertiser would be able to gather any information as to the productivity of an advertisement through an electronic medium.

11. Thereafter it is for the Visitor and the advertiser to connect with each other, if they so desire. Magicbricks does not have any visibility whether any such connection is made or not, because this is outside the ambit of Magicbricks.
12. Any Visitor who chooses the option of seeking information relating to contact number of the advertiser necessarily has to enter into terms and conditions of Magic Bricks which amongst others categorically provides *"Company is not involved in any transaction between any parties who are using our website. There are risks, which the User assumes when dealing with people who might be acting under false pretenses and the same shall be borne by the User. The website is a venue only and do not screen or/and censor or/and otherwise control the listings offered to other Users, nor does Company screen or/and censor or/and otherwise control the Users of its service. Company cannot and does not control the behavior of the participants on this site. We cannot control whether or not Users of Magicbricks.com will complete the transactions they describe on our site. It is extremely important that the user takes care throughout his dealings with other people, users on this site. Company does not accept or/and assume responsibility for the content or/and context of the user comment."*
13. Magicbricks on its website recommends and advises its Visitors to refer to the RERA website to see complete information with respect to any Project/Property developed, built by a Developer/Builder and/or initiated/referred to by a real estate agent (which is



required to be registered with Specified Authorities under RERA) before making any Buy/Sell or any other decisions;

14. Magicbricks makes no representations or warranties of any kind, express or implied about the completeness, accuracy, reliability or suitability with respect to the information, services or related information provided by Developer/ Builder on its site with respect to any property or project;
15. Magicbricks offers various packages of advertisements to its Customers;
16. The Customer makes payment of the fees to Magicbricks for booking an advertising space on the website of Magicbricks;
17. Upon payment being made to Magicbricks the advertisement as provided by the Customer is put up on the website of Magicbricks;

Magicbricks states and submits that the fees it receives from the Customer who wants to advertise its property on the website of Magicbricks is not at all linked or dependent on the sale of a property which is advertised on the Website of Magicbricks. The fees payable by the Customers to Magicbricks is fixed for all.

Magicbricks also states that in case if the customer of Magicbricks is a developer of a real estate project, then all the material advertised on the web portal of Magicbricks pertaining to the real estate project of the developer, is not generated or made by Magicbricks. The same is provided by the Developer to Magicbricks.

Magicbricks states and submits that the developer who provides content to Magicbricks for advertisement is governed by the provisions of The Real Estate (Regulation and Development) Act, 2016 ("RERA") and

hence if the developer violates any provisions of RERA then it would be liable to face action thereunder.

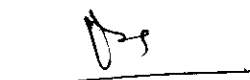
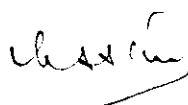
Besides the abovementioned services, Magicbricks further states that if the visitor of the website has left his number on the website, then by way of assistance and without any charge whatsoever, an assistance is provided to the Visitor where representatives of Magicbricks calls the Visitor to provide all the options already available on the website, orally to ensure the Visitor has full visibility of all products advertised. This is to help particularly those Visitors who may be technologically less knowledgeable than others.

Magicbricks contends that while the representative of Magicbricks calls the visitor it does not solicit or represent or advice or lead the visitor to buy a particular project over another. The representative only informs the visitor of further advertisements which are published which matches or pertains to the search which the visitor would have made on the website of Magicbricks.

Further, Magicbricks does not give any deals or discounts in a project to its visitors of the website. If the developer is offering any deal or discount for its project and has requested that the same also be advertised on the web portal of Magicbricks, then the same is advertised on the website.

Magicbricks states that a visitor cannot buy or sell or deal with properties on its web portal.

Magicbricks in its humble submission states that by virtue of the aforesaid Magicbricks repeats and reiterates that it does not fall within the meaning and definition of a "Real Estate Agent" provided under RERA and it also does not undertake any functions which a Real Estate Agent would undertake.



In light of the above, Magicbricks submits that the Complaint be dismissed with costs.

Submissions Of Magicbricks Realty Services Limited.

1. Magicbricks is an online portal/ website i.e. www.magicbricks.com ("Website"), exhibiting advertisements of real estate properties posted by Owners/Developers/Real Estate Agents ("Clients"). It is similar to a platform like a newspaper, bill board etc.
2. Individual Owners are granted the privilege of posting advertisement of their own property for a month complimentary i.e. free of cost, however for certain packs the property is posted for a fee charged by Magicbricks. Thus, Magicbricks earns its revenue from advertisements posted by Clients. The charges collected from Clients, for posting advertisement on Website, is not linked to consummation of a transaction between Clients and the buyers but is linked to the duration, placement and size and nature (i.e. Listing or Visibility services) of the advertisement.
3. For all Advertisements (paid/complementary) Clients, shall endorse the terms and conditions of the Website including Privacy policy forming part thereof. In addition to the compliance with Website Terms and Conditions, the Clients who avail services of Magicbricks, offline, he/it is required to fill in a physical order form. It is pertinent to note here that the Order Form carries a field, which requires an Advertiser to

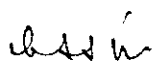
declare RERA ID number. Copies of Website Terms and Conditions, Privacy Policy and Order Form are annexed hereto and collectively marked as Exhibit "A".

A. SEARCH RESULTS

1. The Website has certain filters which can be used for the purpose of doing systematic search. One of the filters available to a Visitor of the website is RERA approved properties (new) and RERA approved Agents (new). A Visitor by clicking on those filters will have access to RERA approved properties and RERA approved Agents respectively. A copy of screen shot of such filter is annexed hereto as Exhibit "B".
2. A Visitor of website gets to explore a bouquet of properties, some of which are advertised on Magicbricks. In addition to paid advertised properties, Magicbricks posts projects basis its own research or data available with it, only for the purpose of information (such projects do not have any value indicated nor the contact details of owners/agents are indicated and hence are not advertisements).

B. VISITORS

1. Magicbricks does not charge any fee from any of the visitors on its website.
2. Visitors are people who may be Purchasers of Real Estate, researchers, regulators, Real Estate Owners, Real Estate developers, Real Estate Agents or any person who logs into, browses or in any manner visits the web portal of Magicbricks.
3. The Visitors to the Website have two options/Under the first option a Visitor logs in and simpliciter browses the site



checking his/its requirements, educating himself/itself with the information available and exit the Website. In such circumstances Magicbricks has no means to identify such users. Such Visitors are not required to provide any information or contact details to Magicbricks.


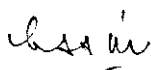
4. Under the second option Visitors while browsing the Website may want to know more details of a particular property, for which the Visitors may request for the contact details of the advertiser. For such request the Visitors are not required to pay any consideration to Magicbricks. Once the Visitor clicks the tab / button, User need to submit his contact details i.e. Name, Email, Mobile, and user mobile number. The mobile number of the visitor is authenticated by sending an OTP to the mobile number as has been provided by the Visitor.
5. The Visitor has to put in that OTP and the system checks the OTP to verify the phone number. Once the verification is made, the mobile number or any other phone number or contact details that the advertiser may have put on the website is made available on the screen of the Visitor.
6. Under second option stated under paragraph 4 hereinabove, providing of the phone number is of importance (i) to ensure that the website is not hacked and that the information available on the website is not scrapped, (ii) genuineness of the Visitor and (iii) in most of the cases there is skeletal information about the property. Large number of properties are advertised by real estate brokers who do not want to divulge all details of the property. Simple information would not really lead to

identification of the property and the skeletal information would be in the abstract form which is equivalent to no information. This is akin to newspaper advertisement where skeletal details are provided together with mechanism of identification of the property or by collecting the interest through post box mechanism.

7. The customer of Magicbricks is also provided with the phone number of the Visitor making an enquiry of a particular property to enable them to know the number of responses they get against their advertisement on Magicbricks Website. In the modern internet world there is no other or better mechanism by virtue of which the advertiser would be able to gather any information as to the productivity of an advertisement through an electronic medium.
8. As regard print media is concerned there is a mechanism of ascertaining hits by ascertaining the circulation / readership of newspapers. The intention of circulating hits of a Visitor is the mechanism which enables the advertiser to understand the productivity of its expenditure.

C. OTHER FACILITIES

Besides the abovementioned offering of advertisement space, Magicbricks offers various other facilities, free of cost, to all visitors like tools and advise, entry news, property news, expert corner, rates and trend poles etc. These are facilities and contents which are provided without any charges



D. STEPS TAKEN BY MAGICBRICKS TO INFORM VISITORS THAT MAGICBRICKS IS NOT A PARTY TO THE TRANSACTION.

1. Any Visitor who chooses the option of seeking information relating to contact number of the advertiser has to necessarily accept terms and conditions of Magicbricks which amongst others categorically provides *"Company is not involved in any transaction between parties who are using our website. The website is a venue only and do not screen or/and censor or/and otherwise control the listings offered to other Users, We cannot control whether or not Users of Magicbricks.com will complete the transactions....."*
2. Magicbricks on its Website recommends and advises its Visitors to refer to the RERA website to see complete information with respect to any Project/Property developed, built by a Developer/Builder and/or initiated/referred to by a real estate agent (who/which is required to be registered with Specified Authorities under RERA) before making any Buy/Sell or any other decisions. The relevant portion is *"Project developers or builders and Real Estate Agents, are required to comply with rules, regulations and guidelines of RERA Act 2016 and obtain necessary registration under the said Act. It is mandatory for Project developers or builders and Real Estate Agents to disclose on the Site, all material and requisite information as required under the Act. We do not guarantee that Project(s) and Real Estate Agent have registered under the Act or are compliant with the same. In no event will the Company be liable for any claim made by the Users including seeking any cancellation for any of the inaccuracies in the information*

provided in this Site". "It is recommended and advised to refer to respective RERA website(s) to see and obtain complete information with respect to any Project/Property (which is required to be registered under RERA Act, 2016) developed, built by a Developer /Builder and/or initiated /referred to by a Real Estate Agent, before making any Buy/Sell or any other decisions".

E. WHERE MAGICBRICKS APPROACHES VISITORS

1. When a Visitor is looking out for a specific property basis defined filters, a pop up on the screen showing similar properties advertised would appear, which the Visitor may or may not notice.
2. Magicbricks team reaches out to Visitors only to confirm to them the other available option which are in line with the Visitor search. This is done for the purpose of educating Visitors, particularly those who may not be technologically adept i.e. very skilled or proficient in handling online matters.
3. When the Visitor visits the Website and leaves his/her number, some of the new properties published on Website which are similar to those earlier searched by the Visitor are also picked by the system and shared with the Visitor either by email, or by sms, or by voice call or by all the above mechanisms.

F. IN LAW WHETHER THE OPERATIONS OF MAGICBRICKS MAKES IT A REAL ESTATE AGENT AS DEFINED UNDER THE ACT.

1. Magicbricks does not charge any Visitor including the one who may ultimately consummate a transaction with an Advertiser.

2. Magicbricks has no visibility of nor is privy to any transaction that may take place between an Advertiser and a Visitor/Purchaser.
3. Magicbricks does not negotiate on behalf of any person in a transaction of transfer of plot/apartment, building. Black' Law Dictionary Sixth Edition defines negotiation as "*Negotiation is process of submission and consideration of offers until acceptable offer is made and accepted*". A copy of the Black' Law Dictionary Sixth Edition defining the work negotiation is annexed hereto and marked as Exhibit "C". The word negotiation lends credence to the fact that it should lead to consummation of a transaction.
4. Mumbai Grahak Panchayat itself in its complaint admits that Magicbricks does not participate in a transaction. It says "*the process of decision making as to whether or not to indulge in a transaction is made easy by such web portals*".
5. Compensation received by Magicbricks from advertiser is not linked with transfer and Magicbricks is entitled to fees for publishing the advertisement irrespective of consummation of transaction. The charges collected for posting advertisement on Magicbricks site, by an Individual Owner, Developer, Broker is not linked to consummation of a transaction but is linked to the duration, placement, size and nature (i.e., Listing or visibility services) of the advertisement.
6. The Compensation payable to Magicbricks cannot be called a Commission: -
7. The definition of Real Estate Agent requires (i) negotiation or action by one person; (ii) in a transaction of transfer by way of

sale of plot, apartment or building; (iii) which entitles the person who participated in a negotiation or any act on behalf of one person to remuneration or fees or other charges as commission or otherwise. The words "... transaction of transfer..." deals with critical words "transaction" and "transfer". The word "transaction" as per MGP means *an agreement between a buyer and a seller to exchange goods, services, or financial instruments. Agreement, contract, exchange, understanding, or transfer of cash or property that occurs between two or more parties and establishes a legal obligation. It is also called booking or reservation. In the present context transaction pertains to transfer of plot, apartment of building as the case may be, as such may be referred to as Property collectively.* Therefore, Mumbai Grahak Panchayat agrees that there has to be a conclusion by way of an agreement.

8. Blacks Law Dictionary, eighth edition defines "Transaction" as *"the act or an instance of conducting business or dealings; the formation, performance or discharge of a contract"*.
9. According to them, the word "transfer" under Transfer of Property Act, 1882 means an act by which a living person conveys property, in present or in future to one or more other living persons or to himself and one or more other living persons and to transfer property is to perform such act.
10. The Real Estate (Regulation and Development) Act, 2016 is concerned primarily with sale which would be evident from the definition of Real Estate Agent.

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11. It is submitted that transaction of transfer by way of sale means consummation of a particular transaction.
12. The said Mumbai Grahak Panchayat also endorses the methods of transfer prescribed under the Transfer of Property Act, 1882 but wrongly included in Leave and License.
13. The subsequent part of the definition of the Real Estate Agent includes a person who introduces through any medium prospective buyers and sellers for negotiation for sale of plot, apartment or building and includes property dealers, middle man by whatever name called. This subsequent part of the definition of Real Estate Agent cannot be read in isolation because it would destroy, demolish and overreach the exhaustive definition in the first part which requires (i) consummation /fructification of transfer by way of sale, plot, apartment, building (ii) where a person acting on behalf of one person receives remuneration, fees or other charges for his services arising out of such transaction of transfer by way of commission or otherwise.
14. If the subsequent part of the definition is read in isolation, it would lead to absurd situation where introduction of one person to another merely for negotiation not culminating in a transaction of transfer would make the introducer a Real Estate Agent.
15. Can an introduction by one person to another which if ultimately leads to a transaction, but where the introducer does not have any visibility, control, knowledge of ultimate consummation of transaction or does not participate in any

manner in relation to the transaction and does not receive any compensation thereto will still be considered to be a Real Estate Agent? The Hon'ble Supreme Court of India has in S.R. Batra and ors. Vs. Taruna Batra, AIR 2007 SC 1118, inter-alia, stated that *"it is well settled that any interpretation which leads to absurdity should not be accepted"*.

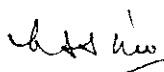
16. The entire Act is to be read as a whole. The preamble of the Act set out herein below shows that it relates to sale. Preamble is set out herein below:

"An Act to establish the Real Estate Regulatory Authority for regulation and promotion of the real estate sector and to ensure sale of plot, apartment or building, as the case may be, or sale of real estate project, in an efficient and transparent manner and to protect the interest of consumers in the real estate sector and to establish an adjudicating mechanism for speedy dispute redressal and also to establish the Appellate Tribunal to hear appeals from the decisions, directions or orders of the Real Estate Regulatory Authority and the adjudicating officer and for matters connected therewith or incidental thereto"

17. Section 9 and Section 10 of the Act also relates to sale. Section 9 and 10 of the Act are set out herein below:

*"9. (1) No real estate agent shall facilitate the sale or purchase of or act on behalf of any person to facilitate the sale or purchase of any plot, apartment or building, as the case may be
....."*

Section 10 – *"Every real estate agent registered under section 9 shall –*



(a) *not facilitate the sale or purchase of any plot, apartment or building, as the case may be, in a real estate project or part of it.....*

(b)

(c)

(A)

(B).....

(C).....

(ii) *permitting the publication of any advertisement whether in any newspaper or otherwise of services that are not intended to be offered.*

(d) *facilitate the possession of all the information and documents, as the allottee, is entitled to, at the time of booking of any plot, apartment or building, as the case may be;*

(e)

18. Sale as defined under Section 54 of the Transfer of Property Act, 1882 is set out herein below:

“Sale is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised.”

19. Therefore, as seen above, the Act applies only to transaction which are concluded by way of a sale of an apartment or building.

20. Magicbricks does not have visibility of any discussions between the Advertiser and the Visitor. Neither is any revenue of Magicbricks linked to consummation of a transaction between the Visitor and Advertiser.

21. Web portals such as Magicbricks have been operating in India for the past 8-10 years, i.e. much prior to the Act coming into force. Therefore, had the intention of the legislation been to include web portals within the ambit of the Act as a Real Estate Agent, it would have specifically added the term "web portals" in the definition of Real Estate Agent, when it has already added words such as "property dealers, brokers, middlemen" in the definition.
22. The correct way of reading a definition is considered by the Supreme Court in various cases and Magicbricks relies upon two such cases, the first being Kalidas Dhanjibhai Vs. State of Bombay reported in AIR 1955 SC 62.
23. Facts of that case being the Appellant was the Owner of a small establishment situated in Ahmedabad. His business was very small which entailed going to certain local mills, collecting orders from them for spare parts and thereafter manufacturing the spare parts so ordered in his workshop and delivering the same to the mills and collecting his money for the spare parts. No buying or selling was done on the premises situated in Ahmedabad. The question which arose was whether the premises situated in Ahmedabad was a "shop" within the meaning of Section 2(27) of the Bombay Shops and Establishments Act, 1948.

"Shop" means any premises where goods are sold, either by retail or wholesale or where services are rendered to customers, and includes an office, a store room, godown, warehouse or work place, whether in

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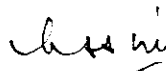
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the same premises or otherwise, mainly used in connection with such trade or business but does not include a factory, a commercial establishment, residential hotel, restaurant, eating house, theatre or other place of public amusement or entertainment."

24. The Learned Attorney General argued that the definition of shop should be read such that "*shop... includes a work place... mainly used in connection with such trade or business*". The Learned Attorney General also argued that the emphasis is on the words "good are sold" and not on the word "premises" because a trade or business relates to the buying and selling of goods and is not confined to the premises where that occurs.
25. The defendant relied on the principle of "*ejusdem generis rule*". The argument advanced by them was that the trade or business contemplated by the main portion of the definition is not any business of selling wherever and however conducted but only those trades where the selling is conducted on defined premises. The very idea of a shop in that connotation betokens a room or a place or a building where goods are sold. The rest of the definition merely links on the main definition ancillary places, such as store rooms, godowns, work places etc. which are mainly used in connection with the business. The Hon'ble Supreme Court stated that "*We think that as a matter of plain construction this is logical and right*".
26. The Learned Advocate General suggested that the way he has read the definition should be upheld as the Shops Act is a social legislation designed to prevent sweated labour and undesirable

employment of women and young children and partly to safeguard the health and provide for safety of workmen and employees. However, the Hon'ble Supreme Court held that *"We do not intend to break the general rule that points to the undesirability of interpreting the provisions of one Act by those of another passed by a different legislature, but as we have already decided the question of construction and interrelation and are now considering only the general policy of the State Legislature....."*. *"Therefore, even on the assumption of the Learned Attorney-General that two interpretations of Section 2 (27) are possible, we prefer the one which, in our opinion, better accords with the logical construction of the words used"*.

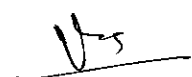
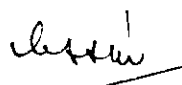
27. The Hon'ble Supreme Court of India while dealing with the argument of the Learned Attorney General of social legislation designed to prevent social injustice, stated that the fear of the Learned Attorney General is groundless as the legislation allowed to do away with contingences.
28. In the present case also, the legislature is free to amend or bring about clarification as and when it deems fit and proper and hence the argument that for social justice, web portals should be brought within the ambit of a Real Estate Agent is unfounded and misconceived.
29. The second judgment where the Hon'ble Supreme Court of India has interpreted definition having the words, means and includes is Mahalakshmi Oil Mills Vs. State of Andhra Pradesh (1989) 1 SCC 164.



30. In this judgment the Hon'ble Supreme Court of India was dealing with the definition of Tobacco as defined under the Central Excises and Salt Act, 1944. Tobacco "*means any form of tobacco, whether cured or uncured and whether manufactured or not, and includes the leaf, stalks and stems of the tobacco plant, but does not include any part of a tobacco plant while still attached to the earth*". The Appellants argued that the word tobacco in its ordinary connotation takes in the tobacco plant and every part of it, including the seed and that the definition also makes it clear that it takes in every form of tobacco, manufactured or not. Thus, tobacco seeds, not only when they are in their raw unmanufactured state but also on manufacture they manifest themselves in the form of tobacco and hence tobacco seed oil or tobacco seed cake will fall within the definition of tobacco. However, the State argued that the definition of tobacco covers expression means as well as what it includes and hence the same is exhaustive. Tobacco seeds does not come in either the first part or the second part of the definition and hence tobacco seeds and tobacco cakes cannot be said to form part of the definition of tobacco. The Hon'ble Supreme Court of India *inter-alia* held "*We are inclined to accept the contention urged on behalf of the State that the definition under consideration which consists of two separate parts which specify what the expression means and also what it includes is obviously meant to be exhaustive*".

G. FACED WITH THE QUESTION OF WHAT HARM IF WEB PORTALS REGISTER

1. In case if Magicbricks is directed to seek registration as a Real Estate Agent under the Act, then Magicbricks would suffer irreparable loss, as Magicbricks will not be in a position to comply with the obligations cast upon a Real Estate Agent under the Act, as Magicbricks is not in the business of real estate broking and hence its entire business model and technical model does not work like a Real Estate Agent. For e.g., Section 10 (d) of RERA requires a Real Estate Agent to facilitate possession of all information and documents as the allottee is entitled to at the time of booking of any apartment. Magicbricks is not present at the time of booking.
2. As seen from the business model of Magicbricks, it is not even aware whether the advertiser (Developer) and the Visitor have met or engaged in discussions. Further, Magicbricks is not even aware whether the Visitor has booked the apartment and hence it is not possible for Magicbricks to be present at the time of booking of an apartment as is required under RERA to fulfil such obligation.
3. If once Magicbricks is determined as a Real Estate Agent which can only be done if the subsequent part of the definition can independently stand on its own, which would violate and defeat the requirement of completion of a transaction of transfer and receiving compensation thereof. If that is the case then it would be open for a Visitor who would have discussed with a potential seller of a property, though it never culminated into any transaction, to file litigation proceedings for claiming



compensation towards expenses incurred. It would give rise to frivolous litigations.

4. Under Section 4 of the Act, Developer is required to update the name of RERA Agent appointed by it. Where a real estate agent posts an advertisement on Magicbricks, if Magicbricks is a real estate agent, how would and who would update such information, despite the fact that Magicbricks does not have any agreement with the Developer.
5. There is no mechanism available to Magicbricks and the web portals to check whether the property advertised requires RERA registration or is of the specification as advertised. The onus lies on the advertiser to furnish such information. For example, a property developer in Sikkim advertises its project, how can Magicbricks verify the contents? If any such requirement is placed, it would make the cost of advertisement in website prohibitive which in many ways would destroy transparency.

H. OTHER ARGUMENTS

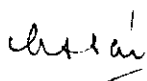
1. The Complaint if at all paid heed to will kill transparency. Time and again it has been submitted that there is no specific complaint against Magicbricks and that they have in fact suggested that Magicbricks is doing a very good job.
2. Any public interest litigation should be filed at the earliest. In this case it is filed 2 years after RERA came into force. Public interest litigation should be for bonafide public good and not merely a mechanism for attaining private ends.

I. PROTECTION ALREADY AVAILABLE

1. All purchasers are aware of the RERA website. It is the duty of the Purchasers to visit the RERA website to check the information.
2. RERA already protects the interest of Purchasers and no gain would be achieved if web portals are required to register as Real Estate Agent.

J. CASE LAWS CITED BY THE COMPLAINANT

1. The Complainant has relied on two judgments of the Hon'ble Supreme Court of India for understanding of the words "means" and "includes" in a definition.
2. The first judgment relied is Black Diamond Beverages and another vs. Commercial Tax officer, Central Section, Assessment Wing, Calcutta & others, (1998) 1 SCC 458.
3. The judgment in fact only states that even if there is a term "includes" in the definition, the first part of the definition beginning with "means" should be given a "*ordinary, popular and natural meaning. The interpretation thereof is in no way controlled or affected by the second part which "includes" certain other things in the definition*". The aforesaid clarifies that the judgment does not deal with the consequences and interpretation to be provided to the second part of the definition which has the term "includes".
4. Therefore, the reliance placed by the Complainant on the aforesaid judgment is erroneous and of no relevance to the facts of the present matter.
5. The second judgment relied on is State of Bihar Vs. Tata Iron and Steel Co Limited 1995 Supp (2) SCC 4.



6. The judgment needs to be carefully examined. The definition that was considered was “colliery” and in the first part of the definition it clearly states “...where the getting of coal is the principal object” and it includes plant for production of coke.
7. While interpreting the definition, the Hon’ble Supreme Court did not destroy the principal object and in fact relied upon the principal object to say “..... since hard coke also comes within the definition of ‘coal’ and hence is subject to control by the Central Government Authorities.
8. The aforesaid makes it evidently clear that the judgment cited by the Complainant supports the contention of Magicbricks that the subsequent part of the definition of Real Estate Agent which commences with the word “includes” will have to support the first part and it cannot destroy and overreach the first part of the definition.

Reply and written submissions on behalf of locon solutions private limited (housing.com):

8 It contends that - salient features, provisions and interpretation The Real Estate (Regulation and Development) Act, 2016, are:

The Real Estate (Regulation and Development) Act, 2016 (hereinafter referred to as the "RERA") has been enacted by the Parliament and all provisions thereof came into effect on May 1, 2017. The true interpretation of the objective and purpose of enactment of RERA derived is as under

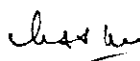
- (i) As per the long title of RERA (which essentially describes the nature of a proposed measure / statute), it is a statute to

establish the Real Estate Regulatory Authority for regulation and promotion of the real estate sector and to ensure sale of plot, apartment or building, as the case may be, or sale of real estate project, in an efficient and transparent manner and to protect the interest of consumers in the real estate sector and to establish an adjudicating mechanism for speedy dispute redressal and also to establish the Appellate Tribunal to hear appeals from the decisions, directions or orders of the Real Estate Regulatory Authority and the adjudicating officer and for matters connected therewith or incidental thereto.

- (ii) The 'Statement of Objects and Reasons' (which briefly explains the purpose, objectives, contents of a proposed legislation and helps in understanding the necessity and scope thereof) appended with the Real Estate (Regulation and Development) Bill, 2013 introduced before the Rajya Sabha on August 14, 2013 reads as follows:

"The real estate sector plays a catalytic role in fulfilling the need and demand for housing and infrastructure in the country. While this sector has grown significantly in recent years, it has been largely unregulated, with absence of professionalism and standardization and lack of adequate consumer protection.

Though the Consumer Protection Act, 1986 is available as a forum to the buyers in the real estate market, the recourse is only curative and is not adequate to address



all the concerns of buyers and promoters in that sector. The lack of standardization has been a constraint to the healthy and orderly growth of industry. Therefore, the need for regulating the sector has been emphasized in various forums.”

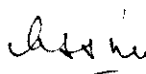
In view of the above, it becomes necessary to have a Central legislation, namely, the Real Estate (Regulation and Development) Bill, 2013 in the interest of effective consumer protection. uniformity and standardization of business practices and transactions in the real estate sector. The proposed Bill provides for the establishment of the Real Estate Regulatory Authority (the Authority) for regulation and promotion of real estate sector and to ensure sale of plot, apartment or buildings, as the case may be, in an efficient and transparent manner and to protect the interest consumers in real estate sector and establish the Real Estate Appellate Tribunal to hear appeals from the decisions, directions or orders of the Authority. The proposed Bill will ensure greater accountability towards consumers, and significantly reduce frauds and delays as also the current high transaction costs. It attempts to balance the interests of consumers and promoters by imposing certain responsibilities on both. It seeks to establish symmetry of information between the promoter and purchaser, transparency of contractual conditions, set minimum standards of accountability and a fast-track dispute resolution mechanism. The proposed Bill will induct professionalism and standardization in the sector, thus paving the way for accelerated growth and investments in the long run.

Amongst other objects, RERA has been enacted in view of the necessity and intent to control agents, brokers, middlemen who are involved in a real estate transaction. Historically, some of the States (like, Haryana) have attempted to bring out laws for regulation of this category but the same have failed to deliver the desired results due to various reasons, and therefore it was sought to be remedied by RERA to, amongst others, infuse over all transparency, ensure fair-play and reduce frauds & delays; and establish symmetry of information between the promoter and allottee.

From the above it is evident that RERA is a law governing the acts and conduct of sellers, buyers and agents in the real estate sector - with the objective of creating transparency, faith dealings and protection of buyers' interests. It is an understandable position that any business activity would entail, and be dependent on, other sectors and services — whose products and services are used from time to time for the core activity. In real estate business also, several external sectors and services are linked such as; material, labour, architects, consultants, sales & marketing professionals, brokers, advertisers etc. Some of these may be involved in the planning, designing, construction, marketing and sales activities, but RERA does not appear to, directly or indirectly, touch upon these external resources or bring the same within its ambit.

As regards agents / brokers etc. being within the ambit of RERA, in order to understand the intention of legislature, the following is relevant:

- (i) Shri. K. C. Venugopal (Alappuzha) in his speech during the 'Discussion on the motion for consideration of the Real Estate (Regulation and Development) Bill, 2016' before 16th Lok



Sabha mentioned — "Now-a-days there are a lot of agents in the real estate sector and there is no regulation for them. But now the real estate agents must register themselves in order to regulate the sale and purchase of properties in real estate projects that have been registered. Registered agents must not facilitate the sale of unregistered projects nor mislead buyers regarding services offered. This would also provide transparency in this sector."

(ii) It finds mention in the 'Report of the Standing Committee on Urban Development on Real Estate (Regulation and Development) Bill, 2013 ' that suggestions were received from stakeholders that there is no clarity on the eligibility criteria for the registration of real estate agents, and this needs to be incorporated in the final statute to ensure transparency in property dealing. It was further argued that the objective should be to create a pool of licensed real estate agents who are adequately trained and certified, like other self-employed professional e.g. insurance agents, lawyers etc. On this, the Ministry of Housing and Urban Poverty Alleviation opined as under:

"the main thrust of the Bill is regarding disclosure and transparency in relation to real estate projects, registered under the Bill. As real estate agents are an important link in the 'transaction' chain, it has been decided to register them and make them accountable."

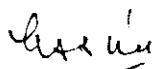
The legislature has visualized 'real estate agent' as a person / entity (dealing, acting on behalf of, or under the mandate of a party) which is part of a proposed transaction or in other words a link

between the seller and buyer. It also indicates that 'real estate agent' is to be viewed as any other agent / representative (for instance, insurance agent, lawyers etc.) of a particular party in a transaction. To impute a wider scope of activities for a 'real estate agent' would be highly inequitable and contrary to the purported legislative intent.

It is in the ordinary course of real estate business to engage or contract with external resources for marketing, sales promotion and for reaching out to the prospective buyers. It may be worthwhile to mention that Section 10(c)(ii) of RERA and Rule 17(ii) of Maharashtra Real Estate (Regulation and Development) (Registration of real estate projects, Registration of real estate agents, rates of interest and disclosures on website) Rules, 2017 (hereinafter referred to as the "Maha-RERA Rules") also recognizes that a real estate agent advertises or permits to advertise about real estate projects. In such a scenario, an averment that even such external resources which are the medium or which host the advertisements, listings or publications of a real estate agent are also classified as a 'real estate agent' under RERA, would not be a correct approach or interpretation of the objects of RERA.

Mischief Rule & Purposive Interpretation of Statutes:

(i) It is a well-established principle that while interpreting a statute it is to be taken into consideration for which the statute was enacted. In this regard, in the matter of U.P. Secondary Education Service Vs State of U.P. (Special Appeal No. 146 of 2010, reported as (2011) 2 All LJ 149), the Hon'ble Allahabad High Court reiterated the mischief rule for statutory



interpretation as laid down in Heydon's case (reported as [1584] EWHC Exch J36) which provided as under:

"that for the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law) four things are to be discerned and considered: (1) what was the common law before making of the Act; (2) what was the mischief and defect for which the common law did not provide; (3) what remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth; and (4) the true reason of the remedy."

The Allahabad High Court stated that the mischief as used in statutory interpretation means a legal defect which is sought to be rectified or the factual condition that is causing concern. It is the duty of the judge to rationalize the law and to attune it with the object and purpose for which the law is enacted. It is not necessary in every case to strike down the rule, if it can be saved by subtle intervention without causing damage to the contents, with purpose and save it from the vice of unconstitutionality.

- (ii) In the matter of Badshah Vs Urmila Badshah Godse and Others (reported as AIR 2014 SC 869), the Hon'ble Supreme Court has observed that
 - (a) while interpreting a statute where alternative constructions possible the Court must give effect to that which will be responsible for the smooth working of the

system for which the statute has been enacted rather than one which will put a road block in its way; and

(b) one should avoid a construction which would reduce the legislation to futility and should accept the bolder action based on the view that Parliament legislate only for the purpose of bringing about an effective result.

(iii) Apart from the mischief rule, under various judicial pronouncements the Hon'ble Supreme Court has laid down the importance of purposive / contextual interpretation of statutes. Relevant observations from some of the key judicial pronouncements are extracted here under:

(a) Chief Justice of Andhra Pradesh and Others Vs L.V.A. Dixitulu and Others (reported as AIR 1979 SC 193):

"If the language, or the phraseology employed by the legislation is precise and plain and thus by itself proclaims the legislative intent in unequivocal terms, the same must be given effect to, regardless of the consequences that may follow. But if the words used in the provision are imprecise, protean or evocative or can reasonably bear meanings more than one, true meaning of the rule of strict grammatical construction ceases to be a sure guide to reach at the real legislative intent. In such a case, in order to ascertain the true meaning of the terms and phrases employed, it is legitimate for the Court to go to each portion throwing light on the purpose

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of the legislation, the object sought to be achieved and the consequences that may flow from the adoption of one in preference to the other possible interpretation. Where two alternative constructions are possible, the Court must choose the one which will be in accord with the other parts of the statute and ensure its smooth, harmonious working, and eschew the other which leads to absurdity, confusion, or friction, contradiction and conflict between its various provisions, or undermines, or tends to defeat or destroy the basic scheme and purpose of the enactment."

- (b) *Kehar Singh and Others Vs State (Delhi Administration)* (reported as AIR 1988 SC 1883):

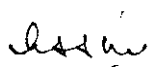
"But, if the words are ambiguous, uncertain or any doubt arises as to the terms employed, we deem it as our paramount duty to put upon the language of the legislature rational meaning. We then examine every word, every section and provision. We examine the Act as a whole. We examine the necessity which gave rise to the Act. We will consider the provisions to ensure coherence and consistency within the law as a whole and to avoid undesirable consequences."

It was observed in *Organo Chemical Industries and Another Vs Union of India and Others* (reported as

(1979) 4 SCC 573), East India Hotels Ltd. and Another Vs Union of India and Another (reported as (2001) 1 SCC 284), and Prakash Kumar Vs State of Gujarat (reported as (2005) 2 SCC 409) art or word of a statute should not be construed in isolation. An Act has to be read as a whole, the different provisions have to be harmonized and the effect has to be given to all of them. Each provision of the statute should be construed with reference to other provisions to make the provision consistent with the object sought to be achieved.

- (c) It was held by the Hon'ble Supreme Court in State of Haryana and others Vs Sampuran Singh and others (reported as (1975) 2 SCC 810), Reserve Bank of India Vs Peerless General Finance and Investment Co. Ltd. and Others (reported as (1987) 1 SCC 424), and High Court of Gujarat and Another Vs Gujarat Kishan Mazdoor Panchayat and Others (reported as [2003] 2 SCR 799), that:

Interpretation of statute must depend on their text and the context, which are the basis of interpretation and both are important. A statute is best interpreted when we know why it was enacted. With this knowledge, the statute must be read, first as whole and then section by section, clause by clause, phrase by phrase and word by word.



By no stretch of imagination a court is entitled to add something more than what the statute intended. The cardinal principle of construction of statute is that the true or legal meaning is derived by considering the meaning of words used in light of the apparent object sought to be achieved.

- (iv) The intention of the legislature (as discussed above) in including real estate agents within the ambit of RERA was to rectify / cure the existing mischief of the fraudulent activities undertaken by some of the real estate agents involved in the real estate transactions and to bring a regulatory mechanism governing their actions.

It is submitted that no objective of RERA would be met, by bringing the online portal / digital platforms like Housing.com within the ambit of RERA. The RERA provisions itself provide for, and recognize, the need to advertise / publish the real estate projects; however, it is evident that such activities would have to be done on, or through, an external medium – as also emergent from use of the word "medium" in Section 2(zm) of RERA. Housing.com being one such external medium / platform only provides advertising services (space) to sellers and their acts are nowhere intended to persuade, convince or otherwise influence a buyer's decision to buy a property. It simply hosts, lists and show-cases products and services of another party on their platform.

As emergent from various judicial pronouncements mentioned above, the scope of definition of 'real estate agent' under RERA needs to be understood from the context in which it is used under RERA i.e. under

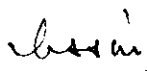
Sections 9 and 10 which provide the role, functions and responsibilities of a 'real estate agent'. Sections 9 and 10 of RERA clearly provide, amongst others, that no real estate agent shall facilitate sale or purchase of a real estate project without such agent being registered under RERA; and no real estate agent shall facilitate sale or purchase of a real estate project which is not registered under RERA.

The fundamental aspect highlighted in the above provisions is that a 'real estate agent' facilitate in a sale-purchase transaction — which the law pre-supposes as the core activity of a 'real estate agent'. The definition of 'real estate agent' as given in Section 2(zm) needs to be read along with Sections 9 and 10, in order to understand the scope and ambit of persons who can be called a 'real estate agents'. It would be wrong to state that every person who introduces prospective buyers and sellers to each other becomes a real estate agent. It is essential that the act of 'facilitation' is undertaken to be classified as a 'real estate agent'. Housing.com does not 'facilitate' in any manner under a real estate transaction. Kindly refer to paragraph 2 hereinafter for a summary of the activities of Housing.com.

Definition of "real estate agent" & its functions under RERA and meaning of relevant terms and expressions used therein:

- (i) The definition of "real estate agent" as provided in Section 2(zm) of RERA is extracted herein under:

"means any person, who negotiates or acts on behalf of one person in a transaction of transfer of his plot, apartment or building, as the case may be, in a real estate project, by way of sale, with another person or transfer of plot, apartment or building, as the case may be, of any



other person to him and receives remuneration or fees or any other charges for his services whether as a commission or otherwise and includes a person who introduces, through any medium prospective buyers and sellers to each other for negotiation for sale or purchase of plot, apartment or building, as the case may be, and includes property dealers, brokers, middlemen by whatever name called."

- (ii) Section 9 of RERA, amongst others, provides that without its registration with State RERA authorities no real estate agent shall facilitate, or act on behalf of any person to facilitate, the sale or purchase of any plot, apartment or building.
- (iii) Conjoint reading of Section 10 of RERA and Rule 17 of the MahaRERA Rules lay down the functions and responsibilities of real estate agent as under:
 - i) not to facilitate the sale or purchase of any plot, apartment or building, as the case may be, in a real estate project or part of it, being sold by the promoter in any planning area, which is not registered with the Authority;
 - ii) maintain and preserve such books of account, records and documents as may be prescribed;
 - iii) not involve himself in any unfair trade practices, namely making false representation about standard of amenities


and services, promoter having certain approvals or affiliations which actually do not exist;

- iv) permit the publication of any advertisement whether in any newspaper or otherwise of services that are not intended to be offered.

For Housing.com, there is no question of a principal – agent relationship with any of the sellers, and even buyers, as none of the requisites specified above are fulfilled. (i) Housing.com is not employed as an agent / representative of another - all its contracts with the sellers are on principal to principal basis; (ii) Housing.com does not have any mandate to create, modify or terminate contractual relationships on behalf of another; (iii) Housing.com neither receives instructions to act on behalf of another nor does it undertake acts which bind a seller or make it answerable to a prospective buyer. In any real estate transaction Housing.com only provides a medium without being involved in any manner whatsoever in the actual transaction.

The intention of RERA is to bring accountability on, and prevent fraudulent activities by, persons who, in a real estate transaction, either (i) act as agent without any authority / consent given by a seller; or (ii) act beyond the scope of the authority / consent if so given by a seller. Housing.com does neither of these as its acts, scope of services, mandates etc. are purely driven by the content supplied by the seller and devoid of any instructions to act any further than putting the content on its platform. It is in simple words an advertising media content is advertised (except for forwarding numbers and details) its role ends there just like a Post box option available to any advertiser in case of physical advertisement.

Dictionary meanings – "negotiate"



- To communicate with another party for the purpose of reaching an understanding; to bring about by discussion or bargaining.

(Black's Law Dictionary - Tenth Edition)

- To work or talk with others to achieve a transaction, agreement etc.; to succeed in passing through, around, or over. (Collins Dictionary – Seventh Edition)

- To try to reach an agreement by formal discussion; to arrange or agree something by formal discussion; formal discussion between people who are trying to reach an agreement. (Oxford Advanced Learner's Dictionary of Current English - Eight Edition)

- To discuss or arrange for a sale or bargain, or the preliminaries of a business transaction, and also to sell or discount negotiable paper, or assign or transfer it by endorsement or delivery. The word "negotiate" used in connection with business transaction ordinarily means to bargain with another respecting a transaction or to conduct communication or conferences with a view to reaching a settlement or agreement. (Devkubai N. Mankar and Others versus Rajesh Builders and Others (reported as AIR 1997Bom 142))

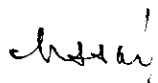
One of the key facets of the definition of 'real estate agent' in RERA is the act to "negotiate" which, basis the foregoing, means to interact, discuss, deliberate, including a bargain, to arrive at an agreement for consummation of the sale-purchase transaction. Being a simpliciter portal / platform for sellers to advertise their properties, none of the employees or representatives of Housing.com indulge in any discussions, interactions, negotiations, consultancy with the buyers or assist the sellers in any limb of

the transaction. All such discussions and negotiations are held by the sellers themselves directly with the prospective buyers without any role of Housing.com or it being privy to the same. Housing.com is not concerned with the same.

"introduce" —

- To present someone by name to another person or two or more people to each other; to cause to experience for the first time; to bring in, establish. (Collins Dictionary _Seventh Edition)
- To tell two or more people who have not met before what each other's names are; the act of bringing something into use or existence for the first time, or of bringing something to a place for the first time; the act of making one person formally known to another, in which you tell each the other's name (Oxford Advanced Learner's Dictionary of Current English - Eighth Edition)
- To bring forward formally or in an official manner; to bring forward one person to the presence of another as an equal (Advanced Law Lexicon - Fifth Edition)

It is correct that the literal meaning of the term "introduce" is to bring together or connect two parties. However, the term "introduces" as used in the definition of 'real estate agent' needs to be understood in conjunction with the role, functions and responsibilities of a 'real estate agent' as provided under Sections 9 and 10 of RERA. As mentioned in paragraph 1.3 (iv) hereinbefore, the fundamental activity of a 'real estate agent' being regulated by Sections 9 and 10 of RERA is — facilitation (also discussed



further in paragraph 1.4 (iv)(d) hereinafter). Therefore, the act of introduction should be construed in similar sense, and while introducing prospective buyers and sellers to each other there should be an underlying objective of facilitating or furthering the transaction.

It is also very important to consider the terms "introduces" and "medium" used in the definition – which are two different concepts. The use of the word "medium" in Section 2(zm) of RERA demonstrates that law itself recognizes that introduction is effected through any medium, in other words through a communication channel. Housing.com is that particular medium / channel / platform / external resource, available to sellers (including a real estate agent, broker) to introduce themselves to prospective buyers and by no means can it be said that Housing.com itself introduces prospective buyers and sellers to each other. Assuming that an online platform like Housing.com is reckoned as introducing two parties and therefore classified as 'real estate agent' under RERA, then applying the same reasoning all other tools, aids, resources etc. used by a seller for example - newspaper, magazine, posters, bill-boards, banners, telephone, mobile, SMSs, WhatsApp, Facebook, email, television, radio, trade fair, property exhibitions / events / conferences; in order to reach out to prospective buyers would also fall within the definition of 'real estate agent' under RERA. With the same logic, even online search engines like Google, Yahoo, Bing, Ask.com etc. should also be construed as 'real estate agent' under RERA. To give such an enlarged meaning / interpretation of the term "introduces" in Section 2(zm) of RERA neither appears to be correct nor in consonance with the objective of RERA.

"facilitate" -

To make the occurrence of something easier or less difficult; (Black's Law Dictionary - Tenth Edition)

- To make easier; assist the progress of (Collins Dictionary Seventh Edition)
- To make an action or a process possible or easier. (Oxford Advanced Learner's Dictionary of Current English - Eighth Edition)

The term "facilitate" has been used in Sections 9 and 10 of RERA, and it very importantly describes the role of a real estate agent. Even the clarifications issued by the Ministry of Housing and Urban Poverty Alleviation, Government of India and other States on whether web-portals / websites / newspapers/ exhibitions should be registered as 'real estate agent' under RERA, have laid the test as whether these entities are "engaging in" / "facilitating" a sale-purchase transaction.

As mentioned in paragraph 1.3(iv), the scope of definition of 'real estate agent' under RERA needs to be understood from its context under RERA (Section 9 and 10). It is also pertinent to mention that the opening sentence in the definition section of RERA (Section 2) states "In this Act, unless the context otherwise requires" – which signifies that every definition in RERA has to be read subject to the qualification expressed in the definition clause. In the matter of Vanguard Fire and General Insurance Co. Ltd. Madras Vs Fraser & Ross (reported as AIR 1960 SC 971), the Hon'ble Supreme Court observed that a court has not only to look at the words but also to look at the context, the collocation and the object of such words relating to such matter and interpret the meaning intended to be conveyed by the use of the words under those circumstance.

As appearing from the dictionary meaning, "facilitate" embodies / pre-supposes an act of assistance to the seller, buyer or to the sale-purchase transaction itself and with an objective of consummation of the transaction. Housing.com does not go beyond the act of listing of the sellers' advertisements on its platform, and is neither approached by, nor approaches, any seller or buyer to provide any kind of assistance in their own transaction.

"means and includes"-


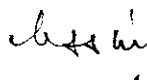
In the matter of Vanguard Fire & General Insurance Co. Ltd. (reported as AIR 1960 SC 971), the Supreme Court has laid down that when a word is defined to 'mean' such and such, the definition is prima facie restrictive and exhaustive. A restrictive definition means that the meaning so defined in the statute for a particular word has a very restrictive ambit, so much so that its meaning cannot go beyond what has been defined. There is nothing that can be included in the meaning beyond what has been stated. There is seldom any scope for interpretation in case of a restrictive definition.

While dealing with the concept of "means and includes" in the case of Bharat Co-Operative Bank (Mumbai) Ltd. Vs Co-Operative Bank Employees Union (reported as AIR 2007 SC 2320), the Supreme Court considered the differences between the inclusive and exhaustive definitions and made the following observations: "When in the definition clause given in any statute the word "means" is used, what follows is intended to speak exhaustively. When the word "means" is used in the definition it is a "hard-and-fast" definition and no meaning other than that which is put in the

definition can be assigned to the same. On the other hand, when the word "includes" is used in the definition, the legislature does not intend to restrict the definition: it makes the definition enumerative but not exhaustive. That is to say, the term defined will retain its ordinary meaning but its scope would be extended to bring within it matters, which in its ordinary meaning may or may not comprise. Therefore the use of the word "means" followed by the word "includes" in the definition of "banking company" in Section 2(bb) of the Industrial Disputes Act, 1946 is clearly indicative of the legislative intent to make the definition exhaustive and would cover only those banking companies which fall within the purview of the definition and no other."

In view of the above, it would be incorrect to read the second part of the definition which begins with the words "and includes" independently of the first part. The part of the definition which begins with the words "and includes" is merely an explanatory part of the definition. Since the legislature in its wisdom has used the words "which includes" as part of the single definition, therefore, reading it as a separate and independent part of the definition would amount to wrongful interpretation.

Thus, what emanates from above is that the legislative intent of RERA is to regulate the existing genus of agents with an aim to reform and regulate the Activities of agents as understood in the common parlance prior to enactment of RERA. It is not the intention of expand its ambit and reach to entities who though may be associated with the real estate sector, are not into, or part of the business of sale-purchase of properties. This is in consonance with principles of statutory interpretation and pragmatic



realties background of business, activities and services rendered by Housing.com:

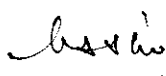
Housing.com is an online portal managed and operated by Locon Solutions Private Limited, having commenced its operation in 2012, which provides (i) marketing and advertising services' medium to sellers in the real estate sector; and (ii) news and information to general public about the real estate market. Being a marketing, advertising and information discovery platform, sellers (which could be property owners, property developers / builders, agents, brokers etc.) who intend to sell and rent properties in the open market themselves upload their advertising material and information on Housing.com website as they deem fit and proper, to reach out to a larger audience who are visiting the platform for research and information purposes. In consonance with constantly evolving digital platforms, Housing.com is merely an evolved platform which is interactive and user-friendly, unlike other forms of advertising such as print media (newspaper, magazine, posters, bill-boards, banners), Google, Facebook, television, radio, telecommunication network, trade fair, property exhibitions / events / conferences etc.

Earlier, the marketing / advertising sector was dominated by the print media where advertisements, commercials, information etc. about products / services were given in newspapers, magazines, classifieds, posters, billboards etc. Now, with the technology up-gradation, emergence of innovative concepts and their reach to general public, the marketing & advertising business has taken different shapes and forms including digital media in the form of online platforms / web portals providing comprehensive and in-depth information – on the click of a button. An online platform amongst others is a digitally maneuvered platform whereas

an offline platform transcends the digital boundary into a non-digital boundary, chiefly in a physical form where interactive processes are in person and on a one to one basis. It must be clearly borne in mind that there are two forms of modus operandi, (i) One, where there is just an online functioning / interface in the online to offline. The digital world is used for initial stages purposes and transferred to the offline platform to give effect to a transaction. There are players in the market adopting this method. In such a situation the continuing of introduction and negotiation through online to offline may be stated or may be contended to be doing the business of negotiation, facilitation and participation in the transaction. Housing.com has no offline platform modes and further, no role or involvement in the transaction. It is simply acting as a medium for advertising.

Certain key aspects of the business, functioning and processes of Housing.com are provided below which also demonstrates that it does not perform the role of a 'real estate agent' as defined under RERA:

- (i) Housing.com only provides a platform / medium which enables sellers (whose acts are anyways regulated by RERA) to advertise their projects / properties. All information about projects / properties (such as nature of property, location, status of approvals and construction, photographs, layout plans, pricing etc.) are provided by the sellers themselves and the website does not get involved in verifying the correctness / completeness of such information. However, as a matter of practice, all sellers who wish to advertise on the portal need to provide us with a declaration / undertaking that they are in compliance with laws applicable to them



including RERA.

- (ii) Data / content which are submitted on the platform is as per the content given by estate agents / developers, as the case may be. However, the buyer is at all times requested to verify the correctness of the details of the project / property in addition. In such manner the doctrine of caveat emptor i.e. buyer beware is clearly not diluted and rather bolstered by such advise / suggestion by the website. Housing.com provides clear information about the scope of its services and disclaimers to prospective buyers that every buyer / website user is required to exercise due diligence prior to entering into any transaction and independently verify all property details provided by the sellers (including their registration under RERA, status of approvals etc.) or information posted by the website's in-house team.
- (iii) The website's agreements with the sellers do not constitute any principal agent relationship and the same are on principal to principal basis. The website does not represent or act on behalf of any party, in any capacity whatsoever, and our activities are de-linked to the transaction or its consummation. It simply undertakes to provide the sellers advertising services in the form of a display on Housing.com website and allowing the prospective buyers to connect with the sellers directly. Housing.com merely provides space/medium to any advertiser for which it charges upfront fixed fee.
- (iv) Housing.com typically would enter into a contractual term sheet with the advertisers notably the developers. Such term sheet inter alia would encompass the payment terms, the various packages

etc. Housing.com reserves its rights and craves leave to file and /or rely upon the term sheet as and when required or by the order of the Hon'ble Court. The fees are fixed in advance and are not dependent on the success of any transaction etc.

(v) The website's activities are confined to listing of advertisement material on its website, and it does not in any manner participate in the transaction or facilitate the same. Housing.com does not introduce prospective buyers and sellers to each other and mere medium or channel for buyers to search for relevant sellers and get connected to them for their property needs. All sellers are listed on Housing.com and it is a 'pull model' where the prospective buyers make search on the platform as per their preferences and view the list of sellers meeting their search criteria. Basis their search, the prospective buyers initiate a contact and the request for contact details is automatically generated. Once a buyer provides his / her contact details the platform shows them the contact details of the concerned seller.

(vi) A significant number of listings on Housing.com are provided free of any charge / fee, however these listings are very basic as compared to paid listings. Housing.com derives its revenue from sellers who opt for a paid listing which is show-cased as a preferred listing with add on benefits. The sellers (owners, builder or agents) opt for the listing profile / package depending on size of space on the website, project / property location, nature of advertisement (sale or rent), listing characteristics, period of listing etc. as chosen by the sellers themselves. The fee payable to Housing.com is a fixed amount which is a pre-agreed understanding between sellers and

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Housing.com.

Revenue Model: The revenue generated by Housing.com is from the following sources-

a) Developers:

- Advertising fee: The fee charged from the developers for advertising projects / posting content about their projects / listings on the platform depending on the package that is chosen by the developer.
 - Visualization Products: This offering provides hardware and 3D software facilities (like a kiosk) to the developer at their office premises for advertisement of their upcoming projects thereby giving the customers actual visualization of the project upon its completion. This is simply state of the art hardware in the rapidly evolving digital world to propel the advertising standards in the market. Since, Housing.com is equipped with the necessary know-how, it provides these services.

b) Brokers: The fee charged from the brokers for posting certain number of listings of new projects, resale and rental properties on the platform.

c) Other modes of revenue:

A. Lead sharing and advertisement for banks / financial institutions offering home loans: Housing.com shares leads in relation to the search for properties made on the platform with the banks / financial institutions which offer home loans at the choice opted by a prospective buyer. For sharing these leads and putting advertisement Housing.com charges a fee from such institutions.

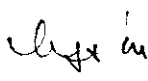
B. Advertisement for other brands:

Housing.com provides space on its platform to other brands like amazon, ICICI Lombard, HCL, etc. to advertise and charges a fee for the same.

It is apparent and clear that none of the earnings make Housing.com an agent in terms of RERA. Also, it is pertinent to note that no fee is charged to a prospective buyer. The fee is only for advertisements.

C. Housing.com provides various other services and information to its website users, some of which are listed below, which an agent / broker involved in a real estate transaction does not ordinarily indulge into:

- i News updates.
- ii Articles / legal information.
- iii Interviews from industry expert.



iv Price trends of different localities.

D. Housing.com spends considerable amount on information technology, knowhow and technical expertise for the development, operations and up-gradation of the website from time to time, which a typical agent / broker in a real estate transaction does not indulge into. Such services are beneficial for public interest and helps in improving transparency and awareness in real estate sector. This also, educates the buyer in respect of the various options available to him which meet with his criteria so that the user can make an informed decision to buy the property.

Freedom to carry on any profession, trade, occupation or business:

Under Article 19(1)(g) of the Constitution of India all citizens have the freedom to profess any profession, trade, occupation or business. However, this fundamental right is subject to the limitation imposed under Article 19(6) which permits the law to impose reasonable restrictions on the exercise of such right, in the interests of the general public. Further, such right shall be subject to any law relating to: (i) the professional or technical qualifications necessary for practicing such profession, trade, occupation or business or profession; or (ii) the State itself (or by a corporation owned or controlled by the State) to carry on any such profession, trade, occupation, business, industry or service, to the exclusion of citizens.

While interpreting the phrase "reasonable restriction" the Indian courts have observed that the said phrase connotes that the restriction / limitation imposed on the person in enjoyment of the right should not be arbitrary or of an excessive nature, and beyond what is required in the interest of public.

It has been further observed that a restriction which has no relation with the object which the legislation seeks to achieve cannot be regarded as a reasonable restriction on such freedom / right.

In Lala Hari Chand Sarda Vs Mizo District Council and Others (reported as AIR 1967 SC 829), the Hon'ble Supreme Court observed that the fundamental right of a citizen to carry on any profession, trade, occupation or business can be restricted only by a law necessitated in the interest of general public, and such restriction should not be arbitrary, excessive or beyond what is required in the interest of the general public.

In Mohammad Faruk Vs State of Madhya Pradesh and Others (reported as AIR 1970 SC 93), the Hon'ble Supreme Court held that in evaluating whether an impugned law imposes reasonable restriction on any profession, trade, occupation or business, a Court should, amongst other, consider (i) attempt an evaluation of its direct and immediate impact upon the fundamental rights of citizens affected thereby; (ii) larger public interest sought to be ensured in the light of object sought to be achieved; (iii) necessity to restrict the citizen's freedom; (iv) inherent pernicious nature of the act restricted or its tendency to be harmful to the general public; (v) possibility of achieving the object by imposing a less drastic restraint.

In M. J. Sivani and Others Vs State of Karnataka and Others (reported as AIR 1995 SC 1770), it was held that the test of reasonableness is whether the law strikes a proper balance between social control on the one hand and the right of individual on the other hand. It was further observed that a Court must take into account factors like nature of the right enshrined, underlying purpose of the restriction imposed, evil sought to be remedied, its extent and urgency, and to what extent the restriction is, or is not, proportionate to the evil and conditions prevalent at that time.



It is understood and appreciated that every profession, trade, occupation, business needs to be regulated, or be subject to restrictions, which are reasonably required in public interest. As explained in foregoing paragraphs, it would not be appropriate to regulate online portals / listing platforms such as Housing.com under RERA by classifying them as a 'real estate agent'. An interpretation of this sort would tantamount to an unreasonable restriction on the business of and thus being inconsistent with the spirit of 19(1)(g).

Regulation under Information Technology Act, 2000:

The Information Technology Act, 2000 ("IT Act") provides for the concept of "intermediaries" and regulations governing their functions. The term "intermediary" with respect to any particular electronic record has been defined as under:

"any person who on behalf of another person receives, stores or transmits that record or provides any service with respect to that record and includes telecom service providers, network service providers, internet service providers, web-hosting service providers, search engines, online payment sites, online-auction sites, online marketplaces and cyber cafes...

Section 79 of IT Act while providing the role & functions of an intermediary limitations thereon, states that an intermediary is not liable for any third-party information, data, or communication link made available or hosted by it. Housing.com, being an online platform, acts as an

"intermediary" under the ambit of IT Act and is governed and regulated by the provisions thereof and compliances required thereunder.

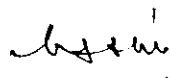
Right to equality includes right to inequality:

Article 14 of the Constitution of India provides that the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India. However, this general rule is subject to reasonable classification (without it being class legislation).

In Kedar Nath Bajoria and Others Vs State of West Bengal (reported as AIR 1953 SC 404), it was held that the equal protection of the laws guaranteed by Article 14 does not mean that all laws must be general in character and universal in application and the State has power of distinguishing and classifying persons or things for the purposes of legislation. All that is required in class or special legislation is that the legislative classification must not be arbitrary but should be based on an intelligible principle having a reasonable relation to the object which the legislature seeks to attain.

In State of Kerala versus Haji K. Haji K. Kutty Naha and Others (reported as AIR 1969 SC 378) the Supreme Court observed that where objects, persons or transactions essentially dissimilar are treated in uniform manner, discrimination may result as refusal to make a rational classification may itself in some cases operate as denial of justice .

In State of Kerala and Others Vs N.M. Thomas and Others (reported as AIR 1976 SC 490) the Supreme Court held, amongst others, that circumstances which govern one set of persons / objects may not necessarily be the same for others, so the question of unequal treatment



does not really arise between persons governed by different conditions and different sets of circumstances.

In Re: The special Courts Bill, 1978 (reported as AIR 1979 SC 478) the Court reiterated the observations in various judgments of Supreme Court on Article 14 and observed, amongst others, that the law can classify and set apart the classes according to the needs and exigencies of the society and as suggested by experience. Such classification must not be arbitrary but must be rational, that is to say (i) the classification must be founded on an intelligible differentia which distinguishes those that are grouped together from others; and (ii) the differentia must have a rational in relation to the object sought to be achieved by the Act.

As laid down by Indian Courts, equal protection of laws guaranteed under Article 14 does not mean that same laws should apply to all persons. The varying needs of different class of persons often require separate treatment, and identical treatment in unequal circumstances would amount to inequality. In the extant case, bringing Housing.com within the ambit of a 'real estate agent' under RERA would lead to it being treated similar to a regular agent / broker who is involved in the transaction (unlike Housing.com) and tantamount to denial of the right to be reasonably classified / distinguished and thus denial of equality as enshrined in Article 14.

In reply to the allegations made by Mumbai Grahak Panchayat it is submitted that they are based on a misinterpretation of the definition of "Real Estate Agent" provided under Section 2(zm) of the RERA. It denies the allegations, insinuations and contentions made in the complaint made by

Mumbai Grahak Panchayat. Further, the answering respondent denies allegations and submits that -

It is specifically denied that Housing.com falls under the definition of "real estate agent" under RERA as alleged or otherwise. The second part of the definition which starts with "which includes" can't be read independently of the first part of the definition which begins with the words "means". It is further denied that the answering respondent undertakes any negotiations, facilitations, introduction or participates in the transaction of transfer of plot, apartment or building as provided in the definition of real estate agent under the provisions of the RERA. It is further denied that the answering respondent provides assistance as contemplated under Rule 70 of the MahaRERA Rules. The Complainant has failed to explain in a practical manner how Housing.com is an estate agent.

It is denied that Housing.com is receiving any remuneration as a real estate agent or has been negotiating and acting on behalf of a person who intends to transact in a transaction of transfer of plot, apartment or building in a real estate project and such services on payment of charges. The revenue model and the services provided by Housing.com have been explained in detail hereinbefore and the same does not constitute the business of a real estate agent as defined under RERA.

Housing.com has made detailed representations and submissions in this reply with regard to its functioning, business objects, listings, disclosures and services rendered and the same may be referred to



in response to the contentions made under the head "Real Estate Web Portals liable to register under RERA as Real Estate Agent".

The contention against Housing.com made under the head 'Rent Agreement Online' on page 9 of the Complaint does not in any manner make it an agent under the RERA. The contentions are without any basis and justification and do not demonstrate that Housing.com is a real estate agent.

It should be noted that Housing.com complies with the advertising standards prescribed by the Advertising Standards Council of India. These advertising ads ensure that advertisement conform to the code for self-regulation which requires advertisement to be legal, honest, faithful and not harmful or hazardous while observing fairness in competition.

In view of the forgoing, it may be clear that Housing.com does not fulfill any criterion required to fall within the scope of definition of "real estate agent" under RERA and therefore ought not to be brought within the ambit of RERA as a 'real estate agent'. Therefore, it prays that appropriate orders may be passed by this Authority to cease further proceedings in the matter, and the impugned notice dated July 23, 2018 be withdrawn.

Written submissions on behalf of info edge (india) limited (99acres.com)

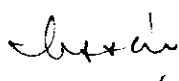
Business model of 99acres.com:

The website "99acres.com" is a **media, directory and vertical search platform** owned by Info Edge (India) Limited which is listed on National Stock Exchange (NSE) and Bombay Stock Exchange (BSE), and which since 1997 is, inter-alia, in the business of providing online classified platform / medium to various entities pursuing business in multiple sectors.

With the evolution and the spread of the internet and its entry into India in mid 1990s, traditional media advertising platforms / mediums like television, radio, newspaper, magazines etc. have evolved and extended their operations to the internet. Leveraging this progress and development, Info Edge (India) Limited has nurtured and created various internet-based platforms / mediums like Naukri.com, Jeevansathi.com, Shiksha.com etc., for publishing advertisements catering to various sectors. The directories of information that are arranged and accumulated by the Company, are now made available through various websites that exist on the internet. These websites serve as vertical search engines.

99acres.com is an online real estate classifieds platform / medium where it basically and predominantly makes available advertisement opportunities to the entities such as individual owners, real estate agents, developers, etc. on a principal to principal basis to reach a wider audience to be able to disseminate and advertise their products and offerings. Its intention, object and functioning as manifest from its business and working model is, without any doubt or ambiguity, that of a medium and does not in any manner extend to being a real estate agent ("**Agent**") as defined under the Real Estate (Regulation and Development) Act, 2016 ("**RERA Act**").

- A. (i) Info Edge (India) Limited is a listed entity under the ambit and jurisdiction of Securities and Exchange Board of India ("**SEBI**") being the governing statutory body, having necessary permissions and licenses from SEBI and duly bound by various SEBI Regulations which include publication of quarterly reports, etc. The books of accounts of the company namely, profit and loss account and balance sheets are in public domain


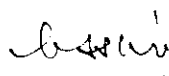


being mandatorily required to be displayed on the website of the company. In none of the filings before the stock exchange / statutory authorities, "99acres.com" is disclosed as a broker / real estate agent as it does not carry on the business of real estate agent in any manner even remotely.

- (ii) 99acres.com does not derive, and has never derived, any income as "commission" or "brokerage" or any revenue akin thereto or otherwise linked to, or dependent on a real estate transaction at any stage. Working as an agent, middleman, a broker as defined under the RERA Act, has never been the intent, object or functioning of the answering respondent. In the circumstances the business of 99acres.com has to be viewed and determined from its strategy and business positioning and entrepreneurial activity and such understanding is as encompassed in the corporate incorporation domain of the answering respondent and its statutory filings and disclosures before the authorities and shareholder as referred to hereinabove. It is a settled principle of law and jurisprudence that no business, entrepreneurial activity and working model can be foisted and imposed on any businessman / commercial venture by and under any judicial review, legislation or otherwise.
- (iii) Further, an assessment of the business of the answering respondent under the provisions of RERA Act is also indicative of the fact that it does not qualify to be brought under the reach of the definition of Agent under RERA Act. It is most stated that in the event, at any time in future, the answering

respondent would want to undertake the business activity of that of a real estate agent, it would conceive such business model, carry out the necessary incorporation and amendments to its business objects, deal with and comply with legal and regulatory issues, obtain approvals and pass resolutions as required, make relevant disclosures to the statutory bodies and others and proceed to register with the jurisdictional Real Estate Regulatory Authority and commence its business with utmost planning, efficiency and effectiveness. As a precursor to this, it would conduct appropriate feasibility and marketing analysis. At that stage, it would surely ensure that it complies with all the statutory requisites and only thereafter it would enter into and start business of Agent which it clearly does not do at present.

- B. (i) The internet technology as compared to traditional media platforms, aims to provide a user-friendly reach to viewers / audience and efficient platform capabilities for parties to market their projects / properties. 99acres.com functions like internet search engines such as Google, Facebook, Wikipedia, Yahoo, Bing, Ask.com etc. Users visit the 99acres.com platform in a similar fashion like the patrons of other search engines like Google and others to search for information and 99acres.com provides search functionality and information to users about real estate projects / properties in similar manner. Users visit 99acres.com to search for matching properties as per their requirements.
- (ii) Unlike builders, promoters or agents who are interested in



selling or offering for sale specific properties, 99acres.com has no intention / does not sell or offer for sale any property / project. The sole purpose of 99acres.com is to promote its own advertising platform / business. 99acres.com uses traditional media platforms like TV, Radio etc. to advertise its own internet media and web based platform.

C. The revenue of the website is generated from the following activities:

- (i) For the services of providing a medium for advertisement to various entities as explained hereinafter, 99acres.com charges a fixed fee which is pre-determined and agreed in the contract entered into with such advertisers. 99acres.com advertising offerings are available for users visiting the website and 99acres.com also offers remarketing options for same users via social media and emailers. Users have an option to either directly contact the advertiser or leave their details on 99acres.com to be accessed by the advertiser. Such fee is paid by advertisers including individual owners of properties who have chosen the option to pay for advertising (which could be in the form of a property listing, banners, etc.) of their properties for multitudinous deals / transaction such as sale / resale, renting out, leave and license, lease, time share, temporary accommodation, PG. Such properties range from bungalows, flats, units, row houses, agricultural and non-agricultural plots, PG accommodation, hostels, guest houses, including time share apartments, etc. It is pertinent to state that many of such properties are not governed by the RERA Act.
- ii) 99acres.com provides access to the directory of the users searching for the property on the website to the entities such as

real estate agents and developers who are interested in offering for sale real estate units for sale, rent, leave and license, etc. Such directory is nothing but storage of data of visitors who have chosen to be made part of the directory and consented to be directly contacted by the advertisers. 99acres.com stores the user's details for subsequent direct retrieval by the advertisers. Such access is available to multiple advertisers on payment of fixed fees payable in advance. These are very similar to YELLOW PAGES in the offline world.

- iii) 99acres.com generates revenue by charging a fee from the sellers for posting their advertisement / content on the platform or in other words, it can be said that the generation of revenue is from the selling of advertisement space on the platform for a specific duration as per available options which is based on the space, positioning and tenure of the advertisement subscribed.
- iv) 99acres.com also provides special advertising solutions for re-advertising the advertisements displayed by 99acres.com on other web based platforms having much wider reach, by providing its advertisements / contents to such platforms like Facebook and Google, so that users directly contact the advertisers *and not 99acres.com at all*.
- v) Similarly, 99acres.com also provides advertising services to clients by selling mass e-mailer options. These services are charged, based on the volume of expressions / emails. An agent never provides a service by which the prospective buyer and prospective seller are able to completely bypass the agent and contact each other directly, negotiate actual real estate transaction, conclude it and

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implement it. The essence of the business of a broker is that a commission which becomes payable only and only if negotiations are successful leading to a completion of successful transaction. As against this, 99acres.com is not concerned whether the two parties viz., prospective seller and buyer actually negotiate with each other and conclude the transaction or successfully execute the transaction. The revenue of 99acres.com is not contingent upon such successful implementation of the transaction and irrespective of the success of the transaction, 99acres.com only provides advertising / re-advertising and mass e-mailer services to earn its revenue.

D. 99acres.com doesn't act as a broker:

- (i) Neither of the services mentioned hereinabove are charged with respect to the responses or are contingent upon any responses / site visits / conversions and are purely on visibility. In this respect, the business of 99acres.com is similar to a newspaper. 99acres.com does not charge any fee / revenue in the form of "commission" or "brokerage" and / or any revenue akin thereto in any other form linked to, or connected with, the transaction of sale, purchase or renting of real estate. In accordance with its business model, where the revenue stream is restricted to an upfront fee. 99acres.com does not charge any fees / remunerations / charges which are linked to the actual happening or successful completion of the transaction or part thereof, nor does it track whether a transaction has been negotiated, entered into or successfully completed pursuant to an advertisement put up on its website or services availed by

the proposed sellers. Further, 99acres.com is unaware of the progress of any transaction relating to the sale or purchase of a piece of real estate, maturing and completion of the transaction or any of its stages. 99acres.com does not track whether a transaction has been completed or not pursuant to an advertisement put on its website.

- (ii) The functions of the answering respondent are akin to that of a newspaper / directory in as much as the newspaper / directory render the services for a fee. The only difference being, whilst the answering respondent does it on an online platform, the newspaper / directory provide these services through an offline medium. Just like newspapers display the P.O. box number to contact an advertiser, the platform either displays the contact details or provides the option to the user to provide his details for being contacted. The only difference between the website and a newspaper or a directory is that a newspaper or a directory uses offline medium to share the contact details of the advertisers and the website uses online medium to perform the same task. The end result of such an activity in both cases i.e., either by offline or online medium, results in generation of responses to the advertisement. In light of the same, it is submitted that in true and correct evaluation of portals, the answering respondent can't be said to be an agent and performs no activities akin to that of an agent. In case the fee charged by the answering respondent is considered to be "Remuneration" as provided in the definition of Real Estate Agent under the RERA Act, then likewise the fee charged by

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newspapers can be brought in the same terminology. As globally positioned, just like newspapers, such portals can't be considered to be an agent.

- (iii) As part of advertising on the platform, the advertisers have an option to display their contact details along with the details of property / project. This is similar to the advertisement made in a newspaper, hoarding or billboard where the contact details of the advertiser are provided in the advertisement itself. In such cases, it is impossible for 99acres.com to track / have knowledge of the information of the user who contacts the advertiser in response to his advertisement. It is manifest therefore, without any apprehension or doubt, that the answering respondent is not a Real Estate Agent as defined in RERA Act or even as contemplated by the Indian Contract Act, 1872 ("**Contract Act**").
- (iv) Further, in cases where 99acres.com accepts an advertisement for any property on its website, an analysis of data showing the listings on the website of 99acres.com shows that a major chunk / share of listings is in respect of properties which are not covered by RERA Act. The said analysis is as follows: -
 - a) A sizeable component of advertisements is related to properties offered or requested for rental transactions not governed by the RERA Act. As of October 1, 2018, approximately 2,75,239 rental properties are advertised on the platform which contribute to 36.13% of the listings of 99acres.com.

- b) There are listings of properties which are below the threshold of area prescribed by the RERA Act for its governance and the typology of properties listed that are not covered within the ambit of the RERA Act.
- c) There are resale properties which do not attract the provisions of the RERA Act. As of October 1, 2018, approximately 4,28,322 resale properties are listed / advertised on the platform which contribute to 56.23 % of the listings of 99acres.com.
- (v) 99acres.com also provides services of receiving phone calls to the owners who want to sell their units but who prefer not to be flooded with calls made by the users in response to the advertisements. These are individual owners who do not wish to divulge their contact details. In such cases, 99acres.com acts only as a data collector or a data processor and submits the data in an organized form to the advertiser. *It needs to be highlighted that the above services, which are only meant for resale properties, are never offered to a developer who is advertising for sale of units in a project which is covered by RERA Act; whether registered with the concerned Real Estate Regulatory Authority or not.*
- E. 99acres.com empowers prospective buyers / tenants by sharing material for their research, thus providing greater transparency and helping users make informed choices:
 - (i) 99acres.com functions as a **comparison** website / platform for all its users for easily comparing the prevailing real estate market conditions and the options available therein based on various criteria, in order to allow them greater choice. Earlier,

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the marketing / advertising sector was dominated by the print media where advertisements, commercials, information etc. about products / services were given in newspapers, magazines, classifieds, posters, billboards etc. Now, with the technology up-gradation and emergence of new media, the marketing and advertising business has taken different shapes and forms including digital media in the form of online platforms / web portals providing comprehensive and in-depth information on the click of a button.

- (ii) 99acres.com has introduced internationally used and recognized good practices and tools like news articles, price trends, information about area, including schools and hospitals in the nearby locality and infrastructure developments to enhance and foster customer awareness, knowledge and empowerment. Towards this, it uses internationally practiced and acclaimed tools and facilities. Just like TV, magazines, etc 99acres.com educates and empowers customers by providing information to discover and research about properties thereby giving them more information and options for analysis of market trends. It is a guide to an activity which prospective buyers or consumers would wish to do before they open any dialogue for any property of shortlisted properties.

- F. Consumers do such research through various mediums. It can be through magazines, newspaper supplements, classified pages of newspapers, TV programs, radio chat shows and advertisements, bill boards, etc. 99acres.com collates the information available in public domain regarding various real estate projects, price trends, locality

trends etc. and makes it available to the visitors of the website in a user-friendly manner. The users are allowed to access this information for free and in this manner 99acres.com helps create transparency and level playing field in real estate market. 99acres.com does not charge any fees to the users for access to the said information. A website such as 99acres.com merely makes available directories of information pertaining to real estate which it has compiled and thereafter arranged in user friendly manner. Similar information is also given by newspapers such as Times of India, Property Times, in form of informative articles which is content hosted by such magazines / newspapers and not an advertisement.

G. 99acres.com has no offline presence to "facilitate" the transaction:

- (i) An 'online to offline business model' works on the strategy of bringing customers from online platform to offline mode / physical stores. Such business models participate in the transaction through negotiation between the parties or facilitation of the process and thereby assist the consumers in the happening of the transaction for a consideration / fee / commission. Few examples of the online to offline business models operating in India are: myntra.com, firstcry.com, healthkart.com, pepperfry.com and urbanladder.com.
- (ii) There are certain online to offline platforms engaged in the real estate business in India. Such platforms provide the users with guidance and support on various aspects of real estate transaction i.e., buying, selling, offering for sale, leasing of commercial and residential properties, leasing corporate and retail premise and various other land transactions.

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In addition, 99acres.com has no exclusive tie up with any offline partner, neither does it offer offline services through any sister concerns and is a pure online platform.

- (iii) Unlike such online to offline business models and brokers, 99acres.com has no role to play in any of the stages of the transaction, i.e., offer, counter offer, due diligence of property, acceptance, contracts, handling of money, representing a party, negotiating or causing any negotiation or participating in any such process at any stage whatsoever, handing over of possession and completion of transactions in any manner. 99acres.com is purely a non-participatory advertising property portal. 99acres.com has no control or influence over the transaction nor does it derive or earn any monetary benefit in the nature of remuneration / commission or consideration by whatever named called in the RERA Act from the transaction in any manner.
- (iv) 99acres.com is a **media, directory and vertical search platform** and its activities are different from some other online platforms which, unlike pure advertising and information dissemination platforms, go on and get involved in the transaction for the transfer of real estate units and could therefore be considered to facilitate / negotiate / participate in the transaction. Buyers who intend to research about projects / properties visit 99acres.com and find information put up by the advertisers. Sellers who intend to sell properties in the open market provide 99acres.com with their marketing material and data for hosting

/ listing / show-casing on 99acres.com. In public interest, 99acres.com also assists prospective buyers by supplementing / providing additional information collated from publicly available sources like Google, Wikipedia etc. This information relates to all kinds of properties, new / under construction / ready to move; residential / commercial / industrial etc.; owned by individual / societies / builders etc.; and marketed for sale or renting.

H. **99acres.com is merely a 'medium':**

- (i) 99acres.com does not do any introduction and it is only a "medium". The introduction is done by the advertisers through 99acres.com. The word "medium" is defined as under:
- *A way of communicating information, etc. to people; the medium of radio/ television electronic / audio-visual media. Television is the modern medium of communication; (Oxford Advanced Learner's Dictionary – Eighth Edition)*
 - *A means or agency for communicating or diffusing information, news, etc. to the public. (Collins – Seventh Edition)*
- (ii) The activities of 99acres.com are confined to listing of advertisement material and it does not in any manner participate or negotiate in the transaction or facilitate the same. In the definition of a "Real Estate Agent" as provided in section 2(zm) of the RERA Act, the following phrase has been used "includes a person who introduces, through any **medium**, prospective buyers and sellers to each other". It cannot be said that 99acres.com is the introducer, but it is only a medium that is contemplated

in the above definition. 99acres.com does not introduce prospective buyers and sellers to each other. The request for contact details is automatically generated whenever any user / visitor of the website shows interest in any particular listing on the website whether it be a paid advertisement or not; once such a person who chooses to share his contact details and thereby leaves his footprint on the website; the same can be independently accessed by the advertiser without any involvement of any nature of 99acres.com.

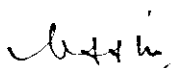
- (iii) 99acres.com is thus not involved in any introduction but is just a platform / medium available for and is limited to sharing of contact details of advertisers and visitors which is incidental to the business of advertising. Mere sharing of contact details of the advertisers and users cannot be treated as 'introduction' as contemplated in section 2(zm) of the RERA Act. Advertisers and users introduce themselves through the medium of 99acres.com and 99acres.com is neither involved in nor exercises any control or influence over interaction, if any, between the advertisers and the users at any point of time. 99acres.com is not even party to any conversation between an advertiser and a prospective buyer. The journey of 99acres.com with the advertisers or buyers ceases even before any preliminary dialogue or the possibility of negotiations initiates between them. 99acres.com is not even remotely involved in any form of negotiations, interactions, dialogues, relationships, commitments, obligations or liabilities emerging out of any interface / interaction between the advertisers and the visitors

like negotiations, due diligence, execution of MoU / agreement, arranging loans, registration and stamping and entries in municipal / revenue records etc.

- (iv) It is not mandatory for the user to provide his / her details to 99acres.com for using the platform. Further, it is optional for any user of the platform to provide his / her details for contacting an advertiser's advertisement and the role of the answering respondent as a platform / medium is limited to posting the advertisement on its website.
- (v) Privacy policy forms a part of the terms of use of the website which includes the following clauses pertaining to disclosures and availing approval of the users in respect of the information provided by them:

"You agree that IEIL may use personal information about you to improve its marketing and promotional efforts, to analyze site usage, improve the Site's content and product offerings, and customize the Site's content, layout, and services. These uses improve the Site and better tailor it to meet your needs, so as to provide you with a smooth, efficient, safe and customized experience while using the Site."

"You agree that IEIL may use your personal information to contact you and deliver information to you that, in some cases, are targeted to your interests, such as targeted banner advertisements, administrative notices, product offerings, and communications relevant to your use of the Site. By accepting the User Agreement and Privacy Policy, you expressly agree to receive this information. If you do not wish to receive these communications, we encourage you to opt out of the receipt of certain communications in your profile. You may make



changes to your profile at any time. It is the belief of IEIL that privacy of a person can be best guaranteed by working in conjunction with the Law enforcement authorities."

Further, 99acres.com clearly states in its terms and conditions with the advertisers that the nature and quantity of responses is in no way guaranteed by it. Relevant portion thereof reads as - *"IEIL offers no guarantee no warranties that there would be satisfactory response or any response at all, once the listing / banner is put on display. Any payments made to IEIL / 99acres.com are solely for the purposes of display of the property advertised."* 99acres.com is just a venue for the hosting of content, beyond this 99acres.com has no role at all.

In the above context, it is worthwhile to note the observations made by the Hon'ble High Court of Bombay¹ in **M/s Bharatmatrimony.com v. the State of Maharashtra**, reported as 2015 SCC OnLine Bom 715. In this order, the Court quashed the criminal proceedings filed against Bharatmatrimony.com by a user of the platform. The user was defrauded by a person whom she met on the platform of Bharatmatrimony.com. While pronouncing its decision, the Hon'ble High Court has placed reliance on the terms and conditions governing the use of Bharatmatrimony.com website wherein ample safety tips and warnings are provided to the users of the platform. The Hon'ble High Court further stated that in order to make out

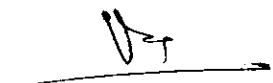
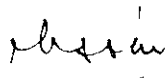
an offence of cheating, an intention of fraud or cheating must be shown against Bharatmatrimony.com; and the platform cannot be held responsible for the user's negligence and carelessness.

I. 99acres.com opens / widens options for buyers:

- (i) Primarily, 99acres.com provides the service of "search" to users. Users visit 99acres.com to search for matching properties as per their requirement. An agent / broker is primarily focused to close / narrow down options for a prospective buyer in order to close a transaction; whereas 99acres.com opens / widens options for buyers and equips them with data / information to enable their research and decision making. Based on user preferred criteria, 99acres.com encourages users to discover more properties advertised on the platform that the user may not have seen earlier, thereby enabling more and more choices and widening the options.
- (ii) However, 99acres.com ensures to explain to its users the risk involved in publicly available information displayed on its website and advises / encourages the users to validate the information before acting on the same or making any decisions. At all times the aim of 99acres.com is to provide the most relevant information to its users who come on the website to search.

J. No principal-agent relationship:

- (i) 99acres.com does not execute any agency contract with any advertiser, and its agreements with the sellers are on principal to principal basis. There is no mandate to act on behalf of,



represent anyone in any capacity whatsoever or negotiate, and all activities are de-linked to the transaction or its completion.

The following is clearly stated on the website:

"The term service does not extend to 99acres.com acting as an agent, either express or implied on behalf of any User / Customer (which includes both the subscriber / advertiser(s) and browser / visitor(s)) and is merely acting as a medium of information exchange"

- (ii) As has been explained earlier in these submissions, 99acres.com derives its revenues exclusively in the manner that has been detailed above. Even though it is possible to create a free listing on 99acres.com, the only differentiator between a paid and unpaid listing is that paid listing (advertisement) is given prominence and more visibility as compared to an unpaid listing. This is similar to the manner in which a newspaper / magazine charges differentially for different types of advertisement depending on the page, section and size of the advertisement. This does not come under the ambit of principal agent relationship.
- K. Depending on the size and duration of advertisements, the sellers are charged a lump sum amount for putting up the advertisement.
- L. **Other businesses of similar nature:**

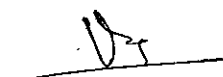
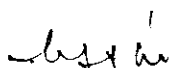
Compelling 99acres.com to register itself as a real estate agent would amount to discrimination since the business which is being carried out by 99acres.com is similar to the following businesses:

 - 1) Newspaper advertising for projects which are covered by the RERA Act;

- 2) TV channels advertising for projects which are covered by the RERA Act;
- 3) Billboards which are rented out for similar advertising under the RERA Act;
- 4) Property exhibitions, where individual advertisers participate by exhibition for sale, exhibitions, rooms;
- 5) Google, Wikipedia;
- 6) **Facebook Marketplace:** Facebook Marketplace is a platform hosted by 'facebook.com'. It provides a platform to the users to buy or sell their items / articles / goods. Amongst other listings, the Facebook Marketplace also provides for a housing section which allows individuals including brokers, agents and property managers to list their available properties for rent or sale.

Any such website having the same web-based business as that of 99acres.com and earning its revenues from advertising without earning any revenue from brokerage and which can operate from a place outside India where the RERA Act does not extend or apply can obviously not be covered or brought within the purview of RERA. Such websites, unless it poses any security threat or threat to integrity and unity of India and unless its contents are immoral like pornography, cannot be blocked and hence, an identical website like 99acres.com cannot sought to be brought purview of RERA merely because it has Head Office in India or the domain name is registered in India. If such an exercise is done, that would be clearly violative of Article 14 and 19(1)(g) of the Constitution of India.

Further, 99acres.com, akin to other technology-driven businesses,



spends considerable amount on new and upcoming technology, know-how and technical expertise for the development, operations and up-gradation of the website from time to time. This is something a typical agent / broker in a real estate transaction does not indulge into.

M. Public benefit services:

99acres.com functions as a comparison website / platform for all its users for easily comparing the prevailing real estate market conditions and the options available therein based on various criteria, in order to allow them greater choice. 99acres.com provides various other public benefit services and information to its website users to improve overall transparency and awareness in real estate sector, some of which are listed below, which an agent / broker involved in a real estate transaction does not ordinarily indulge into:

- (a) Platform for interaction / discussions / information-sharing between people interested in real estate including third party reviews (both positive and negative) of projects / properties.
- (b) Take review / feedback from buyers through 'Grievances' button, about the website content and transparency shown by sellers and taking remedial actions by removing their listing from 99acres.com. As an additional measure, 99acres.com also invests in artificial intelligence technologies to identify inaccurate content posted on the platform.
- (c) An article section where real estate related informative content including project specific comparative analysis and educational material is posted for consumers for their benefit.
- (d) 99acres.com has a consumer forum where consumers post

questions which could be answered by other consumers. It is called 'Ask and Answer'.

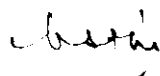
- (e) Based on its own research and material gathered through publicly available sources, 99acres.com also provides updates on news section where real estate news is published for consumption of buyers.
- (f) 99acres.com also publishes property price trends of major cities in India for reference by the buyer which can help them with price analytics of real estate.

99acres.com also provides the users the option on the platform to report abuse against fraudulent practices.

9 Key provisions of Real Estate (Regulation and Development) Act, 2016, its context and meaning:

RERA Act has been enacted by the Parliament and came into effect completely on May 1, 2017. The 'Statement of Objects and Reasons' appended with the Real Estate (Regulation and Development) Bill, 2013 introduced before the Rajya Sabha on August 14, 2013 provides as under:

- (i) The need for RERA Act has originated from absence of professionalism and standardization and lack of adequate consumer protection in the real estate sector.
- (ii) RERA Act was necessitated in the interests of effective consumer protection, uniformity and standardization of business practices and transactions in the real estate sector.
- (iii) RERA Act provides for establishment of an authority to regulate sale-purchase transactions through an efficient and transparent manner and to protect the interest of consumers in



real estate sector. It will ensure greater accountability towards consumers, and significantly reduce frauds and delays by establishing symmetry of information between the promoter and purchaser, transparency of contractual conditions, and inducting professionalism & standardization in the sector.

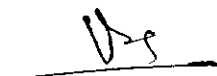
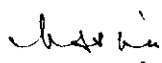
The long title of RERA Act (extracted hereunder), also provides that it is a statute for regulation of the real estate sector and to protect the interest of consumers in the real estate sector and to establish an adjudicating mechanism for speedy dispute redressal.

“An Act to establish the Real Estate Regulatory Authority for regulation and promotion of the real estate sector and to ensure sale of plot, apartment or building, as the case may be, or sale of real estate project, in an efficient and transparent manner and to protect the interest of consumers in the real estate sector and to establish an adjudicating mechanism for speedy dispute redressal and also to establish the Appellate Tribunal to hear appeals from the decisions, directions or orders of the Real Estate Regulatory Authority and the adjudicating officer and for matters connected therewith or incidental thereto.”

- (i) Sh. K. C. Venugopal (Alappuzha) in his speech during the ‘Discussion on the motion for consideration of the Real Estate (Regulation and Development) Bill, 2013’ before 16th Lok Sabha mentioned that there is no regulation for agents in the real estate sector and by including them under RERA Act this would help to regulate the sale and purchase of properties in real estate projects and provide transparency. It finds mention in the ‘Report of the Standing Committee on Urban Development on

Real Estate (Regulation and Development) Bill, 2013' that the objective should be to create a pool of licensed real estate agents who are adequately trained and certified, like other self-employed professional e.g. insurance agents, lawyers etc.

- (ii) Therefore, it has been the intention of legislature to visualize 'real estate agent' as a person / entity dealing, acting on behalf of, or under the mandate of a party in a proposed transaction, or in other words a link between the seller and buyer. Real estate agents have envisaged as trained professionals facilitating real estate transactions between prospective buyers and prospective sellers. It is in the ordinary course of a real estate business of the real estate agent to engage or contract with external resources for marketing, sales promotion and for reaching out to the prospective buyers. Even under Section 10(c)(ii) of RERA Act and Rule 17(ii) of Maharashtra Real Estate (Regulation and Development) (Registration of real estate projects, Registration of real estate agents, rates of interest and disclosures on website) Rules, 2017 (hereinafter referred to as the "**Maha-RERA Rules**") it is recognized that a real estate agent would advertise about real estate projects. In such a scenario, an assumption or interpretation that even such external resources which host the advertisements or publications of a Real Estate Agent are also classified as a 'Real Estate Agent' under RERA Act, would not be a correct approach to interpret, or advance the cause of, objects of RERA Act. Therefore, legislative intent is to regulate traditional real estate agents who facilitate real estate transactions between



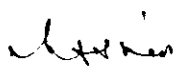
prospective purchasers and sellers for commission basis. Therefore, extending the definition 'real estate agent' under Section 2(zm) to web portals like 99acres.com which only host real estate advertisements and as a incident thereof, share contact information of advertisers and users and disseminate information concerning real estate sector collated from public sources will be doing violence to the legislative intent.

Interpretation of the provisions of RERA Act and terms used therein:

- (i) Further, under various judicial pronouncements the Hon'ble Supreme Court has laid down the importance of purposive / contextual interpretation of statutes. Relevant observations from some of the key judicial pronouncements are extracted herein below:
 - a) "It is a settled rule of construction that to ascertain the legislative intent, all the constituent parts of a statute are to be taken together and each word, phrase or sentence is to be considered in the light of the general purpose of the Act itself."
 - b) "If the language, or the phraseology employed by the legislation is precise and plain and thus by itself proclaims the legislative intent in unequivocal terms, the same must be given effect to, regardless of the consequences that may follow. But if the words used in the provision are imprecise, protean or evocative or can reasonably bear meanings more than one, the rule of strict grammatical construction ceases to be a sure guide

to reach at the real legislative intent. In such a case, in order to ascertain the true meaning of the terms and phrases employed, it is legitimate for the Court to go beyond the literal confines of the provision and to call in aid other well recognised rules of construction, such as its legislative history, the basic scheme and framework of the statute as a whole, each portion throwing light, on the rest, the purpose of the legislation, the object sought to be achieved, and the consequences that may flow from the adoption of one in preference to the other possible interpretation. Where two alternative constructions are possible, the Court must choose the one which will be in accord with the other parts of the statute and ensure its smooth, harmonious working, and eschew the other which leads to absurdity, confusion, or friction, contradiction and conflict between its various provisions, or undermines, or tends to defeat or destroy the basic scheme and purpose of the enactment."

- c) "But, if the words are ambiguous, uncertain or any doubt arises as to the terms employed, we deem it as our paramount duty to put upon the language of the legislature rational meaning. We then examine every word, every section and every provision. We examine the Act as a whole. We examine the necessity which gave rise to the Act. We will consider the provisions to ensure coherence and consistency within the law as a whole and to avoid undesirable consequences."



D) “No part or word of a statute should be construed in isolation. An act has to be read as a whole, the different provisions have to be harmonized and the effect has to be given to all of them. Each provision of the statute should be construed with reference to other provisions to make the provision consistent with the object sought to be achieved.” The Hon’ble Supreme Court² in *Reserve Bank of India v. Peerless General Finance and Investment Co. Ltd. and Others*, reported as (1987) 1 SCC 424 has made following observations:

- Interpretation of statute must depend on their text and the context, which are the basis of interpretation and both are important. By no stretch of imagination, a court is entitled to add something more than what the statute intended. The cardinal principle of construction of statute is that the true or legal meaning is derived by considering the meaning of words used in light of the apparent object sought to be achieved.

The RERA provisions itself provide for, and recognize, the need to advertise / publishes the real estate projects; however, it is evident that such activities would have to be done on, or through, an external medium - as also emergent from use of the word “medium” in Section 2(zm) of RERA Act. 99acres.com being one of such external mediums / platforms only provides advertising services to sellers and their acts are nowhere intended

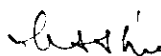
to persuade, convince or otherwise influence a buyer's decision to buy a property. It simply hosts, lists and show-cases products and services of another party on their platform. As emergent from various judicial pronouncements mentioned above, the scope of definition of 'real estate agent' under RERA Act needs to be understood from the context in which it is used under RERA Act i.e. under Section 9 and 10 which provides the role, functions and responsibilities of a 'real estate agent'. Section 9 and 10 of RERA Act clearly provides that:

- (a) no real estate agent shall facilitate sale or purchase of a real estate project without such agent being registered under RERA Act; and

The fundamental aspect highlighted in the above provisions is that a 'real estate agent' facilitates in a sale-purchase transaction – which the law pre-supposes as the core activity of a 'real estate agent'. Section 9 and 10 need to be read along with definition of 'real estate agent' as given in Section 2(zm), in order to understand the scope and ambit of persons who can be called a 'real estate agent'. It would be incorrect to state that every person who negotiates, acts on behalf of another, or introduces prospective buyers and sellers to each other – becomes a 'real estate agent'. It is essential that the act of 'facilitation' is undertaken to be classified as a 'real estate agent'. It is not the case that 99acres.com 'facilitates' in any manner under a real estate transaction.

Definition of "Real Estate Agent" & its functions under RERA Act and meaning of relevant terms and expressions used therein:

- (i) The definition of "real estate agent" as provided in Section 2 (zm) of RERA Act is extracted herein under:



“means any person, who negotiates or acts on behalf of one person in a transaction of transfer of his plot, apartment or building, as the case may be, in a real estate project, by way of sale, with another person or transfer of plot, apartment or building, as the case may be, of any other person to him and receives remuneration or fees or any other charges for his services whether as a commission or otherwise and includes a person who introduces, through any medium, prospective buyers and sellers to each other for negotiation for sale or purchase of plot, apartment or building, as the case may be, and includes property dealers, brokers, middlemen by whatever name called.”

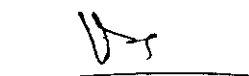
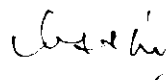
- (ii) Section 9 of RERA Act, amongst others, provides that without its registration with State Real Estate Regulatory Authority, no real estate agent shall facilitate or act on behalf of any person to facilitate the sale or purchase of any plot, apartment or building.
- (iii) Conjoint reading of Section 10 of RERA Act and Rule 17 of the Maha-RERA Rules lay down the functions and responsibilities of real estate agent as under:
 - (a) not facilitate the sale or purchase of any plot, apartment or building, as the case may be, in a real estate project or part of it, being sold by the promoter in any planning area, which is not registered with the Authority;
 - (b) maintain and preserve such books of account, records and documents as may be prescribed;
 - (c) not involve himself in any unfair trade practices, namely

making false representation about standard of amenities and services, promoter having certain approvals or affiliations which actually do not exist;

- (d) permit the publication of any advertisement whether in any newspaper or otherwise of services that are not intended to be offered.

(iv) **means and includes:**

- a) The Supreme Court in Vanguard Fire & General Insurance Co. Ltd. v. Fraser & Ross, reported as reported as 1960 3 SCR 857 has laid down that when a word is defined to 'mean' such and such, the definition is prima facie restrictive and exhaustive. A restrictive definition means that the meaning so defined in the statute for a particular word has a very restrictive ambit, so much so that its meaning cannot go beyond what has been defined. There is nothing that can be included in the meaning beyond what has been stated. There is seldom any scope for interpretation in case of a restrictive definition.
- b) The Supreme Court in Bharat Co-Operative Bank (Mumbai) Ltd. v. Co-Operative Bank Employees Union, reported as 2007 4 SCC 685 has laid down that when in the definition clause given in any statute the word "means" is used, what follows is intended to speak exhaustively. it is a "hard and fast" definition and no meaning other than that which is put in the definition can be assigned to the same. When the word "includes" is used in the definition, the legislature does not intend to restrict the definition; makes the definition enumerative but not exhaustive. That is to say,



the term defined will retain its ordinary meaning but its scope would be extended to bring within it matters, which in its ordinary meaning may or may not comprise. Therefore, the use of the word "means" followed by the word "includes" in the definition is clearly indicative of the legislative intent to make the definition exhaustive.

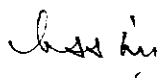
- c) In light of the above pronouncements, it would be incorrect to read the second part of the definition which begins with the words "and includes" independently of the first part. The definition can be said to be in two parts when for its own independent existence and for its purposive meaning one-part need not depend upon or draw any support or sustenance from the other part and vice versa. Since the legislature in its wisdom has used the words "which includes" as part of the single definition, therefore, reading it as a separate and independent part of the definition would amount to wrongful interpretation. Therefore, the second part of the definition is nothing but explanatory part of the core definition inclusive thereof and cannot be read in isolation to extend its amplitude.
- (v) Consideration is an integral part of the definition of "Real Estate Agent":

The use of the words "and receives" in the definition of real estate agent is of different connotation and intention of the legislature can be found that consideration was an integral part. If the legislature had ever desired or intended to provide that irrespective of the fact as to whether the person introducing receives any consideration or not, the legislature

would have either used the word "or" instead of the word "includes". Other method which could have been used by the legislature would have been to divide the definition by giving separate sub-clauses, for the words beginning with "who negotiates" and ending with "or otherwise" and for the words beginning with "a person who introduces" and ending with "whatever name called". In such a situation, if it had been so intended by the legislature, where a consideration is received by such person depending upon the fruition / success of transaction would have become redundant and irrespective of the fact whether a final sale is concluded or otherwise; a mere introducer by any medium would still be called as "real estate agent". If the legislature had ever intended to provide that irrespective of the fact whether a transaction for sale of flat / tenement / unit in real estate project defined under Section 2(zn) of the RERA Act is successful or otherwise, resulting in an actual sale or otherwise; there was no reason for the legislature to define the term "real estate agent".

Further the words "*receives remuneration or fees or any other charges for his services whether as a commission or otherwise*" have to be interpreted by applying well settled principles of *noscitur a sociis* and *ejusdem generis* and general words '*remuneration*', '*fees*', '*any other charges*' and '*otherwise*' take their colour from the word '*commission*' which is dependent on fruition of the contract. The principles of *ejusdem generis* and *noscitur a sociis* can be explained as under:

This *ejusdem generis* principle is a facet of the principle of *noscitur*



a sociis. The Latin maxim *noscitur a sociis* contemplates that a statutory term is recognized by its associated words. The Latin word “sociis” means “society”. Therefore, when general words are juxtaposed with specific words, general words cannot be read in isolation. Their colour and their contents are to be derived from their context.

The Latin expression “*ejusdem generis*” which means “of the same kind or nature” is a principle of construction, meaning thereby when general words in a statutory text are flanked by restricted words, the meaning of the general words are taken to be restricted by implication with the meaning of the restricted words. This is a principle which arises “from the linguistic implication by which words having literally a wide meaning (when taken in isolation) are treated as reduced in scope by the verbal context”. It may be regarded as an instance of ellipsis, or reliance on implication. This principle is presumed to apply unless there is some contrary indication.

Therefore, fixed advertising fees charged by 99acres.com for advertising on its platform and fees charged by it for providing access to the directory of users can’t be equated with remuneration or fees or any other charges whether as a commission or otherwise received by real estate agent for his services.

- (vi) Rule 7 of Maharashtra Real Estate (Regulation & Development) (Registration of Real Estate Projects, Registration of Real Estate Agents, Rates of Interest and Disclosure on Website) Rules, 2017 clearly shows that for being a Real Estate Agent, a person

must provide assistance to enable the allottee and the promoter of each real estate project to exercise their respective rights and their respective obligations at the time of marketing and selling, purchase and sale, etc., hence, providing assistance for enabling the purchaser and seller to fulfil their respective obligations in a transaction of sale in future in real estate project is an essential prerequisite.

Section 2(zr) of the RERA Act already provides that the words and expressions used in the RERA Act, but not defined in RERA Act and defined in any law for the time being in force, shall have the same respective meanings assigned to them in those laws. The Contract Act is an existing central legislation, Section 182 thereof defines the terms 'agent' and 'principal'. In view of the fact that Section 185 provides that no such consideration is necessary to create an agency; if the legislature had ever intended to include a person already falling in the definition of "agent" within the purview of the provisions of Section 182 and 185 of the Contract Act; with no correlation with receipt of consideration on actual success of the transaction; the legislature would have no reason to define the term "Real Estate Agent" at all and would have defined only the term "agent" by incorporating the definition from Section 182 of the Contract Act. In the context of the RERA Act, a contract of agency, when a person is acting as a real estate agent, presupposes that remuneration received by such person must be taken on actual fruition / success of the transaction of sale and not otherwise. The four ingredients of the definition indicated in Section 2(zm) above are therefore essential and the said four ingredients are not present in the subsequent parts of the definition if interpreted independent to the

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former part, the subsequent part is nothing but an inclusive and clarificatory part of the core of the statute.

In the matter of 99acres.com, there is no question of a principal - agent relationship with any of the sellers as none of the requisites specified above are fulfilled. It should be noted that (i) 99acres.com is not employed as an agent / representative of another - all of our contracts with the sellers are on principal to principal basis; (ii) 99acres.com does not have any mandate to create, modify or terminate contractual relationships on behalf of another; (iii) neither does 99acres.com receive instructions to act on behalf of another nor does it undertake acts which bind a seller or make it answerable to a prospective buyer. In any real estate transaction, 99acres.com only provide a starting point to a seller without being involved, in any manner whatsoever, in the actual transaction.

The intention of RERA Act is to bring accountability on, and prevent fraudulent activities by, persons who, in a real estate transaction, either (i) act as agent without any authority / consent given by a seller; or (ii) act beyond the scope of the authority / consent if so given by a seller. 99acres.com does neither of these as its acts, scope of service, mandates etc. are purely driven by the content supplied by the seller and devoid of any instructions to act any further then putting the content on its platform.

Dictionary meanings:

(a) *"negotiate"* -

- To communicate with another party for the purpose of reaching an understanding; to bring about by discussion or bargaining. (*Black's Law Dictionary - Tenth Edition*)

- To work or talk with others to achieve a transaction, agreement etc.; to succeed in passing through, around, or over. (*Collins Dictionary – Seventh Edition*)
- To try to reach an agreement by formal discussion; to arrange or agree something by formal discussion; formal discussion between people who are trying to reach an agreement. (*Oxford Advanced Learner's Dictionary of Current English - Eight Edition*)
- as interpreted the term 'negotiate' as under: "7. The word "negotiate" is a technical word and as used with reference to commercial paper, it is almost a word of art. It may be used in two senses, as meaning to discuss or arrange for a sale or bargain, or the preliminaries of a business transaction, and also to sell or discount negotiable paper, or assign or transfer it by endorsement or delivery. In law and law books, it is sometimes used in both senses. The word "negotiate" used in connection with business transactions ordinarily means to bargain with another respecting a transaction or to conduct communication or conferences with a view to reaching a settlement or agreement. It is that what passes between the parties or their agents in course of or incident to the making of a contract and is also conversation in arranging terms of a contract. It also means "to discuss or arrange a sale or a bargain; to arrange the preliminaries of a business transaction".

According to Black's Law Dictionary (Sixth Edition), negotiation is a process of submission and consideration of offers until acceptable offer is made and accepted. It means the deliberations, discussion or conference upon the terms of a proposed agreement or the act of settling or arranging the terms and conditions of a bargain, or sale, or other business transaction. Negotiation is thus a communication process used to put deals together. The job of the negotiator in case of negotiation for sale is to obtain all the terms and the conditions, including the price, and to place the same before the owner. With that his job as a negotiator "to negotiate" comes to an end. It is not within his domain to strike a bargain and perform the deal. It is for the owner to accept or not to accept the deal arrived at by the agent or attorney by negotiation."

- To discuss or arrange for a sale or bargain, or the preliminaries of a business transaction, and also to sell or discount negotiable paper, or assign or transfer it by endorsement or delivery. The word "negotiate" used in connection with business transaction ordinarily means to bargain with another respecting a transaction or to conduct communication or conferences with a view to reaching a settlement or agreement. This has been observed by The Hon'ble Bombay High Court, in the case of Devkubai Mankar vs Rajesh Builders AIR 1997 Bom 142.


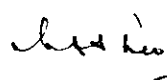
One of the key facets of the definition of 'real estate agent' in RERA Act is the act to "negotiate" which, basis the foregoing, means to interact, discuss, deliberate, including a bargain, to arrive at an agreement for

consummation of the sale-purchase transaction. Being a simpliciter portal / platform for sellers to advertise their properties, none of the employees or representatives of 99acres.com indulge in any discussions, interactions, negotiations, consultancy with the buyers under the sale-purchase transaction or assist the sellers in any limb of the transaction. All such discussions and negotiations are held by the sellers themselves directly with the prospective buyers without any role of 99acres.com or 99acres.com being privy to the same.

(b) “introduce” –

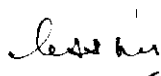
- To present someone by name to another person or two or more people to each other; to cause to experience for the first time; to bring in, establish. (*Collins Dictionary – Seventh Edition*)
- To tell two or more people who have not met before what each other's names are; the act of bringing something into use or existence for the first time, or of bringing something to a place for the first time; the act of making one person formally known to another, in which you tell each the other's name. (*Oxford Advanced Learner's Dictionary of Current English - Eighth Edition*)
- To bring forward formally or in an official manner; to bring forward one person to the presence of another as an equal (*Advanced Law Lexicon - Fifth Edition*)

It is correct that the literal meaning of the term “introduce” is to bring together or connect two parties. At the same time the act of introduction is



not a passive act. It involves active engagement of the introducer in bringing two parties together for negotiation for transaction. It can't happen without both parties knowing that they are being introduced to each other. Further, the term "introduces" as used in the definition of 'real estate agent' needs to be understood in conjunction with the role, functions and responsibilities of a 'real estate agent' as provided under Section 9 and 10 of RERA Act. The fundamental activity of a 'real estate agent' being regulated by Section 9 and 10 of RERA Act is - facilitation. Therefore, the term 'introduce' in Section 2(zm) shall be construed to mean that introduction of prospective buyers and sellers to each other by active involvement of a third party for a consideration which is dependent on fruition/success of final negotiations. The term 'introduce' cannot be given such wide and sweeping interpretation so as to include mere sharing contact information of advertisers and users through mediums like 99acres.com. Accepting such a wide interpretation will lead to absurd results because the term 'introduce' will then cover within its sweep all the advertising and information dissemination mediums such as newspapers, news channels, radio channels, bill boards, pamphlets, online and offline classifieds, property exhibition centers, online search engines like Google, Yahoo, etc., social media like Facebook, WhatsApp, Twitter as all of the aforesaid entities, through the paid or unpaid content published on the respective mediums, share contact information parties. It is certainly not the legislative intent of RERA to cover all such advertising and information disseminating entities within ambit of the term 'real estate agent'. The Hon'ble Supreme Court has held that any broad and sweeping interpretation which leads to absurd results ought to be avoided (State of Maharashtra vs. M/s. Shiv Datt & Sons, reported as 1993 Supp (1) SCC 222.)

The use of the word "medium" in Section 2(zm) of RERA Act demonstrates that law itself recognizes that introduction is effected through a medium, in other words through a communication channel. 99acres.com is an external resource or facility available to sellers (including a real estate agent, broker) and only acts as the medium / channel used by them to introduce themselves to prospective buyers and by no means can it be said that 99acres.com introduces prospective buyers and sellers to each other. Through the advertisements put up on 99acres.com, the real estate agents and developers introduce themselves to the users of the website. Similarly, the users of 99acres.com who choose to share their contact details so as to enable the prospective sellers to contact them also introduce themselves to the advertisers through the medium of 99acres.com. Even in this process, 99acres.com does not act as introducer since it is only for the user to make a conscious choice of choosing an option on the website and authorizing the website to share the contact details of the user/prospective buyer with any other prospective seller which would not only include developers, agents or resellers of tenements in the projects covered by RERA but also include advertisers like developers, real estate agents and individuals in projects not covered by RERA. In this process, all that is done by 99acres.com is to enable access to the data when a user/visitor voluntarily chooses to do so. This is nothing but an incident of the basic business of



advertising medium. Assuming for the sake of argument, without in any manner admitting, and whilst denying that an online platform like 99acres.com is reckoned as introducing two parties and is therefore capable of being termed as a 'real estate agent' under RERA Act; then with the same reasoning all tools, aids, resources etc. used by a seller (including but not limited to newspaper, magazine, posters, bill-boards, banners, telephone, mobile, SMSs, WhatsApp, Justdial, Google, Facebook, email, television, radio, trade fair, property exhibitions / events / conferences) to reach out to prospective buyers would also fall within the definition of 'real estate agent' under RERA Act. With the same logic, even online search engines like Google, Yahoo, Bing, Ask.com etc. should also be construed as 'real estate agent' under RERA Act. To give such an enlarged meaning / interpretation of the term "introduces" in Section 2(zm) of RERA Act neither appears to be correct nor in line with the objective of RERA Act. Further, it is submitted that as the authority has not asked for an explanation from such platforms like Google, Facebook, Newspapers, Radio, TV property shows, etc, which play similar role as 99acres.com of merely providing a medium for display of information, likewise 99acres.com should not be required to be registered as a real estate agent under the RERA Act.

(c) "*facilitate*" -

- To make the occurrence of something easier or less

difficult; (*Black's Law Dictionary - Tenth Edition*)

- To make easier; assist the progress of (*Collins Dictionary - Seventh Edition*)
- To make an action or a process possible or easier. (*Oxford Advanced Learner's Dictionary of Current English - Eighth Edition*)

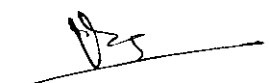
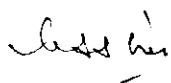
The term "facilitate" has been used in Section 9 and 10 of RERA Act, and it very importantly describes the role of a real estate agent. Even the clarifications issued by the Ministry of Housing and Urban Poverty Alleviation, Government of India and other States on whether web-portals / websites / newspapers/ exhibitions should be registered as 'real estate agent' under RERA Act lay emphasis on "engaging in" / "facilitating" a sale-purchase transaction.

In fact, answer in the Frequently Asked Questions section on the website of MahaRERA show that unless website / newspaper / exhibitions either intends to facilitate sale or purchase or act on behalf of any person to facilitate sale or purchase, such person does not need registration as a real estate agent. The precise question and answer reads thus:

Question: "80. Will listing websites / newspapers / exhibitions promoting real estate needs to take agents' license?"

Answer: Yes, if they intend to facilitate the sale or purchase of or act on behalf of any person to facilitate the sale or purchase of any plot, apartment or building, as the case may be, in a registered real estate project being sold by the promoter in any planning area."

The scope of definition of 'real estate agent' under RERA Act needs to be understood from its context under RERA Act (Section 9 and 10). It is also



pertinent to mention that the opening sentence in the definition section of RERA Act (Section 2) states “In this Act, unless the context otherwise requires” – which signifies that every definition in RERA Act has to be read subject to the qualification expressed in the definition clause.

As appearing from the dictionary meaning, “facilitate” embodies / pre-supposes an act of assistance to the seller, buyer or to the sale-purchase transaction itself and with an objective of consummation of the transaction. 99acres.com does not go beyond the act of listing of the sellers’ advertisements on its platform, and is neither approached by, nor approaches, any seller or buyer to provide any kind of assistance in their own transaction. In fact, by sharing of data, empowering more choices, creating transparency by disseminating more information, a platform like 99acres.com does the exact opposite of facilitation leading up to the closure of transaction of transfer of property.

(d) “*advertise*”

- to present or praise (goods, a service etc.) to the public,
especially in order to encourage sales. (*Collins Concise English Dictionary Seventh Edition*)

(e) “*advertisement*”

- any public notice, as a printed display in newspaper, a short film on television, announcement on radio, etc., designed to sell goods, publicize an event, etc. (*Collins Concise English Dictionary Seventh Edition*)

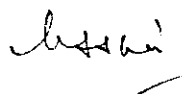
- careful consideration, advice or counsel, take something under advertisement, reserve judgment while considering something. (*Concise Oxford English Dictionary Twelfth Edition*)
- Advertising is merely identification and description, apprising of quality and place. It has no other object than to draw attention to the article to be sold and the acquisition of the article to be sold constitutes the only inducement to its purchase. (1 John W. Rast v. Van Deman & Lewis Company, reported as 1915 (60) Law Ed 679)

As provided in the definitions of advertise / advertisement above, the act of advertisement involves displaying information to draw public attention to the article / goods / services. The limited involvement of 99acres.com is with respect to providing a platform / space to the sellers to advertise their properties / services.

Right to equality includes right to inequality:

Article 14 of the Constitution of India provides that the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India. However, this general rule is subject to reasonable classification (without it being class legislation).

The Hon'ble Supreme Court in Kedar Nath Bajoria & Ors. v. State of West Bengal (reported as 1954 SCR 30) held that the equal protection of the laws guaranteed by Article 14 does not mean that all laws must be general in character and universal in application and the State has power of distinguishing and classifying persons or things for the purposes of




legislation. All that is required in class or special legislation is that the legislative classification must not be arbitrary but should be based on an intelligible principle having a reasonable relation to the object which the legislature seeks to attain.

The Hon'ble Supreme Court³ observed that where objects, persons or transactions essentially dissimilar are treated in a uniform manner, discrimination may result as refusal to make a rational classification may itself in some cases operate as denial of equality.

The Hon'ble Supreme Court held *State of Kerala and Ors. v. N.M. Thomas and Ors.* (reported as 1976 2 SCC 310), amongst others, that circumstances which govern one set of persons / objects may not necessarily be the same for others, so the question of unequal treatment does not really arise between persons governed by different conditions and different sets of circumstances.

The Hon'ble Supreme Court reiterated the observations in various judgments of Supreme Court on Article 14 and observed, amongst others, that the law can classify and set apart the classes according to the needs and exigencies of the society and as suggested by experience. Such classification must not be arbitrary but must be rational, that is to say (i) the classification must be founded on an intelligible differentia which distinguishes those that are grouped together from others; and (ii) the differentia must have a rational in relation to the object sought to be achieved by the Act.

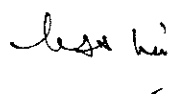
As laid down by Indian Courts, equal protection of laws guaranteed under Article 14 does not mean that same laws should apply to all persons. The varying needs of different class of persons often require separate

treatment, and identical treatment in unequal circumstances would amount to inequality. In the extant case, bringing 99acres.com within the ambit of a 'real estate agent' under RERA Act would lead to it being treated similar to a regular agent / broker who is involved in the transaction (unlike 99acres.com) and tantamount to denial of the right to be reasonably classified / distinguished and thus denial of equality as enshrined in Article 14.

Regulation under Information Technology Act,:

- The Information Technology Act, 2000 ("IT Act") provides for the concept of "intermediaries" and regulations governing their functions.
- 99acres.com is an online platform which acts as an "intermediary" under the ambit of IT Act and is governed and regulated by the provisions thereof and compliances required thereunder, including but not limited to Section 79 thereof which provides for limitations on the role and functions of an intermediary and states that an intermediary is not liable for any third-party information, data, or communication link made available or hosted by it.
- 99acres.com is essentially governed by Section 2(w) of the IT Act which defines the term "Intermediary" as also Section 2(za) which defines the term "Originator". These sections are mentioned herewith:

Section 2 (w): "Intermediary" with respect to any particular electronic records, means any person who on behalf of another person receives, stores or transmits that record or provides any service with



respect to that record and includes telecom service providers, network service providers, internet service providers, web hosting service providers, search engines, online payment sites, online-auction sites, online market places and cyber cafes.

Section 2(za): "Originator" means a person who sends, generates, stores or transmits any electronic message or causes any electronic message to be sent, generated, stored or transmitted to any other person but does not include an intermediary;

Relevant provisions of the IT Act:

- (i) Following definitions in the IT Act are relevant, which read thus:

"Section 2. Definitions: In this Act, unless the context otherwise requires-

(a) "access" with its grammatical variations and cognate expressions means gaining entry into, instructing or communicating with the logical, arithmetical, or memory function resources of a computer, computer system or computer network;

(i) "computer" means any electronic magnetic, optical or other high-speed data processing device or system which performs logical, arithmetic, and memory functions by manipulations of electronic, magnetic or optical impulses, and includes all input, output, processing, storage, computer software, or communication facilities which are connected or related to the computer in a computer system or computer network;

(j) "computer network" means the interconnection of one or more computers through –

(i) the use of satellite, microwave, terrestrial line or other

communication media; and

(ii) terminals or a complex consisting of two or more interconnected computers whether or not the interconnection is continuously maintained;

(k) "computer resource" means computer, computer system, computer network, data, computer data base or software;

(l) "computer system" means a device or collection of devices, including input and output support devices and excluding calculators which are not programmable and capable of being used in conjunction with external files, which contain computer programmes, electronic instructions, input data and output data, that performs logic, arithmetic, data storage and retrieval, communication control and other functions;

(o) "data" means a representation of information, knowledge, facts, concepts or instructions which are being prepared or have been prepared in a formalized manner, and is intended to be processed, is being processed or has been processed in a computer system or computer network, and may be in any form (including computer printouts magnetic or optical storage media, punched cards, punched tapes) or stored internally in the memory of the computer;

(r) "electronic form" with reference to information means any information generated, sent, received or stored in media, magnetic, optical, computer memory, micro film, computer generated micro fiche or similar device;

(s) "Electronic Gazette" means the Official Gazette published in the electronic form;

(t) "electronic record" means data, record or data generated, image or

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sound stored, received or sent in an electronic form or micro film or computer generated micro fiche;

(v) "information" includes data, text, images, sound, voice, codes, computer programs, software and databases or micro film or computer generated micro fiche:"

- (ii) In this context, Section 79 in Chapter XII of the IT Act is crucial and the same reads thus:

"Section 79: Exemption from liability of intermediary in certain cases–

(1) Notwithstanding anything contained in any law for the time being in force but subject to the provisions of sub-sections (2) and (3), an intermediary shall not be liable for any third party information, data, or communication link made available or hosted by him.

(2) The provisions of sub-section (1) shall apply if– (a) the function of the intermediary is limited to providing access to a communication system over which information made available by third parties is transmitted or temporarily stored or hosted; or (b) the intermediary does not– (i) initiate the transmission, (ii) select the receiver of the transmission, and (iii) select or modify the information contained in the transmission; (c) the intermediary observes due diligence while discharging his duties under this Act and also observes such other guidelines as the Central Government may prescribe in this behalf.

(3) The provisions of sub-section (1) shall not apply if– (a) the intermediary has conspired or abetted or aided or induced, whether by threats or promise or otherwise in the commission of the unlawful act; (b) upon receiving actual knowledge, or on being notified by the appropriate Government or its agency that any information, data or

communication link residing in or connected to a computer to a computer resource controlled by the intermediary is being used to commit the unlawful act, the intermediary fails to expeditiously remove or disable access to that material on that resource without vitiating the evidence in any manner.

Explanation—For the purposes of this section, the expression “third party information” means any information dealt with by an intermediary in his capacity as an intermediary.

- (iii) Further, Section 67 (c) of the IT Act mandates the intermediary to preserve and retain information for the described period and this section reads thus:

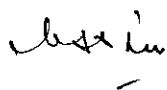
“Section 67C. Preservation and retention of information by intermediaries-

(1) Intermediary shall preserve and retain such information as may be specified for such duration and in such manner and format as the Central Government may prescribe.

(2) Any intermediary who intentionally or knowingly contravenes the provisions of sub-section (1) shall be punished with an imprisonment for a term which may extend to three years and also be liable to fine.”

It should be noted that Section 79 of the IT Act starts with a non-obstante clause by using the words - notwithstanding anything contained in any law for the time being in force and is made subject only to Sub-sections 2 and 3 of Section 79 thereof.

As far as the matrimonial websites which are carrying on advertising business like 99acres.com, have been recognized as intermediaries as defined under sub-clause (w) of section 2 of Information Technology Act, 2000 by the Ministry of Communications and Information



Technology, Government of India by its advisory No. 5 (6) / 2015 - ESD dated June 6, 2016. The respondent, Info Edge (India) Limited, has a website Jeevansathi.com which strictly follows the said advisory and an identical activity like 99acres.com is therefore acknowledged as an activity of an intermediary under sub-clause (w) of section 2 of Information Technology Act, 2000. The said online matrimonial websites / matrimonial mobile applications specific advisory was developed for the benefit of registered users (who are either creating the profile or whose profile is being uploaded for matrimonial alliance) by the Ministry of Communications and Information Technology in consultation with Ministry of Women and Child Development ("MWCD"), Ministry of Home Affairs, National Commission for Women, Matrimonial Website service providers as well as industry associations in response to a request made by the MWCD.

Since it was being suggested that the guidelines for regulating the functioning of matrimonial websites be developed, Department of Electronics and information Technology issued the said advisory which recognized the online matrimonial sites as intermediaries under IT Act.

Certain relevant judgments on Intermediaries are mentioned:

Relying on Kent RO Systems Limited and others v. Amit Kotak Re: Special Courts Bill 1978, reported as AIR 1979 SC 478 and Shreya Singhal v. Union of India (UOI) it is submitted that wide interpretation of Section 2(zm) to include intermediaries like 99acres.com within definition of real estate agent will be in direct conflict with Section 79 of IT Act and not in consonance with the ratio of Hon'ble Supreme Court in the case of Shreya Singhal v. Union of India. It is submitted that as an

intermediary, 99acres.com enjoys certain immunities under Section 79 of the IT Act. Important of intermediaries and providing safe harbor provisions for them is succinctly captured in submissions of one of the Petitioners as recorded by the Hon'ble Supreme Court in the case of Shreya Singhal v Union of India which are reproduced as under:

"10. Online intermediaries provide significant economic benefits and this is why across the world major economies provide a safe harbour regime to limit liability for online intermediaries when there is unlawful behaviour by intermediary users. Online intermediaries organise information by making it accessible and understandable to users. Intermediaries enhance economic activity, reduce costs and enable market entry for small and medium enterprises, thereby inducing competition, which eventually leads to lower consumer prices and more economic activity.

11. Online intermediaries do not have direct control of information that is exchanged on their platforms. Legal regimes across the world prescribe exemptions from liability for intermediaries and these safe harbour provisions are regarded as a necessary regulatory foundation for intermediaries to operate.

12. In the wake of representations by the information technology industry following the arrest in 2004 of Avnish Bajaj, the CEO of Baazee.com, an auction portal, Parliament with effect from 27-10-2009 substituted Chapter XII of the IT Act comprising Section 79. This new safe harbour protection

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to intermediaries was introduced to protect intermediaries from burdensome liability that would crush innovation, throttle Indian competitiveness and prevent entrepreneurs from deploying new services that would encourage the growth and penetration of the internet in India.

D. Important features of Section 79

13. Section 79 in Chapter XII of the IT Act comprises a self-contained regime with respect to intermediary liability.

14. The object of Section 79 is to exempt an intermediary from liability arising from "third-party information". An intermediary is exempt from all liability (civil and criminal) for any third-party information, data or communication link made available or hosted by him. The purpose of this wide exemption from liability is to protect intermediaries from harassment or liability arising merely out of their activities as an intermediary.

15. The opening words of Section 79 are a widely worded non obstante clause which overrides "anything contained in any law for the time being in force". (Section 81 gives overriding effect to the Act in relation to inconsistent provisions contained in any other law.) The clear intent of Parliament is to insulate intermediaries as a class from civil as well as criminal liability.

16. The exemption from liability granted by Section 79(1) is subject to the provisions of sub-sections (2) and (3) of Section 79.

17. Section 79(2)(c) provides that in order to ensure exemption

from liability under Section 79(1) the intermediary "observes due diligence while discharging his duties under this Act and also observes such other guidelines as the Central Government may prescribe in this behalf". The mandate of this provision empowers the Central Government to frame statutory guidelines for a specific objective, that is, to ensure observance by an intermediary of his duties under the IT Act. This is clearly brought out by the underlined expressions, particularly the words "in this behalf".

18. The duties of an intermediary under the IT Act include (i) the duty to preserve and retain information as set out in Section 67-C; (ii) the duty to extend all facilities and technical assistance with respect to interception or monitoring or decryption of any information as envisaged in Section 69; (iii) the duty to obey government directions to block public access to any information under Section 69-A; (iv) the duty to provide technical assistance and extend all facilities to a government agency to enable online access or to secure or provide online access to computer resources in terms of Section 69-B; (v) the duty to provide information to and obey directions from the Indian Computer Emergency Response Team under Section 70-B; (vi) the duty to not disclose personal information as envisaged under Section 72-A; and (vii) the duty to take down any information, data or communication link, etc. used to commit an unlawful act as envisaged under Section 79(3)(b)".

In Jitendra Singh Yadav v. Union of India and others⁴, the High

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Court of Madhya Pradesh held that:

- (a) *"The websites merely provide an online service allowing users to post classified advertisement and is a platform which facilitates interaction between buyers and sellers. By virtue of being an **online market place**, Respondent Nos. 3 to 5 fall within the definition of an "intermediary" as defined under Section 2 (1) (w) of the Information Technology Act, 2000."*
- (b) *"Being an intermediary, under Section 79 of information Technology Act, 2000, the Respondents are not liable for any third-party information, data made available or hosted by them, as they do not create, or cause to create content nor do they play any direct or indirect role in selection of content or the receiver of such content. Thus, the transaction impugned by the Petitioner is completely independent of the Respondents' involvement and they have no role in facilitating the transaction. The Company has no control over the outcome of the transactions and has no right, title or interest in any of the products/items being listed by third party users and all such listings are therefore "third party information" as defined in the Explanation to Section 79 of the IT Act."*

In this view of the matter, treating intermediaries like 99acres.com as real estate agents and requiring them to register under RERA will make them liable for third party information which will be in conflict with the legal framework of intermediaries under the IT Act. There is well settled principle of harmonious construction which provides that the statutes shall as far as possible be interpreted in a manner to avoid conflict with other statutes and the statutes shall be interpreted harmoniously.

Therefore, very wide interpretation of Section 2(zm) of RERA putting it in direct conflict with Section 79 of IT Act shall be avoided.

Further, it is submitted that making intermediaries like 99Acres liable for third party information shall have serious adverse effect on the industry and commerce. It will adversely affect innovation, throttle competitiveness of Indian real estate websites and prevent the websites from deploying new services that would encourage the growth of real estate in India and also restrict free flow of information in real estate market which will ultimately prejudicially affect consumer interests.

The only duty cast on intermediary is to remove the content from its website once it comes knowledge of any the government or any statutory authority or a judicial order that unlawful acts are going to be committed. The duty of an advertiser or intermediary governed by IT Act 2000 is to observe due care while conducting business to ensure it does not disseminate or advertise content which it knows to be contrary to any applicable law or has been so intimated by the court or appropriate government or its authority. So long as this duty of care and caution is fulfilled, an intermediary cannot be held to violate any statutory provision. In context of RERA and considering the nature of business of 99acres.com of being only an advertiser, same as newspapers and magazines, it is practically and physically impossible to verify if a particular real estate project is covered by RERA or falls within expected category and also to verify whether such a project is registered with appropriate real estate regulatory authority. This is a matter which is within the exclusive knowledge of concerned advertiser who by putting up an advertisement



essentially makes a self-declaration that it has followed the statutory mandate of RERA.

Compliance with the advertising standards prescribed by the Advertising Standards Council of India-

As an entity providing a medium for advertisement, 99acres.com is committed to the act of providing a medium for advertising and ensuring the protection of interest of the consumer. In this regard, 99acres.com complies with the advertising standards prescribed by the Advertising Standards Council of India ("ASCI"). ASCI is a voluntary self-regulation council registered under Section 25 of the Indian Companies Act, 1956 and seeks to ensure that advertisement conform to its code for self-regulation which requires advertisement to be legal, decent, honest, truthful and not hazardous or harmful while observing fairness in competition.

Certain relevant terms defined in the ASCI code for self-regulation in advertising:

- An advertisement is defined as a paid-for communication, addressed to the Public or a section of it, the purpose of which is to influence the opinions or behavior of those to whom it is addressed. Any communication which in the normal course would be recognized as an advertisement by the general public would be included in this definition, even if it is carried free-of-charge for any reason.
- A consumer is any person or corporate body who is likely to be reached by an advertisement, whether as an ultimate consumer, in the way of trade or otherwise.
- An advertiser is anybody, including an individual or to be

reached by an advertisement, whether as an ultimate consumer, in the way of trade or otherwise.

- An advertiser is anybody, including an individual or partnership or corporate body or association, on whose brief the advertisement is designed and on whose account the advertisement is released.
- Media owners include individuals in effective control of the management of media or their agents; media are any means used for the propagation of advertisements and include press, cinema, radio, television, hoardings, hand bills, direct mail, posters, internet, etc.

In order to achieve the acceptance of fair advertising practices in the best interest of the ultimate consumers, ASCI follows the following basic guidelines:

- To ensure the truthfulness and honesty of representations and claims made by advertisements, and to safeguard against misleading advertisements.
- To ensure that advertisements are not offensive to generally accepted standards of public decency.
- To safeguard against the indiscriminate use of advertising for the promotion of products, which are regarded as hazardous to society or to individuals to a degree or of a type and which is unacceptable to society at large.
- To ensure that advertisements observe fairness in competition so that the consumer's need to be informed of choices in the marketplace and the canons of generally accepted competitive



behavior in business is both served.

The Consumer Complaints Council (“CCC”) of ASCI, which functions as its examining body, considers the complaints raised as well as the response of the advertiser before giving its recommendation as to whether the advertisement in question is violating the provisions of the ASCI Code for Self-Regulation in advertising or not. All CCC recommendations are published on the ASCI website and reported in ASCI's Annual Report. All complaints which are filed before ASCI for any violation are forwarded to the advertisers / the entity advertising being 99acres.com for their explanation.

A few of these instances when the ASCI has sought explanation from 99acres.com in relation to misleading advertisements are mentioned herewith:

- (i) A complaint dated September 24, 2014 was made by ASCI to Info Edge (India) Limited alleging that false information was posted in respect of a property on its platform. In response to the said complaint, 99acres.com provided an explanation that it is merely an intermediary and the alleged information was posted by the builder / advertiser. It should be noted that ASCI accepted the explanation provided by Info Edge (India) Limited and ceased further proceedings in furtherance of the said complaint.
- (ii) In another instance, the ASCI directly sent the complaint to the builder alleging that the builder had posted misleading information on the platform. In this case, ASCI didn't seek any explanation from 99acres.com for displaying the information

on its platform. {the answering respondent craves leave to refer to and rely upon the said complaint as and when produced}

RERA Act is not a law to regulate online portals / advertisers like 99acres.com -

In the past the central and state legislatures have laid down regulations which specifically govern the functioning of web aggregators / online applications. Few of which are mentioned hereafter:

(i) Insurance Regulatory and Development Authority (Insurance Web Aggregators) Regulations, 2017 (**"Insurance Regulations"**):

- The objective of the Insurance Regulations is to supervise and monitor web aggregators as an insurance intermediary who maintains a website for providing interface to the insurance prospects for price comparison and information of products of different insurers and other related matters.
- Any insurer desirous of obtaining leads may enter into an "agreement" with the web aggregator licensed under the Insurance Regulations (*obtaining license under the Insurance Regulations is mandatory, in the absence of which criminal proceedings could be initiated*).
- As per the requirements of the Insurance Regulations, this agreement should necessarily include, amongst others, the details relating to time-frame and mode of

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transmission of leads to be shared.

- Under the Insurance Regulations, it is the duty of the web aggregators to display the information pertaining to insurers on its portal and carry out other activities pertaining to lead generation.
- The Insurance Regulatory and Development Authority has been granted powers under the Insurance Regulations to regulate and penalize the web aggregators (including cancellation of license). These Insurance Regulations also govern the remuneration payable to web aggregators by the insurer and provides for the obligations and code of conduct of the web aggregators.

(ii) Karnataka On-demand Transportation Technology Aggregators Rules, 2016 ("**Karnataka Rules**"):

- An aggregator under the Karnataka Rules is a person who is an aggregator or an operator or an intermediary / market place who canvasses or solicits or facilitates passengers for travel by a taxi and who connects the passengers / intending passengers to a driver of a taxi through phone calls, internet, web-based services or GPS/GPRS based services whether or not any fare, fee, commission, brokerage or other charges are collected for providing such services.
- Under these Karnataka Rules, a license is required from the Karnataka State Transport Authority to act as an aggregator. Additionally, the person applying for license

as an aggregator is required to comply with the IT Act and the IT Rules.

- The Karnataka Rules also provide for the terms and conditions to be observed by the web aggregators which includes, amongst others, maintaining records of all taxis in digital form, list of drivers along with their license numbers, hire charges, qualifications of the driver, etc.
 - Under these Karnataka Rules, the Karnataka State Transport Authority has been granted the power to suspend or cancel the license of the web aggregators.
- (iii) City Taxi Scheme-2015, Delhi ("**Delhi Scheme**"):
- The Delhi Scheme is framed under Sections 93, 95 and 96 of the Motor Vehicles Act, 1988. Any taxi service provider including an aggregator of taxis in Delhi is eligible to apply for a grant of license to the State Transport Authority under the Delhi Scheme. License under this scheme can be obtained either in the individual or group category.
 - As per the provisions of this scheme, any licensee under the group category is required to either maintain a call-center or operate as an aggregator through an authorised call-center or web portal or app. Further, the licensee is also required to maintain a web portal containing all the details of its ownership, services offered, fare structure, name and contact details of a duly appointed grievance redressal officer, etc.
 - The norms for fare structure, arrangement for services,

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driver's profile, vehicle profile, etc. are also provided in this scheme.

Likewise, 99acres.com which functions on a similar model like the web aggregators governed by the aforesaid regulations should not be regulated by a law like RERA Act, the objective of which is completely unrelated to the functioning / technicalities of such portals.

Laws pertaining to real estate agents in other countries-

(i) Law governing estate agents in Singapore:

Estate agents in Singapore are governed by the Estate Agents Act, Cap 95. Detailed provisions on regulation of the estate agents are provided in this Act.

(a) Some of key provisions are in relation to:

- Constitution of Council Governing Estate Agencies, their powers, functions etc. (Part II of the Act - Section 6 onwards)
- Licensing of estate agents and registration of salespersons (Section 28 onwards)
- Application for estate agents license (Section 33)

(b) Procedure for institution of Criminal Proceedings against licensed estate agent or registered salesperson.

There are various online property portals in Singapore allowing purchasers / lessees to peruse property listings in Singapore. Such portals appear to have a model similar to 99acres.com and other portals in India wherein the website allows you to connect directly with the

registered estate agent. The listing allows you to directly connect with the estate agent who has uploaded the listing.

Although, the estate agents (referred to as salespersons in the Act) are licensed, the online property portals which don't function as agents are not required to be licensed. This can be verified from the data of licensed estate agents and registered salespersons uploaded on the website of the Council of Estate Agencies.

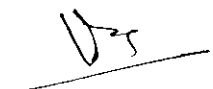
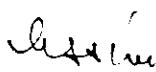
- (c) It is important to note that online portals are not licensed / registered as 'Estate Agents' in spite of the fact that a wide ambit has been given to the terms "estate agent" "estate agency work" defined under the Estate Agents Act.

Below are the definitions:

"estate agent", subject to subsection (3), means a person who does estate agency work, whether or not he carries on that or any other business

"estate agency work, subject to subsection (3), means any work done in the course of business for a client or any work done for or in expectation of any fee (whether or not in the course of business) for a client -

(a) being work done in relation to the introduction to the client of a third person who wishes to acquire or dispose of a property, or to the negotiation for the acquisition or disposition of a property by the client;



or

(b) being work done, after the introduction to the client of a third person who wishes to acquire or dispose of a property or the negotiation for the acquisition or disposition of a property by the client, in relation to the acquisition or disposition, as the case may be, of the property by the client;"

(ii) **Law governing estate agents in United Kingdom (Referred in Point 4 [(v) to (ix)] of Part H of the Reply):**

- a) It would be just and advantageous to refer to the statutory provisions of England in this regard. The Estate Agents Act, 1979 (United Kingdom) is an Act to make provisions with respect to carrying on and persons who carry on certain activities in connection with the disposal and acquisition of interests in land or for the purposes connected therewith. It came into force on May 5, 1982.
- b) Section 1 of the said act defines as to what would mean by estate agency work. The definition is in fact a clear pointer to the basic legal principle that a mere advertiser cannot become an agent since the relationship between a client and a publisher is on a principal to principal basis and not on a principal to agent basis.

Interestingly, after the advent of technology and consequent use of internet web-based platforms, the legislature amended Sub-Section 4 of Section 1 of Estate Agents Act, 1979 of United Kingdom with effect from October 1, 2013 by Section 24 of the Enterprises and Regulatory Reforms Act, 2013. Prior to amendment, sub-section (4) of Section 1 of the said Act read

thus:

"This Act does not apply to the publication of advertisements or the dissemination of information by a person who does no other acts which fall within subsection (1) above."

After the amendment, Section 1 reads thus:

(1) *This Act applies, subject to subsections (2) to (4) below to things done by any person in the course of a business (including a business in which he is employed) pursuant to instructions received from another person (in this section referred to as "the client") who wishes to dispose of or acquire an interest in land –*

(a) for the purpose of, or with a view to, effecting the introduction to the client of a third person who wishes to acquire or, as the case may be, dispose of such an interest; and

(b) after such an introduction has been effected in the course of that business, for the purpose of securing the disposal or, as the case may be, the acquisition of that interest;

and in this Act the expression "estate agency work" refers to things done as mentioned above to which this Act applies.

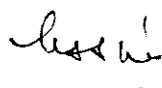
(2) *This Act does not apply to things done –*

(a) in the course of his profession by a practising solicitor or a person employed by him or by an incorporated practice (within the meaning of the Solicitors (Scotland) Act 1980) or a person employed by it; or

(b) in the course of credit brokerage, within the meaning of the Consumer Credit Act 1974; or

*(c)*****

(d) in the course of carrying out any survey or valuation pursuant to a contract which is distinct from that under which other things falling



within subsection (1) above are done; or

(e) in connection with applications and other matters arising under the Town and Country Planning Act 1990, the Planning (Listed Buildings and Conservation Areas) Act 1990, the Planning (Hazardous Substances) Act 1990 or the Town and Country Planning (Scotland) Act 1997, the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997, the Planning (Hazardous Substances) (Scotland) Act 1997 or the Planning (Northern Ireland) Order 1991, Planning Act (Northern Ireland) 2011.

(3) This Act does not apply to things done by any person –

(a) pursuant to instructions received by him in the course of his employment in relation to an interest in land if his employer is the person who, on his own behalf, wishes to dispose of or acquire that interest; or

(b) in relation to any interest in any property if the property is subject to a mortgage and he is the receiver of the income of it; or

(c) in relation to a present, prospective or former employee of his or of any person by whom he also is employed if the things are done by reason of the employment (whether past, present or future).

(4) This Act does not apply to the following things when done by a person who does no other things which fall within subsection (1) above –

(a) publishing advertisements or disseminating information;

(b) providing a means by which –

(i) a person who wishes to acquire or dispose of an interest in land can, in response to such an advertisement or dissemination of information, make direct contact with a person who wishes to dispose of or, as the case may be, acquire an interest in land;

(ii) the persons mentioned in sub-paragraph (i) can continue to communicate directly with each other.

Apart from a person publishing advertisements or dissemination of information, even a person providing the means by which a prospective buyer can make direct contact with prospective seller was excluded from the definition if the prospective buyer can continue to communicate directly with the seller. As a result of the amendment in section 1 sub-section 4 of the Estate Agents Act, 1979 mentioned herein above, the intermediaries such as internet property portals for private sale functioning in United Kingdom stand exempted from the definition of estate agents under the Estate Agent Act, 1979.

Freedom to carry on any profession, trade, occupation or business:

Under Article 19(1)(g) of the Constitution of India all citizens have the freedom to profess any profession, trade, occupation or business. However, this fundamental right is subject to the limitation imposed under Article 19(6) which permits the law to impose reasonable restrictions on the exercise of such right, in the interests of the general public. Further, such right shall be subject to any law relating to: (i) the professional or technical qualifications necessary for practising such profession, trade, occupation or business or profession; or (ii) the State itself (or by a corporation owned or controlled by the State) to carry on any such profession, trade, occupation, business, industry or service, to the exclusion of citizens.

While interpreting the phrase "reasonable restriction" the Indian Courts have observed that the said phrase connotes that the restriction / limitation imposed on the person in enjoyment of the right should not be

arbitrary or of an excessive nature, and beyond what is required in the interest of the public. It has been further observed that a restriction which has no relation with the object which the legislation seeks to achieve cannot be regarded as a reasonable restriction on such freedom / right.

The Hon'ble Supreme Court in *Lala Hari Chand Sarda v. Mizo District Council and Others*, reported as AIR 1967 SC 829 observed that the fundamental right of a citizen to carry on any profession, trade, occupation or business can be restricted only by a law necessitated in the interest of general public, and such restriction should not be arbitrary, excessive or beyond what is required in the interest of the general public.

The Hon'ble Supreme Court held in *Mohammad Faruk v. State of Madhya Pradesh and Others*, reported as AIR 1970 SC 93 that in evaluating whether an impugned law imposes reasonable restriction on any profession, trade, occupation or business, a Court should, amongst other, consider (i) attempt an evaluation of its direct and immediate impact upon the fundamental rights of citizens affected thereby; (ii) larger public interest sought to be ensured in the light of object sought to be achieved; (iii) necessity to restrict the citizen's freedom; (iv) inherent pernicious nature of the act restricted or its tendency to be harmful to the general public; (v) possibility of achieving the object by imposing a less drastic restraint.

The Hon'ble Supreme Court held that the test of reasonableness is whether the law strikes a proper balance between social control on the one hand and the right of individual on the other hand. It was further observed that a Court must take into account factors like nature of the right enshrined, underlying purpose of the restriction imposed, evil sought to be remedied, its extent and urgency, and to what extent the restriction is, or is not, proportionate to the evil and conditions prevalent at that time.

It is understood and appreciated that every profession, trade, occupation, business needs to be regulated, or be subject to restrictions, which are reasonably required in public interest. As explained in foregoing paragraphs, it would not be appropriate to regulate online portals / listing platforms such as 99acres.com under RERA Act by classifying them as a 'real estate agent'. Such an interpretation would tantamount to an unreasonable restriction on business and thus being inconsistent with the spirit of Article 19(1)(g) of the Constitution of India. With due respect, one cannot foresee any risk, jeopardy or prejudice caused to the general public interest if 99acres.com is not brought within the ambit of RERA Act as a 'real estate agent'.

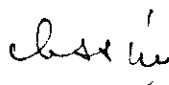
In view of the forgoing, it is submitted that 99acres.com does not fulfill any test or criteria to fall within the definition of "real estate agent" under RERA Act. No risk, jeopardy or prejudice would be caused to the general public interest if 99acres.com is not brought within the ambit of RERA Act as a 'real estate agent'.

Therefore, it is submitted and prayed that appropriate orders may please be passed by this Authority to cease further proceedings in the matter and the impugned notice dated July 23, 2018 is withdrawn.

**REPLY ALONG WITH WRITTEN SUBMISSIONS of Makaan.com
Private Limited**

1. Real Estate (Regulation and Development) Act, 2016, its salient features, provisions and interpretation:

The Real Estate (Regulation and Development) Act, 2016 (hereinafter referred to as the "RERA") has been enacted by the Parliament and all



provisions thereof came into effect on May 1, 2017. The true interpretation of the objective and purpose of enactment of RERA can be derived from the following:

As per the long title of RERA (which essentially describes the nature of a proposed measure / statute), it is a statute to establish the Real Estate Regulatory Authority for regulation and promotion of the real estate sector and to ensure sale of plot, apartment or building, as the case may be, or sale of real estate project, in an efficient and transparent manner and to protect the interest of consumers in the real estate sector and to establish an adjudicating mechanism for speedy dispute redressal and also to establish the Appellate Tribunal to hear appeals from the decisions, directions or orders of the Real Estate Regulatory Authority and the adjudicating officer and for matters connected therewith or incidental thereto.

The 'Statement of Objects and Reasons' (which briefly explains the purpose, objectives, contents of a proposed legislation and helps in understanding the necessity and scope thereof) appended with the Real Estate (Regulation and Development) Bill, 2013 presented before the Rajya Sabha on August 14, 2013 reads as follows:

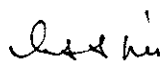
"The real estate sector plays a catalytic role in fulfilling the need and demand for housing and infrastructure in the country. While this sector has grown significantly in recent years, it has been largely unregulated with professionalism and standardization and lack of adequate consumer protection. Though the Consumer Protection Act, 1986 is available as a forum to the buyers in the real estate market, the recourse is only curative and is not adequate to address all the concerns of buyers and promoters in that sector. The lack of standardization has been a constraint to the healthy

and orderly growth of industry. Therefore, the need for regulating the sector has been emphasized in various forums.

In view of the above, it becomes necessary to have a Central legislation, namely, the Real Estate (Regulation and Development) Bill, 2013 in the interests of effective business practices and transactions in the real estate sector. The proposed Bill provides for the establishment of the Real Estate Regulatory Authority (the Authority) for regulation and promotion of real estate sector and to ensure sale of plot, apartment or buildings, as the case may be, in an efficient and transparent manner and to protect the interest of consumers in real estate sector and establish the Real Estate Appellate Tribunal to hear appeals from the decisions, directions or orders of the Authority.

The proposed Bill will ensure greater accountability towards consumers, and significantly reduce frauds and delays as also the current high transaction costs. It attempts to balance the interests of consumers and promoters by imposing certain responsibilities on both. It seeks to establish symmetry of information between the promoter and purchaser, transparency of contractual conditions, set minimum standards of accountability and a fast-track dispute resolution mechanism. The proposed Bill will induct professionalism and standardization in the sector, thus paving the way for accelerated growth and investments in the long run. "

Amongst other objects, RERA has been enacted in view of the necessity and intent to control agents, brokers, middlemen who are involved in a real estate transaction. Historically, some of the States (like, Haryana) have attempted to bring out laws for regulation of this category but the same have failed to deliver the



desired results due to various reasons, and therefore it was sought to be remedied by RERA to, amongst others, infuse over all transparency, ensure fair-play and reduce frauds & delays; and establish symmetry of information between the promoter and allottee. [Also appearing in the 'frequently asked questions (FAQs)' on the official website of MahaRERA.

From the above it is evident that RERA is a law governing the acts and conduct of sellers, buyers and agents in the real estate sector - with the objective of creating transparency fair dealings. and protection of buyers' interests. It is an understandable position that any business activity would entail, and be dependent on, other sectors and services — whose products and services are used from time to time for the core activity. In real estate business also, several external sectors and services are linked such as; material, labour, architects, consultants, sales & marketing professionals, brokers, advertisers etc. Some of these may be involved in the planning, designing, construction, marketing and sales activities, but RERA does not appear to, directly or indirectly, touch upon these external resources or bring the same within its ambit.

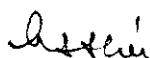
2. As regards agents / brokers etc. being within the ambit of RERA, in order to understand the intention of legislature, the following is relevant:

- (i) Shri. K. C. Venugopal (Alappuzha) in his speech during the 'Discussion on the motion for consideration of the Real Estate (Regulation and Development) Bill, 2016' before 16th Lok Sabha mentioned — "Now-a-days there are a lot of agents in the real estate sector and there is no regulation for them. But now the real estate agents must register themselves in order to regulate the sale and purchase of properties in real estate projects that have been registered. Registered agents must not facilitate the sale of

unregistered projects nor can mislead buyers regarding services offered. This would also provide transparency in this sector. "It finds mention in the 'Report of the Standing Committee on Urban Development on Real Estate (Regulation and Development) Bill, 2013' that suggestions were received from stakeholders that there is no clarity on the eligibility criteria for the registration of real estate agents, and this needs to be incorporated in the final statute to ensure transparency in property dealing. It was further stated that the objective should be to create a pool of licensed real estate agents who are adequately trained and certified, like other self-employed professional e.g. insurance agents, lawyers etc. On this, the Ministry of Housing and Urban Poverty Alleviation opined as under:

"the main thrust of the Bill is regarding disclosure and transparency in relation to real estate projects, registered under the Bill. As real estate agents are an important link in the 'transaction' chain, it has been decided to register them and make them accountable."

The legislature has visualized 'real estate agent' as a person / entity (dealing, acting on behalf of, or under the mandate of a party) which is part of a proposed transaction or in other words a link between the seller and buyer. It also indicates that 'real estate agent' is to be viewed as any other agent / representative (for instance, insurance agent, lawyers etc.) of a particular party in a transaction. To impute a



wider scope of activities for a 'real estate agent' would be highly inequitable and contrary to the purported legislative intent. It is in the ordinary course of real estate business to engage or contract with external resources for marketing, sales promotion and for reaching out to the prospective buyers. It may be worthwhile to mention that Section 10(c)(ii) of RERA and Rule 17(ii) of Maharashtra Real Estate (Regulation and Development) (Registration of real estate projects, Registration of real estate agents, rates of interest and disclosures on website) Rules, 2017 (hereinafter referred to as the "MahaRERA Rules") also recognizes that a real estate agent advertises or permits to advertise about real estate projects. In such a scenario, an averment that even such external resources which are the medium or which host the advertisements listings or publications of a real estate agent are also classified as a 'real estate agent' under RERA, would not be a correct approach or interpretation of the objects of RERA.

3. Mischief Rule & Purposive Interpretation of Statutes:

- (i) It is a well-established principle that while interpreting a statute the Courts may not only take into consideration the purpose for which the statute was enacted, but also the mischief it seeks to suppress. In this regard, in the matter of U.P. Secondary Education Service vs. State of U.P. (Special Appeal No. 146 of 2010, reported as 2011 2 All W 149), the Hon'ble Allahabad High Court reiterated the mischief rule for statutory interpretation as laid down in Heydon's case (reported as 1584 EWHC Exch J36) which provided as under:

"that for the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law) four things are to be discerned and considered: (1) what was the common law before making of the Act; (2) what was the mischief and defect for which the common law did not provide; (3) what remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth; and (4) the true reason of the remedy.."

The Allahabad High Court stated that the mischief as used in statutory interpretation means a legal defect which is sought to be rectified or the factual condition that is causing concern. It is the duty of the judge to rationalize the law. and to attune it with the object and purpose for which the law is enacted. It is not necessary in every case to strike down the rule, if it can be saved by subtle intervention without causing damage to the contents, with purpose and save it from the vice of unconstitutionality.

In the matter of *Badshah v. Urmila Badshah Godse and Others*, reported as AIR 2014 SC 869, the Hon'ble Supreme Court has observed that (a) while interpreting a statute where alternative constructions are possible the Court must give effect to that which will be responsible for the smooth working of the system for which the statute has been enacted rather than one which will put a road block in its way: and (b) one should avoid a construction which would reduce the legislation to futility and should accept the bolder construction based on the view that Parliament would

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legislate only for the purpose of bringing about an effective result.

- (ii) Apart from the mischief rule, under various judicial pronouncements the Hon'ble Supreme Court has laid down the importance of purposive / contextual interpretation of statutes. Relevant observations from some of the key judicial pronouncements are extracted here under:

- (a) Poppatlal Shah v. The State of Madras, reported as AIR 1953 sc 274:

"It is a settled rule of construction that to ascertain the legislative intent. all the constituent parts of a statute are to be taken together and each word, phrase or sentence is to be considered in the light of the general Chief Justice of Andhra Pradesh and Others v. L. V.A. Dixitulu and Others, reported as AIR 1979 SC 193: "If the language, or the phraseology employed by the legislation is precise and plain and thus by itself proclaims the legislative intent in unequivocal terms, the same must be given effect to, regardless of the consequences that may follow. But if the words used in the provision are imprecise, protean or evocative or can reasonably bear meanings more than one, the rule of strict grammatical construction ceases to be a sure guide to reach at the real legislative intent. In such a case. in order to ascertain the true meaning of the terms

and phrases employed. it is legitimate for the Court to go beyond the arid literal confines of the provision and to call in aid other well recognized rules of construction. such as its legislative history. the basic scheme and framework of the statute as a whole. each portion throwing light. on the rest, the purpose of the legislation, the object sought to be achieved. and the consequences that may flow from the adoption of one in preference to the other possible interpretation. Where two alternative constructions are possible, the Court must choose the one which will be in accord with the other parts of the statute and ensure its smooth, harmonious working, and eschew the other which leads to absurdity, confusion, or friction, contradiction and conflict between its various provisions, or undermines, or tends to defeat or destroy the basic scheme and purpose of the enactment." (Emphasis supplied)

- (b) *Kehar Singh and Others v. State (Delhi Administration)*, reported as AIR 1988 SC 1883:

"But if the words are ambiguous uncertain or an v doubt arises as to the terms employed, we deem it as our paramount duty to put upon the language of the legislature rational meaning. We then examine every word. every section and every provision. We examine the Act as a whole. We examine the

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necessity which gave rise to the Act. We will consider the provisions to ensure coherence and consistency within the law as a whole and to avoid undesirable consequences."

It was observed in *Organo Chemical Industries and Anr. vs. Union of India and Others*, reported as 1979 4 SCC 573, *East India Hotels Ltd. and Another v. Union of India and Another*, reported as 2001 1 SCC 284, and *Prakash Kumar v. State of Gujarat*, reported as 2005 2 SCC 409 - no part or word of a statute should be construed in isolation. An act has to be read as a whole, the different provisions have to be harmonized and the effect has to be given to all of them. Each provision of the statute should be construed with reference to other provisions to make the provision consistent with the object sought to be achieved.

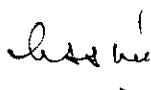
- (c) (i) It was held by the Hon'ble Supreme Court in *State of Haryana and others v. Sampuran Singh and others*, reported as 1975 2 SCC 810, *Reserve Bank of India v. Peerless General Finance and Investment Co. Ltd. and Others*, reported as 1987 1 SCC 424, and *High Court of Gujarat and Another v. Gujarat Kishan Mazdoor Panchayat and Others*, reported as 2003 2 SCR 799, that:

-Interpretation of statute must depend on their text and the context, which are the basis of interpretation and both are important. A statute is best interpreted when we know why it was enacted. With this knowledge, the statute must be read, first a whole

and then section by section, clause by clause, phrase by phrase and word by word.

-By no stretch of imagination, a court is entitled to add something more than what the statute intended. The cardinal principle of construction of statute is that the true or legal meaning is derived by considering the meaning of words used in light of the apparent object sought to be achieved.

- (ii) The intention of the legislature (as discussed above) in including real estate agents within the ambit of RERA was to rectify / cure the existing mischief of the fraudulent activities undertaken by some of the real estate agents involved in the real estate transactions and to bring a regulatory mechanism governing their actions. It is submitted that no objective of RERA would be met, by bringing the online portal / digital platforms like Makaan.com within the ambit of RERA. The RERA provisions itself provide for, and recognize, the need to advertise / publish the real estate projects; however, it is evident that such activities would have to be done on, or through, an external medium — as also emergent from use of the word "medium" in Section 2(zm) of RERA. Makaan.com being one of such external mediums / platforms only provides advertising services (space) to sellers and their acts are nowhere intending to persuade, convince or otherwise influence a buyer's decision to buy a property. It simply hosts, lists and show-cases products and services of another party



on their platform. As emergent from various judicial pronouncements mentioned above, the scope of definition of 'real estate agent' under RERA needs to be understood from the context in which it is used under RERA i.e. under Section 9 and 10 which provides the role, functions and responsibilities of a 'real estate agent'. Section 9 and 10 of RERA clearly provide, amongst others, that:

- (a) no real estate agent shall facilitate sale or purchase of a real estate project without such agent being registered under RERA, and
- (b) no real estate agent shall facilitate sale or purchase of a real estate project which is not registered under RERA.

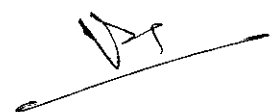
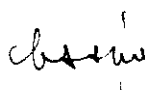
The fundamental aspect highlighted in the above provisions is that a 'real estate agent' facilitates in a sale-purchase transaction — which the law pre-supposes as the core activity of a 'real estate agent'. The definition of 'real estate agent' as given in Section 2(zm) needs to be read along with Section 9 and 10, in order to understand the scope and ambit of persons who can be called a 'real estate agent'. It would be incorrect to state that every person who negotiates, acts on behalf of another, or introduces prospective buyers and sellers to each other — becomes a 'real estate agent'. It is essential that the act of 'facilitation' is undertaken to be classified as a 'real estate agent'. It is not the case that Makaan.com 'facilitates' in any manner under a real estate transaction.

- 4 Definition of "real estate agent" & its functions under RERA and meaning of relevant terms and expressions used therein:

- (a) The definition of "real estate agent" as provided in Section 2(zm) of RERA is extracted herein under:

"means any person, who negotiates or acts on behalf of one person in a transaction of transfer of his plot, apartment or building, as the case may be, in a real estate project, by way of sale, with another person or transfer of plot, apartment or building, as the case may be, of any other person to him and receives remuneration or fees or any other charges for his services whether as a commission or otherwise and includes a person who introduces, through any medium, prospective buyers and sellers to each other for negotiation for sale or purchase of plot, apartment or building, as the case may be, and includes property dealers, brokers, middlemen by whatever name called." (Emphasis Supplied)

- (ii) Section 9 of RERA, amongst others, provides that without its registration with State RERA authorities no real estate agent shall facilitate, or act on behalf of any person to facilitate, the sale or purchase of any plot, apartment or building.
- (iii) Conjoint reading of Section 10 of RERA and Rule 17 of the Maha-RERA Rules lay down the functions and responsibilities of real estate agent as under:
- (a) not to facilitate the sale or purchase of any plot, apartment or building in a real estate project or part of



- it, being sold by the promoter in any planning area, which is not registered with the Authority;
- (b) maintain and preserve such books of account, records and documents as may be prescribed;
 - (c) not involve himself in any unfair trade practices, namely making false representation about standard of amenities and services, promoter having certain approvals or affiliations which actually do not exist;
 - (d) permit the publication of any advertisement whether in any newspaper or otherwise of services that are not intended to be offered.
- (iv) Meaning of relevant terms and expressions: The definition / meaning of the key terms and expressions used in the aforesaid provisions are explained here under:
- (a) "agent"
 - A person employed to do any act for another, or to represent another in dealings with third persons. (Section 182 of Contract Act, 1872)
 - Something that produces an effect; someone who is authorized to act for on in place of another; a representative. (Black's Law Dictionary - Tenth Edition)
 - A person who acts on behalf of another person; representative. (Collins Dictionary – Seventh Edition)
 - A person whose job is to act for, or manage the affairs of, other people in business, politics etc.; a person whose job is to arrange work for an actor, musician, sports player etc. (Oxford

Advanced Learner 's Dictionary of Current English - Eighth Edition)

- A person appointed as a representative of another person.

Lakhani Shahakari SK. V. Sastha v. Moreshwar, reported as AIR 1978 Bom 273, 277.

In P. Krishna Bhatta v. Mundilal Ganapathy Bhatta, reported as AIR 1955 Madras 648, it was held that an agency is a contract of employment for the purpose of bringing another in legal relation with a third party or in other words, the contract between the principal and agent is primarily a contract of employment to bring him into legal relation with a third party or to contract such business as may be going on between him and the third party. An agent is thus a person either actually or by law held to be authorized and employed by any person to bring into contractual or other legal relations with a third party.

While dealing with the meaning and concept of agency, The Hon'ble High Court of Andhra Pradesh in the matter of State of Madras (now Andhra Pradesh) represented by District Collector West Godavari, Eluru and Others v. Jayalakshmi Rice Mill Contractors Co. and Others, reported as AIR 1959 AP 352, observed that the mere fact that a person is employed to do an act for another does not make the former an agent of the latter. In State of Bihar v. Dukhulal Das, reported as AIR 1962 Patna 140, the High Court laid down that the test for determining whether a person is acting as an agent of another person is whether he is purporting to enter into the

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transaction on behalf of his principal, that is, whether he is acting in a representative capacity.

Therefore, the essential requisites of an agency would be:

- an agent needs to be employed, expressly through a contract or impliedly, by its principal to represent or act for the principal. An implied agency is derived from the acts / conduct of parties clearly demonstrating that one is employed to represent another. Intention to create agency, i.e. to vest such kind of authority, power or empowerment by the principal in favor of the agent and be bound by the acts of agent.
- representation i.e. acting on behalf of another, or to do acts of another.

In the matter of Makaan.com, there is no question of a principal – agent relationship with any of the sellers, and even buyers, as none of the requisites specified above are fulfilled. As explained further hereinafter:

- (i) Makaan.com is not employed as an agent / representative of another - all its contracts with the sellers are on principal to principal basis;
- (ii) Makaan.com does not have any mandate to create, modify or terminate contractual relationships on behalf of another;
- (iii) Makaan.com neither receives instructions to act on behalf of another nor does it undertake acts which bind a seller or make it answerable to a prospective buyer. In any real estate transaction, Makaan.com only provides a medium without being involved, in any manner whatsoever, in the actual transaction.

The intention of RERA is to bring accountability on, and prevent fraudulent activities by, persons who, in a real estate transaction, either

- (i) act as agent without any authority / consent given by a seller; or

- (ii) act beyond the scope of the authority / consent if so given by a seller.

Makaan.com does neither of these as its acts, scope of service, mandates etc. are purely driven by the content supplied by the seller and devoid of any instructions to act any further than putting the content on its platform. It is in simple words an advertising medium. Once the content is advertised (except for forwarding numbers and details) its role ends there.

- (b) "negotiate" -

-To communicate with another party for the purpose of reaching an understanding; to bring about by discussion or bargaining. (Black's Law Dictionary Tenth Edition)

-To work or talk with others to achieve a transaction, agreement etc.; to succeed in passing through, around, or over. (Collins Dictionary – Seventh Edition)

-To try to reach an agreement by formal discussion; to arrange or agree something by formal discussion; formal discussion between people who are trying to reach an agreement. (Oxford Advanced Learner's Dictionary of Current English - Eight Edition)

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-To discuss or arrange for a sale or bargain, or the preliminaries of a business transaction, and also to sell or discount negotiable paper, or assign or transfer it by endorsement or delivery. The word "negotiate" used in connection with business transaction ordinarily means to bargain with another respecting a transaction or to conduct communication or conferences with a view to reaching a settlement or agreement. (Devkubai N. Mankar and Others Vs. Rajesh Builders and Others, reported as AIR 1997 Bom 142)

One of the key facets of the definition of 'real estate agent' in RERA is the act to "negotiate" which, basis the foregoing, means to interact, discuss, deliberate, including a bargain, to arrive at an agreement for consummation of the sale purchase transaction. Being a simpliciter portal / platform for sellers to advertise their properties, none of the employees or representatives of Makaan.com indulge in any discussions, interactions, negotiations, consultancy with the buyers or assist the sellers in any limb of the transaction. All such discussions and negotiations are held by the sellers themselves directly with the prospective buyers without any role of Makaan.com or Makaan.com being privy to the same. Makaan.com is not concerned with the same.

(c) "introduce" –

.To present someone by name to another person or two or more

people to each other; to cause to experience for the first time; to bring in, establish. (Collins Dictionary – Seventh Edition)

-To tell two or more people who have not met before what each other's names are; the act of bringing something into use or existence for the first time, or of bringing something to a place for the first time; the act of making one person formally known to another, in which you tell each the other's name (Oxford Advanced Learner's Dictionary of Current English Eighth Edition)

-To bring forward formally or in an official manner; to bring forward one person to the presence of another as an equal (Advanced Law Lexicon - Fifth Edition)

It is correct that the literal meaning of the term "introduce" is to bring together or connect two parties. However, the term "introduces" as used in the definition of 'real estate agent' needs to be understood in conjunction with the role, functions and responsibilities of a 'real estate agent' as provided under Section 9 and 10 of RERA. As mentioned in paragraph 1.3 (iv) hereinbefore, the fundamental activity of a 'real estate agent' being regulated by Section 9 and 10 of RERA is – facilitation. Therefore, the act of introduction should be construed in similar sense, and while introducing

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prospective buyers and sellers to each other there should be an underlying objective of facilitating or furthering the transaction.

It is also very important to consider the terms "introduces" and "medium" used in the definition – which are two different concepts. The use of the word "medium" in Section 2(zm) of RERA demonstrates that law itself recognizes that introduction is effected through a medium, in other words through a communication channel. Makaan.com is that particular medium / channel / platform / external resource, available to sellers (including a real estate agent, broker) to introduce themselves to prospective buyers and by no means can it be said that Makaan.com itself introduces prospective buyers and sellers to each other. Assuming that an online platform like Makaan.com is reckoned as introducing two parties and therefore classified as 'real estate agent' under RERA, then with the same reasoning all other tools, aids, resources etc. used by a seller for example - newspaper, magazine, posters, bill-boards, banners, telephone, mobile, SMSs, WhatsApp, Facebook, email, television, radio, trade fair, property exhibitions / events / conferences; in order to reach out to prospective buyers would also fall within the definition of 'real estate agent' under RERA. With the same logic, even online search engines like Google, Yahoo, Bing, Ask.com etc. should also be construed as 'real estate agent' under RERA. To give such an enlarged meaning / interpretation of the term "introduces" in Section 2(zm) of RERA neither appears to be correct nor in consonance with the objective of RERA.

(d) "facilitate" -

- To make the occurrence of something easier or less difficult; (Black's Law Dictionary - Tenth Edition) -To make easier; assist the progress of (Collins Dictionary - Seventh Edition)
- To make an action or a process possible or easier. (Oxford Advanced Learner's Dictionary of Current English - Eighth Edition)

The term "facilitate" has been used in Section 9 and 10 of RERA, and it very importantly describes the role of a real estate agent. Even the clarifications issued by the Ministry of Housing and Urban Poverty Alleviation, Government of India and other States on whether web-portals / websites / newspapers/ exhibitions should be registered as 'real estate agent' under RERA, have laid the test as whether these entities are "engaging in" | "facilitating" a sale-purchase transaction.

The scope of definition of 'real estate agent' under RERA needs to be understood from its context under RERA (Section 9 and 10). It is also pertinent to mention that the opening sentence in the definition section of RERA (Section 2) states "In this Act, unless the context otherwise requires" – which signifies that every definition in RERA has to be read subject to the qualification expressed in the definition clause.

(e) "means and includes" –

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In the matter of Vanguard Fire & General insurance Co. Ltd. v. M/S. Fraser and Ross and Another, reported as AIR 1960 SC 971, the Supreme Court has laid down that when a word is defined to 'mean' such and such, the definition is prima facie restrictive and exhaustive. A restrictive definition means that the meaning so defined in the statute for a particular word has a very restrictive ambit, so much so that its meaning cannot go beyond what has been defined. There is nothing that can be included in the meaning beyond what has been stated. There is seldom any scope for interpretation in case of a restrictive definition.

While dealing with the concept of "means and includes" in the case of Bharat Co-Operative Bank (Mumbai) Ltd. v. Co-Operative Bank Employees Union, reported as AIR 2007 SC 2320, the Supreme Court considered the differences between the inclusive and exhaustive definitions and made the following observations: "When in the definition clause given in any statute the word "means" is used, what follows is intended to speak exhaustively. When the word "means" is used in the definition it is a "hard-and fast" definition and no meaning other than that which is put in the definition can be assigned to the same. On the other hand, when the word "includes" is used in the definition, the legislature does not intend to restrict the definition: it makes the definition enumerative but not exhaustive. That is to say, the term defined will retain its ordinary meaning but its scope would be extended to bring within it matters, which in its ordinary meaning may or may not comprise. Therefore the use of the word "means" followed by the word "includes" in the definition of "banking company" in Section 2(bb) of the Industrial Disputes Act, 1946 is clearly indicative of the legislative intent to make the definition exhaustive and would cover only those

banking companies which fall within the purview of the definition and no other."

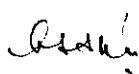
In view of the above, it would be incorrect to read the second part of the definition which begins with the words "and includes" independently of the first part. The part of the definition which begins with the words "and includes" is merely an explanatory part of the definition. Since the legislature in its wisdom has used the words "which includes" as part of the single definition, therefore, reading it as a separate and independent part of the definition would amount to wrongful interpretation.

Thus what emanates from above is that the legislative intent of RERA is to regulate the existing genus of agents with an aim to reform and regulate the activities of agents as understood in the common parlance prior to enactment of RERA. It is not the intention to expand its ambit and reach to entities who, though may be associated with the real estate sector, are not into, or part of, the business of sale-purchase of properties. This is in consonance with principles of statutory interpretation and pragmatic realities.

Background of business, activities and services rendered by

Makaan.com:

1. Makaan.com, which commenced its operations in 2006, is an online portal managed and operated by Makaan.com Private Limited, which provides (i) marketing and advertising services' medium to sellers in the real estate sector; and (ii) news and information to general public about the real estate market. Being a marketing, advertising and information discovery platform, sellers (which could be property owners, property developers / builders, agents, brokers etc.) who intend to sell



and rent properties in the open market themselves upload their advertising material and information on Makaan.com website as they deem fit and proper, to reach out to a larger audience who are visiting the platform for research and information purposes. In consonance with constantly evolving digital platforms, Makaan.com is merely an evolved platform which is interactive and user-friendly, unlike other forms of advertising such as print media (newspaper, magazine, posters, billboards, banners), Google, Facebook, television, radio, telecommunication network, trade fair, property exhibitions / events / conferences etc. The homepage of Makaan.com clearly indicates that it is – "India's only real estate platform with 10,000+ highly rated sellers".

2. Earlier, the marketing / advertising sector was dominated by the print media where advertisements, commercials, information etc. about products / services were given in newspapers, magazines, classifieds, posters, billboards etc. Now, with the technology up-gradation, emergence of innovative concepts and their reach to general public, the marketing & advertising business has taken different shapes and forms including digital media in the form of online platforms / web portals providing comprehensive and in-depth information – on the click of a button. An online platform amongst others is a digitally maneuvered platform whereas an offline platform transcends the digital boundary into a non - digital boundary, chiefly in a physical form where interactive processes are in person

and on a one to one basis. It must be clearly borne in mind that there are two forms of *modus operandi*, (i) One, where there is just an online functioning / interface in the online to offline model. The digital world is used for initial stages purposes and transferred to the offline platform to give effect to a transaction. There are players in the market adopting this method. In such a situation the continuing of introduction and negotiation through online to offline may be stated or may be contended to be doing the business of negotiation, facilitation and participation in the transaction. Makaan.com has no offline platform modes and further, no role or involvement in the transaction. It is simply acting as a medium for advertising.

As mentioned in the foregoing paragraphs, Makaan.com acts as a marketing and advertising tool for various kinds of sellers. Further details about, including a schematic representation of, the operations, processes, and practices followed by Makaan.com for listing of projects/ properties by sellers and the search conducted by a prospective buyer on the website, is provided hereunder.

Sellers' side:

(a) Makaan.com provides marketing / advertising services to three kinds of sellers: owners — who are actual owners / title holders of the concerned project / property; builders — who are the developers of the concerned project / property; and agents — who are the brokers having mandate from owners / builders to sell or rent the



project / property on their behalf. A seller desirous to list its project / property on Makaan.com visits the home page 'www.makaan.com' and clicks on the button 'sell/rent property' to create a log-in account for listing. The seller fills in its details including selecting the seller type - owner or builder or broker.

The seller itself uploads all details, information, location, status of approvals and construction, photographs, layout plans, pricing etc. and even their RERA details.

Seller's project / property is up-loaded on Makaan.com website.

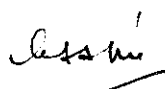
- (a) Prospective buyers visit Makaan.com and show interest in the sellers' projects / properties, and the seller starts getting leads of buyers in the form of link of buyers' contact details.
- (b) Revenue of Makaan.com: A significant number of listings on Makaan.com are provided free of any charge / fee, however these listings are very basic as compared to paid listings. Makaan.com derives its fee from sellers who opt for a preferred listing / add-on benefits for posting their advertisement / content on the website.

For the paid listings, there are two models:

-The owners, builder or agents can opt for a 'premium plan' in which a fee is paid prior to the listing of project / property, and such fee varies depending on size of space on the website, project / property location, nature of advertisement (sale or rent), listing characteristics, period of listing etc. as chosen by sellers. The fee is a fixed amount which

is a pre-agreed understanding between sellers and Makaan.com.

- The agents can avail a preference (in other words a feature) for generation of buyers' leads on their future listing(s) by paying a fixed fee which will enable them to have a preferred listing and good ratings over a non-paying agent. As an incentive such agents who opt to pay a fixed fee to Makaan.com enjoys the benefits like priority on the platform, better visibility, option to receive feedback from the users, etc . This fixed fee is only for the purposes of such incentives and do not in any manner constitute a transaction fee. The buyer's leads are provided to agents based on their performance, feedback from buyers, closure of past deals, ratings etc. The fee paid by the agents under this model is a fixed amount depending on the locality of the property and the nature of lead (i.e. sale / rent) and not being a percentage of the value of the transaction closed by the agents. The fee payable under this model is purely dependent on the disclosure of past deals by an agent, and such disclosure is not mandatory on any agent – as a matter of fact only 5% - 6% of agents under this category disclose their past deals. Makaan.com does not



have any control over an agent's past deals or means to track the same and its fee is solely dependent on agents' disclosure of the same to Makaan.com.

Buyer's side:

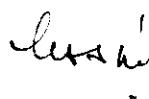
- (a) Makaan.com is open to any individual / entity desirous of buying a property – the website has no buyer / user criteria. A prospective buyer visits the home page 'www.makaan.com' and enters the criteria for searching properties.
- (b) Buyer gets to see the shortlisted properties, sellers' ratings / score (which is based past deals closed, buyer feedback, response time etc.).
- (c) Buyer chooses a property, enters its contact details and directly connects with the seller without any recourse to the answering respondent or their involvement. Buyer has the option for direct call with the seller or it can view the contact details and contact later the seller at a later time. A SMS / email

alert with seller's contact details is also sent to the buyer.

- (d) No fee, remuneration, revenue etc. whatsoever is collected from the buyers visiting Makaan.com or contacting any seller listed on Makaan.com.

Certain key aspects of Makaan.com's business, functioning and processes are provided below which also demonstrates that it does not perform the role of a 'real estate agent' as defined under RERA:

Makaan.com only provides a platform / medium which enables sellers (whose acts are anyways regulated by RERA) to advertise their projects / properties. All information about a particular property / project (such as nature of property, location, status of approvals and construction, photographs, layout plans, pricing etc.) are directly uploaded by the sellers on the website and Makaan.com does not get involved in verifying the correctness / completeness of such information. However, as a matter of practice, all sellers who wish to advertise on the portal need to provide Makaan.com with a declaration / undertaking that they are in compliance with laws applicable to them including RERA.

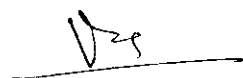
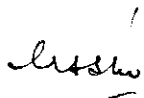


Makaan.com provides clear information about the scope of its services and disclaimers to prospective buyers that every buyer / website user is required to exercise due diligence prior to entering into any transaction and independently verify all property details provided by the sellers (including their registration under RERA, status of approvals etc.) or information posted by its in-house team.

- (ii) The website's agreements with the sellers do not constitute any principal – agent relationship and the same are on principal to principal basis. The website does not represent or act on behalf of any party, in any capacity whatsoever, and its activities are delinked to the transaction or its consummation. Makaan.com simply undertakes to provide them advertising services in the form of a display on Makaan.com website and allowing the prospective buyers to connect with the sellers directly.
- (iii) The website's activities are confined to listing of advertisement material on its website, and it does not in any manner participate in the transaction or facilitate the same. Makaan.com does not introduce prospective buyers and sellers to each other and merely acts as the medium or channel for buyers to search for relevant sellers and get connected to them for their property needs. All sellers are listed on Makaan.com and it is a 'pull model' where the

prospective buyers make search on the platform as per their preferences, see the list of sellers meeting their search criteria. Basis on their search, the prospective buyers initiate a contact independent of Makaan.com, the request for contact details is automatically generated, and once a buyer provides his / her contact details the platform shows them the contact details of the concerned seller.

- (iv) As mentioned in paragraph 2.3(i)(f) herein before, its revenue is not linked in any manner to the sale-purchase transactions and are generated solely from the listing of advertisements on Makaan.com and buyers' leads transmitted to agents.
- (v) Makaan.com provides various other services and information to its website users, some of which are listed below, which an agent / broker involved in a real estate transaction does not ordinarily indulge into:
 - (a) Ratings by / reviews of, buyers about the sellers (which includes rating of agents, brokers etc.) depending on the level of transparency and fair dealing shown by them to the buyers.
 - (b) Providing key information and updates about the real estate sector on the basis of its own research and material gathered through publicly available sources, such as:



- Quotes, comments, statements issued by Government departments / officials including from Chairman, Haryana RERA.
- Price trends, top builders.
- Sales data.

(c) Publishing news articles about key developments in the real estate and infrastructure sector.

(vii) Makaan.com spends considerable amount on information technology, knowhow and technical expertise for the development, operations and up-gradation of the website from time to time. Again, this is something a typical agent / broker in a real estate transaction would not indulge into. Further, such services are beneficial for public interest and helps in improving transparency and awareness in real estate sector. This also, educates the buyer in respect of the various options available to him which meet with his criteria.

Freedom to carry on any profession, trade, occupation or business:

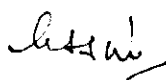
1. Under Article 19(1)(g) of the Constitution of India all citizens have the freedom to profess any profession, trade, occupation or business. However, this fundamental right is subject to the limitation imposed under Article 19(6) which permits the law to impose reasonable restrictions on the exercise of such right, in the interests of the general public. Further, such right shall be subject to any law relating to: (i) the professional or technical qualifications

necessary for practising such profession, trade, occupation or business or profession; or (ii) the State itself (or by a corporation owned or controlled by the State) to carry on any such profession, trade, occupation, business, industry or service, to the exclusion of citizens.

2. While interpreting the phrase "reasonable restriction" the Indian Courts have observed that the said phrase connotes that the restriction / limitation imposed on the person in enjoyment of the right should not be arbitrary or of an excessive nature, and beyond what is required in the interest of public. It has been further observed that a restriction which has no relation with the object which the legislation seeks to achieve cannot be regarded as a reasonable restriction on such freedom / right.

In Lala Hari Chand Sarda Vs. Mizo District Council and Others, reported as AIR 1967 SC 829, the Hon'ble Supreme Court observed that the fundamental right of a citizen to carry on any profession, trade, occupation or business can be restricted only by a law necessitated in the interest of general public, and such restriction should not be arbitrary, excessive or beyond what is required in the interest of the general public.

In Mohammad Faruk Vs. State of Madhya Pradesh and Others, reported as AIR 1970 SC 93, the Hon'ble Supreme Court held that in evaluating whether an impugned law imposes reasonable restriction on any profession, trade, occupation or business, a court should, amongst other, consider (i) attempt an evaluation of its direct and immediate impact upon the fundamental rights of citizens affected



thereby; (ii) larger public interest sought to be ensured in the light of object sought to be achieved; (iii) necessity to restrict the citizen's freedom; (iv) inherent pernicious nature of the act restricted or its tendency to be harmful to the general public; (v) possibility of achieving the object by imposing a less drastic restraint.

In *M. J. Sivani and Others Vs. State of Karnataka and Others*, reported as AIR 1995 SC 1770, it was held that the test of reasonableness is whether the law strikes a proper balance between social control on the one hand and the right of individual on the other hand. It was further observed that a court must take into account factors like nature of the right enshrined, underlying purpose of the restriction imposed, evil sought to be remedied, its extent and urgency, and to what extent the restriction is, or is not, proportionate to the evil and conditions prevalent at that time.

It is understood and appreciated that every profession, trade, occupation, business needs to be regulated, or be subject to restrictions, which are reasonably required in public interest. As explained in foregoing paragraphs it would not be appropriate to regulate online portals / listing platforms such as Makaan.com under RERA by classifying them as a 'real estate agent'. An interpretation of this sought would tantamount to an unreasonable restriction on the business of Makaan.com and thus being inconsistent with the spirit of Article 19(1)(g).

Regulation under Information Technology Act, 2000:

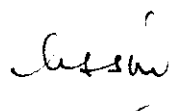
The Information Technology Act, 2000 ("IT Act") provides for the concept of "intermediaries" and regulations governing their functions. The term "intermediary" with respect to any particular electronic record has been defined as under:

"any person who on behalf of another person receives, stores or transmits that record or provides any service with respect to that record and includes telecom service providers, network service providers, internet service providers, web-hosting service providers, search engines, online payment sites, online-auction sites, online-market places and cyber cafes.."

Section 79 of IT Act while providing the role & functions of an intermediary and the limitations thereon, states that an intermediary is not liable for any third-party information, data, or communication link made available or hosted by it. Makaan.com, being an online platform, acts as an "intermediary" under the ambit of IT Act and is governed and regulated by the provisions thereof and compliances required thereunder.

Right to equality includes right to inequality:

Article 14 of the Constitution of India provides that the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India. However, this general rule is



subject to reasonable classification (without it being class legislation).

In *Kedar Nath Bajoria and Others Vs. State of West Bengal*, reported as AIR 1953 SC 404, it was held that the equal protection of the laws guaranteed by Article 14 does not mean that all laws must be general in character and universal in application and the State has power of distinguishing and classifying persons or things for the purposes of legislation. All that is required in class or special legislation is that the legislative classification must not be arbitrary but should be based on an intelligible principle having a reasonable relation to the object which the legislature seeks to attain.

In *State of Kerala Vs. Haji K. Haji K. KutO' Naha and Others*, reported as AIR 1969 SC 378, the Supreme Court observed that where objects, persons or transactions essentially dissimilar are treated in uniform manner, discrimination may result as refusal to make a rational classification may itself in some cases operate as denial of equality.

In *State of Kerala and Others Vs. N.M. Thomas and Others*, reported as AIR 1976 SC 490 the Supreme Court held, amongst others, that circumstances which govern one set of persons / objects may not necessarily be the same for others, so the question of unequal treatment does not really arise between persons governed by different conditions and different sets of circumstances.

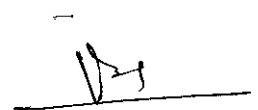
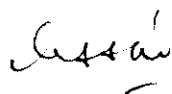
In *Re: The Special Courts Bill, 1978*, reported as AIR 1979 SC 478 the Court reiterated the observations in various judgments of Supreme Court on Article 14 and observed, amongst others, that the law can classify and set apart the classes according to the needs and exigencies

of the society and as suggested by experience. Such classification must not be arbitrary but must be rational, that is to say (i) the classification must be founded on an intelligible differentia which distinguishes those that are grouped together from others; and (ii) the differentia must have a rational in relation to the object sought to be achieved by the Act.

As laid down by Indian Courts, equal protection of laws guaranteed under Article 14 does not mean that same laws should apply to all persons. The varying needs of different class of persons often require separate treatment, and identical treatment in unequal circumstances would amount to inequality. In the extant case, bringing Makaan.com within the ambit of a 'real estate agent' under RERA would lead to it being treated similar to a regular agent / broker who is involved in the transaction (unlike Makaan.com) and tantamount to denial of the right to be reasonably classified / distinguished and thus denial of equality as enshrined in Article 14.

Reply to the allegations made in the Complaint by Mumbai Grahak Panchayat:

The complaint dated July 4, 2018 made by Mumbai Grahak Panchayat is based on a misinterpretation of the definition of "Real Estate Agent" provided under Section 2(zm) of the RERA. The answering respondent clearly denies the allegations, insinuations and contentions made in the complaint made by Mumbai Grahak Panchayat. Further, the answering respondent denies any part of the complaint inconsistent with submissions made herein.



It is specifically denied that Makaan.com falls under the definition of "real estate agent" under RERA as alleged or otherwise. The second part of the definition which starts with "which includes" can't be read independently of the first part of the definition which begins with the words "means". It is further denied that the answering respondent undertakes any negotiations, facilitations, introduction or participates in the transaction of transfer of plot, apartment or building as provided in the definition of real estate agent under the provisions of the RERA. It is further denied that the answering respondent provides assistance as contemplated under Rule 70 of the MahaRERA Rules. The Complainant has failed to in a practical manner explain how Makaan.com is an estate agent.

It is denied that Makaan.com is receiving any remuneration as a real estate agent or has been negotiating and acting on behalf of a person who intends to transact in a transaction of transfer of plot, apartment or building in real estate project and such services on payment of charges. The revenue model and the services provided by Makaan.com have been explained in detail hereinbefore and the same does not constitute the business of a real estate agent as defined under RERA.

Makaan.com has made detailed representations and submissions in this reply with regard to its functioning, business objects, listings, disclosures and services rendered and the same may be referred to in response to the contentions made under the head "Real Estate Web Portals liable to register under RERA as Real Estate Agent".

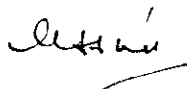
It should be noted that Makaan.com also complies with the advertising standards prescribed by the Advertising Standards Council of India. These advertising standards ensure that advertisement conform to the code for self-regulation which requires advertisement to be legal, honest, truthful and not harmful or hazardous while observing fairness in competition.

In view of the forgoing, it may be clear that Makaan.com does not fulfil any criterion required to fall within the scope of definition of "real estate agent" under RERA and therefore ought not to be brought within the ambit of RERA as a 'real estate agent'.

Therefore, it is submitted and prayed that appropriate orders may be passed by this Authority to cease further proceedings in the matter, and the impugned notice dated July 23, 2018 is withdrawn.

10. Submissions of Mumbai Grahak Panchayat.

1. It is submitted that real estate web portals are "real estate agents" within the meaning of the Real Estate (Regulation and Development) Act, 2016 ("RERA Act"). This is for the following reasons:
2. The term "real estate agent" has been defined in Section 2(zm) of the RERA Act as follows:
"(zm) 'real estate agent' means any person, who negotiates or acts on behalf of one person in a transaction of transfer of his plot, apartment or building, as the case may be, in a real estate project, by way of sale, with another person or transfer of plot, apartment or building, as the case may be, of any other person to him and receives remuneration or



fees or any other charges for his services whether as commission or otherwise and includes a person who introduces, through any medium, prospective buyers and sellers to each other for negotiation for sale or purchase of plot, apartment or building, as the case may be, and includes property dealers, brokers, middlemen by whatever name called"

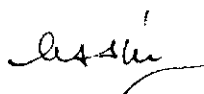
In turn, the term "real estate project" has been defined as follows:

"(zn) 'real estate project' means the development of a building or a building consisting of apartments, or converting an existing building or a part thereof into apartments, or the development of land into plots or apartment, as the case may be"

3. The aforesaid definition of real estate agent uses both the words "means" and "includes". The following principles of statutory interpretation apply to such definitions:
 - i. Where a statute uses the words "means and includes" (particularly if the words 'means' and 'includes' appear in different parts of the definition), it has been held that the first part of the definition which contains the word "means" must receive its ordinary, popular or natural meaning, without being controlled or affected by the second part which contains the word "includes"
 - ii. [*Black Diamond Beverages vs. Commercial Tax Officer*, (1998) 1 SCC 458 (paragraph 7); Also see *State of Bihar v. Tata Iron and Steel Co. Ltd.*, (1995) Supp (2) SCC 4 (paragraph 6)].
 - iii. However, the second part of the definition which contains the

word "includes" allows the word used in the first part to be applied to something to which it would not ordinarily be applicable [*Black Diamond Beverages (supra)* (paragraph 7)].

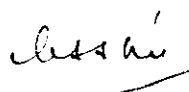
- iv. The judgment of the Supreme Court in *Vanguard Fire and General Insurance Co. Ltd. v. Fraser and Ross*, AIR 1960 SC 971 [at p. 362, vol. 2 (part 2 of 3), reply of Housing.com], cited by Housing.com in its reply, does not assist the Respondents in the instant case. This is for the following reasons. Firstly, the definition in that case, i.e., the word "insurer" under Section 2(9) of the Insurance Act, 1938, used the words "means...but does not include" and not "means...and includes". Secondly, the Supreme Court in that case held that where a statute uses the word "means" in its definition clause, the definition is exhaustive. There can be no dispute with this proposition. However, the Supreme Court in that case relied on the opening line in the definition clause, i.e., "unless there is anything repugnant in the subject or context", and held that the definition of "insurer" was wider than that contained in the definition, as it included even those insurers who had ceased to carry on their insurance business [at paragraphs 6-8]. This is actually against the Respondents in the instant case, since this Hon'ble Authority can therefore give an even wider definition to the term "real estate agent" than that contained in its definition, by looking at the context of the provisions contained in the RERA Act. This is because Section 2 of the RERA Act opens with the line, "In this Act, unless the



context otherwise requires”.

- v. The judgment of the Supreme Court in *Bharat Cooperative Bank (Mumbai) Ltd. v. Coop. Bank Employees Union*, (2007) 4 SC 685 [at p. 601, vol. 2 (part 3 of 3), reply of Housing.com], does not come to the assistance of the Respondents either. In this case, the Supreme Court held that where a definition in a statute uses the words “means...and includes”, the legislature intended for the definition to be exhaustive [at paragraph 23]. However, the definition of the word “banking company” in that case was materially different from the definition of “real estate agent” in the instant case. In that case, “banking company” was defined to “mean” a banking company under Section 5 of the Banking Companies Act, 1949, having branches or other establishments in more than one state. It was also defined to “include” specifically enumerated entities, like the Export- Import Bank of India, the Industrial Reconstruction Bank of India, etc. It was in that context that the Supreme Court held the definition to be exhaustive. In the instant case, the “includes” portion of the definition of “real estate agent” does not specifically enumerate certain entities or organizations as real estate agents.
- 4. A plain reading of the section 2(zm) of the RERA Act makes it clear that the following persons would be considered “real estate agents”:
 - i. A person who “negotiates or acts on behalf of one person” in a transaction contemplated by the section and receives

- remuneration, fees or "any other charges" for his services.
- ii. A person who merely "introduces, through any medium, prospective buyers and sellers to each other for negotiation" for the said transaction.
 - iii. Persons like property dealers, brokers, and even "middlemen" by whatever name they may be known.
5. It is submitted that web portals satisfy each of the above three categories of persons specified in the definition of real estate agent. This is for the following reasons:
- i. These web portals clearly "negotiate or act on behalf of" the seller in property transactions, for the following reasons:
 - 99 acres.com offers several packages in its "new projects", "featured projects" and "property gallery" listings and provides "banners" to builders.
 - Makaan.com provides a "score" to sellers (including builders), in order to indicate to buyers how reliable a seller might be.
 - Housing.com provides "verified listings", i.e., it carries out "100% checks on every listing". In other words, Housing.com informs buyers that it has itself checked and ensured that properties being advertised are authentic and reliable.
 - ii. Each of these web portals receives remuneration from sellers (i.e., developers, brokers, advertisers) for their services. However, they do not receive remuneration, fees or charges from buyers. Thus, they clearly "act on behalf of" sellers. For



instance, 99acres.com clearly receives remuneration, fees, and other charges for its services from sellers.

Likewise, Magicbricks.com charges some of its users a subscription fee. The subscription fees have been set out in Clause III of the terms and conditions on its website as follows:

“- The applicable rate of the Subscription Fees for the Service provided shall be such as mentioned in the ‘My Subscriptions’ page or as may be prescribed by the Company from time to time

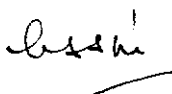
- Liability for the Subscription Fees shall accrue from the Date of Commencement.

- All individual users who access or make postings of information at Magicbricks.com for the purpose of buying property shall be exempted from the application of this clause.”

- iii. It is not possible to restrict the wide meaning of the words “remuneration”, “fees”, and “charges” and confine them to mean “commission”, as is sought to be argued by the Respondents. The rules of ejusdem generis and noscitur a sociis cannot be employed to defeat the legislative intent of a statutory enactment. Further, these rules apply when a series of specific words are used in close proximity to one another, which specific words constitute a genus unto themselves. When those specific words are then followed by general words, the general words take their colour from the specific words. [see: Maharashtra University of Health v. Satchikitsa, (2010) 3 SCC 786 (paragraphs 17, 19, 23, 27-33)]. However, the

definition of "real estate agent" under Section 2(zm), on the other hand, does not use any specific words similar to "commission" which might be considered to constitute a genus along with the word "commission".

- iv. These portals clearly introduce prospective buyers and sellers to each other for negotiation for sale or purchase of property. Unlike classified listings in newspapers, which only introduce potential sellers to potential buyers, but not potential buyers to potential sellers, these portals give the contact details of buyers to sellers as well:
- Thus, 99acres.com gives the contact details of sellers to buyers, and importantly, also provides contact details of buyers to sellers.
 - Makaan.com not merely provides the seller's contact details to the buyer, but also organizes a direct/automatic call between the buyer and the seller.
 - Magicbricks.com gives the contact details of sellers to buyers and buyers to sellers. Further, Magicbricks.com itself calls up buyers and informs them about the latest listings advertised by sellers.
 - Housing.com gives buyers' contact details to sellers [see: pages 41, 43-44, reply of Housing.com], and sellers' contact details to buyers [see: page 47-49, reply of Housing.com].
- v. A perusal of the terms and conditions "Magicbricks.com", which are available on its website, is also instructive.



-- The said terms and conditions state that Magicbricks.com offers certain "Services" to its users. The term "Services" has been defined in the terms and conditions as follows:

"'Services': Means the Services to be provided by the Company to the User of Magicbricks.com and shall include the provision of following facilities:

- 1. Service to the Users wishing to post their profile or listing for the purpose of sale/rental of their property, and for users providing property services etc.*
- 2. Service to the Users who wishes to secure a property through Magicbricks.com and its Internet links.*
- 3. Service to the users who wishes to place a print advertisement in any of the group publications through the www.Magicbricks.com site.*
- 4. Services to the Users who wishes to insert advertisements at Magicbricks.com.*
- 5. Service to the Users who wishes to receive advertisements and promotional messages on www.Magicbricks.com and through emails."*


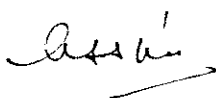
-- The term "User" has been defined in the said terms and conditions of Magicbricks.com as follows:

"'User': Is defined as an individual or corporate subscriber for the Services and the signatory, whose particulars are contained in the application form and includes his successors and permitted assignees."

6. The word "negotiate" has a very broad meaning in law, and it

includes even arranging the preliminaries of a business transaction. In *Devkubai N. Mankar v. Rajesh Builders*, AIR 1997 Bom 142 (at paragraph 7), the Bombay High Court held as follows:

"7. The word "negotiate" is a technical word and as used with reference to commercial paper, it is almost a word of art. It may be used in two senses, as meaning to discuss or arrange for a sale or bargain, or the preliminaries of a business transaction, and also to sell or discount negotiable paper, or assign or transfer it by endorsement or delivery. In law and law books, it is sometimes used in both senses. The word "negotiate" used in connection with business transactions ordinarily means to bargain with another respecting a transaction or to conduct communication or conferences with a view to reaching a settlement or agreement. It is that what passes between the parties or their agents in course of or incident to the making of a contract and is also conversation in arranging terms of a contract. It also means "to discuss or arrange a sale or a bargain, to arrange the preliminaries of a business transaction". According to Black's Law Dictionary (Sixth Edition), negotiation is a process of submission and consideration of offers until acceptable offer is made and accepted. It means the deliberations, discussion or conference upon the terms of a proposed agreement or the act of settlement or arranging the terms of and conditions of a bargain, or sale, or other business transaction. Negotiation is thus a communication process used to put deals together. The job of the negotiator in case of negotiation for sale is to obtain all the terms and the conditions, including the price, and to place the same before the owner. With that his job as a negotiator "to negotiate" comes to an end.



It is not within his domain to strike a bargain and perform the deal. It is for the owner to accept or not to accept the deal arrived at by the agent or attorney by negotiation."

7. Similarly, the word "act" is one which is of very wide import. In *P. Ramanatha Aiyar's Advanced Law Lexicon* (5th edition, at p. 79-80), the word "act" has been defined as follows:

"In a general sense, something done; the exercise of power, or an effect produced thereby...The term 'act' in the context of liability is used in a very wide sense, meaning 'any event which is subject to the control of the human will' and includes both positive and negative acts, i.e., 'acts of commission and acts of omission'...When it is said, however, that an act is one of the essential conditions of liability, we use the term in the widest sense of which it is capable. We mean by it any event which is subject to the control of the human will."

8. Thus, it is clear that these real estate web portals are not mere neutral intermediaries that simply list property advertisements by sellers:
 - i. They act on behalf of a seller in a transaction by doing things like offering featured listings, placing a "verified tag" on a property listing (thereby affixing their seal of approval on the safety/reliability of that listing), etc.
 - ii. They receive remuneration, fees and other charges for their services, by charging rates to sellers for placing different categories of advertisements on their websites.
 - iii. They introduce, through the electronic medium of the Internet, prospective buyers and sellers to each other for

negotiation for the sale or purchase of a plot, apartment or building. They can be considered to be middlemen.

9. There is no requirement, as contended by Magicbricks.com in its Written Submissions, for:
 - i. The real estate agent to be “present / visible / available at the time of booking...”
 - ii. Participation by the real estate agent in the consummation of any transaction.
 - iii. There to be a transaction of purchase, sale or transfer.
10. As long as the person has done any one of the three things set out above in paragraph 5, such person would qualify as a real estate agent. Thus, even a portal that merely facilitates a connection or introduction between buyers and sellers “for negotiation for sale or purchase of plot, apartment or building” would be a real estate agent.
11. The obligations set out under Section 10 will attach to any person who is a real estate agent. Merely because any portal does not engage in the practices prohibited by Section 10 does not ipso facto mean that such portal is not a real estate agent. Further, Section 10 does not impose a heavy or onerous burden on the Respondents as was sought to be argued by the Respondents. This is for the following reasons:
 - i. Section 10(a) merely requires the Respondents to ensure that a real estate project which is listed on their websites is registered with the Real Estate Regulatory Authority.
 - ii. Section 10(b) requires the Respondents to maintain books of

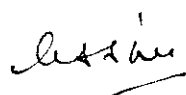


accounts, records and documents that may be prescribed. This is similar to records that the Respondents would have to preserve for tax reasons in any case.

- iii. Section 10(c) requires the Respondents to ensure that they do not involve themselves in prescribed unfair trade practices. This can be done by giving users a prominent disclaimer that the representations made on their website by promoters are not verified by the Respondents.
 - iv. Section 10(d) merely requires the Respondents to “facilitate” the possession of all the information and documents that the allottee is entitled to. This can be done by providing a hyperlink to the RERA website, which contains all such information and documents.
12. It is submitted that since real estate web portals are real estate agents, they are required to register as such under the provisions of the RERA Act:
- i. Section 9(1) of the RERA Act prohibits any real estate agent from facilitating the sale or purchase of any plot, apartment or building in a “real estate project or part of it” without obtaining registration under the Section.
 - ii. Rule 11 of the Maharashtra Real Estate (Regulation and Development) (Registration of Real Estate Projects, Registration of Real Estate Agents, Rates of Interest and Disclosures on Website) Rules, 2017 provides that real estate agents must make an application to register as such forthwith and in any case prior to engaging in any activity

relating to marketing, advertising sale or purchase of any apartments. Not merely are web portals like Magicbricks.com and 99acres.com operating with impunity without registration, despite engaging in marketing and advertising of sale/purchase of apartments on their websites, but they are also advertising in newspapers.

- iii. The registration of real estate agents serves an important public purpose. Section 10 of the RERA Act prescribes certain functions that must be performed by registered real estate agents. For example, a registered real estate agent cannot, under the said provision, facilitate the sale or purchase of real estate being sold by a promoter who is not himself registered under the RERA Act. Similarly, a registered real estate agent cannot engage in an unfair trade practice like making any statement which contains a false or misleading representation. These provisions of immense beneficial value to ordinary hard-working consumers.
 - iv. Failure to comply with these provisions entails penal consequences under Section 62 of the RERA Act, which prescribes a penalty of Rs. 10,000 for every day during which the default continues, which may cumulatively extend up to 5% of the cost of the plot, apartment or building.
13. It is submitted that Section 79 of the Information Technology Act, 2000 ("IT Act") does not affect the applicability of the RERA Act to real estate web portals:
- i. Section 79 of the IT Act provides as follows:



"Section 79. Exemption from liability of intermediary in certain cases.

(1) Notwithstanding anything contained in any law for the time being in force but subject to the provisions of sub-sections (2) and (3), an intermediary shall not be liable for any third party information, data, or communication link made available or hosted by him.

(2) The provisions of sub-section (1) shall apply if-

(a) the function of the intermediary is limited to providing access to a communication system over which information made available by third parties is transmitted or temporarily stored or hosted; or

(b) the intermediary does not-

(i) initiate the transmission,

(ii) select the receiver of the transmission, and

(iii) select or modify the information contained in the transmission;

(c) the intermediary observes due diligence while discharging his duties under this Act and also observes such other guidelines as the Central Government may prescribe in this behalf.

(3) The provisions of sub-section (1) shall not apply if-

(a) the intermediary has conspired or abetted or aided or induced, whether by threats or promise or otherwise in the commission of the unlawful act;

(b) upon receiving actual knowledge, or on being notified by the appropriate Government or its agency that any information, data or communication link residing in or connected to a computer

resource controlled by the intermediary is being used to commit the unlawful act, the intermediary fails to expeditiously remove or disable access to that material on that resource without vitiating the evidence in any manner.

Explanation. -For the purposes of this section, the expression "third party information" means any information dealt with by an intermediary in his capacity as an intermediary." (emphasis supplied)

- ii. The term "intermediary" is defined under Section 2(1)(w) of the IT Act as follows:

"(w) 'intermediary', with respect to any particular electronic records, means any person who on behalf of another person receives, stores or transmits that record or provides any service with respect to that record and includes telecom service providers, network service providers, internet service providers, web-hosting service providers, search engines, online payment sites, online-auction sites, online-market places and cyber cafes."

- 14. It is submitted that Section 79 of the IT Act does not apply to real estate web portals like Magicbricks.com and 99acres.com because they are not mere neutral intermediaries:

- i. Section 79(1) provides that an intermediary will not be liable for any third party information etc made available by him. However, the information in this case is not merely third party information. The information is modified by the real estate web portal in the form of "verified tags" and property descriptions by experts.

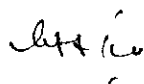
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- ii. Section 79(2)(a) provides that Section 79(1) of the IT Act applies only if the function of the intermediary is limited to providing access to a communication system over which information made available by third parties is transmitted or temporarily stored or hosted. However, these web portals do not merely provide such access – they also provide “verified tags” thereby affixing their stamp of approval on listings.
- iii. Further, Section 79(2)(b) provides that Section 79(1) applies if the intermediary does not initiate the transmission, select the receiver of the transmission or select or modify the information contained in the transmission. However, these real estate web portals initiate a transmission to potential buyers (in the form of emails to buyers of properties listed by “platinum” sellers), select the receiver of the transmission (i.e., the more premium the advertisement package that is purchased, the greater the number of buyers who get to view the listing), and modify the transmission by affixing a verification stamp and providing property descriptions by experts. Thus:
 - 99 acres.com affixes a “verified tag” on the listings of sellers who purchase the “platinum” option [see: page 91, Reply of 99acres.com].

11. Supplementary written submissions on behalf of Locon Solutions private limited (housing.com):

(1)(a) That it is stated that the authority has no jurisdiction to enhance the scope of the Real Estate (Regulation and Development) Act, 2016 ("the RERA Act"), either by resorting to means of interpretation or by means of supplementary legislation under Section 85 of RERA Act. It is stated, as will be discussed in the following paragraphs of the written submissions, that the language of Section 2(zm) of the RERA Act is absolutely clear, in so far as it excludes entities engaged in the task of advertising, from the scope of the definition of 'real estate agent'. Any attempt to enhance the scope of the said definition would amount to violating the provisions of the legislation, which is beyond the jurisdiction of the Maharashtra Real Estate Regulatory Authority ("the Authority"). Furthermore, powers of delegated legislation vested with the Authority under Section 85 of the RERA Act, are subject to the express limitations of the parent Statute and the Authority cannot enhance the scope of the RERA Act to authorities that are expressly excluded by the parent Statute. The definition clause, i.e. Section 2(zm) of the RERA Act being absolutely clear and specific in its exclusion of entities engaged in the task and business of advertising, the Authority is statutorily barred by enhancing the scope of Section 2(zm) by resorting to its power of delegated legislation under Section 85 of the RERA Act. Such an exercise has time and again been struck down by the Hon'ble Supreme Court of India as an unconstitutional exercise of power of delegated legislation and ultra vires the limits prescribed by the parent Statute. Therefore, it is stated that the present proceedings ought to be abandoned on the said count alone.



(b) It is further submitted that there is no factual basis, either in pleadings or even through implication, specifically by anyone that the answering respondent is performing any of the activities engaged in by 'real estate agents'. It is submitted that the answering respondent does not perform, even factually, any function or role traditionally and statutorily associated with 'real estate agent'."

2. Answering respondent is merely a 'medium':

In the definition as given under Section 2(zm) of the RERA Act, a real estate agent means "any person, who negotiates or acts on behalf of one person in a transaction of transfer of his plot, apartment or building, as the case may be, in a real estate project, by way of sale, with another person or transfer of a plot, apartment or building, as the case may be, of any other person to him and receives remuneration or fees or any other charges for his services whether as commission or otherwise and includes a person who introduces, through any medium, prospective buyers and sellers to each other for negotiation for sale or purchase of a plot, apartment or building, as the case may be, and includes property dealers, brokers, middlemen by whatever name called."

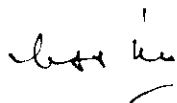
3. Section 2(b) of the RERA Act defines the term advertisement as "any document described or issued as advertisement through any medium and includes any notice, circular or other documents or publicity in any form, informing persons about a real estate project, or offering for sale of a plot, building or apartment or inviting persons to purchase in any manner such plot, building or apartment

or to make advances or deposits for such purposes..”

4. The provision of Section 2 (zm) of the RERA Act specifically excludes any and every entity engaged in the business of advertising of real estate projects from the definition of "real estate agent".
5. From the conjoint reading of Section 2(zm) and Section 2(b) of the RERA Act it is manifest that the legislature identifies 'medium' as a separate party. The identification and designation of a "medium" as a separate entity, distinct from 'real estate agent', 'the promoter' and the 'allottee', the three entities being engaged in the transaction of sale and purchase (with complicated and varying deal structures) where under the agent operates on the authority of agency with the specific purpose of representing the principal and binding him in transactions with third parties, is significant of the intention of the legislature to exclude the entity of an advertiser from the scope of the definition of 'real estate agent'.

From a conjoint appreciation of both the sections, it is manifest that the scheme of the act and the legislative intent clearly envisages a party, notably a 'medium', which may play an incidental role in the principal transaction between a real estate agent and an allottee. However, such 'medium' is not the object of regulation under the scheme of the RERA Act. The intention of the legislature is to regulate only principal parties, engaged in the principal transaction and their agents, in the real estate market. As such the act regulates only the promoters, allottees and real estate agents.

6. It is manifest that in the RERA Act the intention of the legislature is

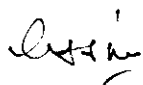


to regulate individuals / entities engaged in the substantial business and / or only such individuals / entities which are performing these functions can be called as 'Real Estate Agents'. The specific language of legislature, "through any medium", as used in Section 2(zm) of the RERA Act, excludes the inclusion of entities / web hosting services, including advertising services, in the definition of Real Estate Agent.

7. By the use of the words "through any medium" the legislature is presumed to specifically identity this distinct party, though performing a function to the ultimate assistance of a Real Estate Agent and promoter, but only in an incidental capacity and not assuming the substance of the relationship and functions of real estate agent. This is supported by the exhaustive definition of "advertisement" under Section 2(b) which includes advertisement "through any medium" including publicity in any form which informs different parties about a real estate project. The specific language of both the sections supports the clear intention of the legislature that an entity engaged in the business of advertising, which may incidentally inform prospective allottee about real estate projects and the process of purchasing the same are to be excluded from the definition of 'real estate agent'. If the entity like the answering respondent in this case, is brought within the scope of the definition of real estate agent, it would do injustice and violence to the language of the Section 2(zm) read with Section 2(b) of the RERA Act by rendering the words "through any medium" redundant and surplusage, which is impermissible in law.

12. It is stated that the above stand is further supported by Sections 9, 10 and 19 of the RERA Act— which identify and lay down the statutory functions / obligations of an agent. From the specific language of the said statutory provisions it is manifest that the legislature consciously and deliberately identified only those individuals / entities under section 2(zm) of the RERA Act who are substantially engaged and perform functions of that of an agent. Without prejudice to the submissions made above, it is further stated that in case the Authority feels that there is still some ambiguity in the language of the provision of Section 2(zm) of the RERA Act and the Legislature perhaps missed out providing for regulation of entities like the answering respondent, even in that case the Authority is legally and constitutionally barred from reading entities like the answering respondent into the definition of 'real estate agent'. It is a settled principle of interpretation that a casus omissus by the Legislature cannot be supplied by the Court (in the present case the authority discharging quasi-judicial power) by judicial interpretative process except in the case of clear necessity and when reason for it is found in the four corners of the statute itself.

Reference in this regard may be had to the case of Indore Development Authority versus Shailendra, (reported as (2018) 3 SCC 412) wherein the Supreme Court of India relied on the case of Padma Sundara Rao Vs State of T.N., (reported as (2002) 3 SCC 533) and made the following observations "what legislation wanted has been stated in the provision. The court cannot give extended meaning to the expression. It is not open to the Court to aid defective phrasing of the Act or to make up for the deficiencies. It is not open to the Court to recast, rewrite, or reframe the provision. The court cannot assume omission and add or amend words. Plain and



unambiguous construction has to be given without addition and substitution of the words. The temptation of substituting words by explaining what it thought legislation is endeavoring is to be discouraged. Court has to consider what has been said and what has not been said. It is wrong and dangerous to proceed by substituting some other words for the words of the statute. When literal reading produces an intelligible result it is not open to read words or add words to statute. Making any generous addition to the language of the Act would not be a construction of the statutory provision; rather, would be an amendment thereof. While interpreting the provision the Court only interprets the law. The intention of the legislation must be found by the words used by the legislature itself. The legislative casus omissus cannot be supplied by judicial interpretative process. When language of the provision is clear, there is no scope (or reading something into it. The scenario that thus emerges in relation to an interpretation of a statute can be explained as follows. It is a salutary principle that it is not open to the Court to add or substitute some words in place of the words of the statute. The court cannot reframe the legislation. The court cannot add to, or amend, the provisions,' neither can the expressions used in the statute be treated as fungible ',

13. It is stated that the legislature never intends any part of the statute to be redundant and /or surplusage, and any interpretation must first give credibility in interpreting those words to refer to the context of the act and the legislative intent. The Courts always presume that the legislature inserted every part thereof for a purpose and the legislative intent is that every part of the statute should have effect. Thus, if the entities discharging the function of advertisers are brought within the scope of the

definition of 'real estate agent', such an interpretation would render the word "medium" otiose, which is impermissible by law.

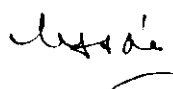
In *Gurudev datta VKSSS Maryadit and Ors. Vs State of Maharashtra*, (reported as (2001) 4 SCC 534), the Hon'ble Supreme Court held that:

"It is yet another rule of construction that when the words of the statute are clear, plain and unambiguous, then the Courts are bound to give effect to that meaning, irrespective of the consequences. It is said that the words themselves best declare the intention of the law giver. The Courts have adhered to the principle that efforts should be made to give meaning to each and every word used by the legislature and it is not a sound principle of construction to brush aside words in a statute as being inapposite surpluses, if they can have a proper application in circumstances conceivable within the contemplation of the statute."

Reference may also be had to the case of *Visitor, AMU and Ors.*

Vs K.S. Misra (reported as (2007) 8 SCC 593), the Hon'ble Supreme Court held that:

The Courts always presume that the Legislature inserted every part thereof for a purpose and the legislative intent is that every part of the statute should have effect. The legislature is deemed not to waste its words or to say anything in vain and a construction which attributes redundancy to the Legislature will not be accepted except for compelling reasons. It is not a sound principle of construction to brush aside words in a statute as being inapposite surplusage, if they can have appropriate application in circumstances conceivably within the contemplation of the statute."



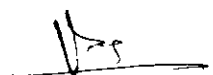
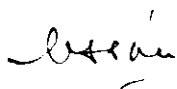
Referring the backdrop of parliamentary debates which were instrumental in gathering the legislative intent and the scheme of the act, it becomes clear that legislature intended to rectify / cure the existing mischief of the fraudulent activities undertaken by some of the real estate agents (as commonly known in the real estate business) involved in the real estate transactions and to bring a regulatory mechanism governing their actions. It is also manifest that the legislature was of specific view that advertisement of a real estate project was a crucial component of the machinery and needed to be regulated. It is also clear that the Legislature was fully aware with regard to the evolving medium for advertisement, which over a period of time had progressed from, and in addition to, from print media to digital media and assumed a more sophisticated and upgraded version thereof. This intention is manifest from the expansive definition of the term 'advertisement' as defined in Section 2(b) of the RERA Act.

14. Shri. K. C. Venugopal (Alappuzha) in his speech during the 'Discussion on the motion for consideration of the Real Estate (Regulation and Development) Bill, 2016' before 16th Lok Sabha mentioned – "Now-a days there are a lot of agents in the real estate sector and there is no regulation for them. But now the real estate agents must register themselves in order to regulate the sale and purchase of properties in real estate projects that have been registered. Registered agents must not facilitate the sale of unregistered projects nor can mislead buyers regarding services offered. This would also provide transparency in this sector.."

15. Mischief sought to be redressed by the legislature:

The legislative intent clearly and specifically is to regulate the functioning of the real estate agent and not to expand its reach beyond the same. The intent is to suppress the mischief that would be created by real estate agents as understood commonly in the real estate business and to advance the remedy in respect thereto. By this tool of construction of law, it is apparent that the definition of the term 'real estate agent' has to be read on similar lines. In the functioning of an agent, it is paramount that a principal-agent relationship is established between the buyers / promoters and the agents. The agent would then function as a representative of the principal (be it promoter or allottee) and carry out and conduct the broad spectrum of services which can broadly be classified as negotiating, providing the security factor to the principal, helping and effecting the complicated parts of a real estate deal including modes of payment, structuring of parking payments and release thereof to respective parties / recipient through structuring such as escrow agreements, ensuring that the property is rendered in the state as decided, execution of conveyance, handing over of possession and completion of all such formalities. It is basically an end-to-end service.

16. It is specifically stated here that the answering respondent, being engaged in the exclusive business of advertising of different real estate projects and unbiased and dispassionate overview of the real estate market only for knowledge and information purposes in public interest, does not provide any of the services mentioned in the preceding paragraph, which are statutory in nature. Furthermore, there is an express disclaimer that the answering respondent functions on a principal-principal basis purely for the purposes of providing a platform for advertisement, which



strikes at the very root of a contemplated relationship between a real estate agent and its client.

17. Business of answering respondent pertains to advertisement:

The answering respondent typically enters into a contractual agreement for advertisement with developers. Such term sheet / contract, inter alia would encompass the payment terms, various packages etc. only for the purposes of providing space for advertisement on its web portal on terms similar as that offered by print media. The fee is fixed in advance and is not dependent on the success of any transaction. Furthermore, the fee so fixed is exclusively for the purposes of providing advertisement related space and nothing else.

Apart from the same, the terms of use of the answering respondent clearly specify this limited nature of service, of just the medium, being offered by the answering respondent vis-à-vis the advertised projects and their promoters. It specifies the role of answering respondent as being confined to provide information and nothing more. These terms constitute an open offer to contract to the general public containing the fundamental terms of service. The act of accepting the services of the answering respondent implies an acceptance of the said open offer by the user of the platform. This acceptance constitutes an acceptance of the fact that the answering respondent in no way and under no circumstance would act as an agent of any promoter whose project is advertised on its portal. Therefore, there is no possibility of an impression being given to contrary by the answering respondent, either expressly or impliedly.

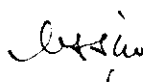
Even otherwise, under common law and general principles of Indian Contracts Act, 1872, the relationship of a principal and agent is premised

on the existence of an authority (express and implied) of an agent to represent the principal in transactions with the third party and bind the principal to the third party on the basis of the same. In this respect, Section 182 of Indian Contract Act, 1872 reads as: "An "agent" is a person employed to do any act for another, or to represent another in dealing with third persons. The person for whom such act is done, or who is so represented, is called the "principal".

It is reiterated that there is no express or implied authority given by the users of the platform to the answering respondent. Further, there are express disclaimers on the portal to the members of the public stating that the answering respondent doesn't appear on behalf of any party.

It is a settled principle of law that mere nomenclature of the contract will not determine the nature of the contract. In such circumstances, the purpose and substance of the agreement should be ascertained. In such cases, the intention of the parties would be the deciding factor of the purpose of the contract, which would be determined from the substance and nature of the contractual obligations undertaken by the parties. In this regard, reference may be had to the case of Achintya Kumar Saha Vs Nanee Printers and Ors. (reported as (2004) 12 SCC 368) held that, "In cases where courts required to consider the nature of transactions and status of parties thereto, one cannot go by mere nomenclatures such as, license, licensee, licensor, license fee etc. In order to ascertain the substance of the transaction, we have to ascertain the purpose and the substance of the agreement. In such cases, intention of the parties is the deciding factor".

The substance that a contract must necessarily have, in order to sustain a relationship of agency, even for the purposes of Section 2(zm) of



the RERA Act is the power of an agent to represent on behalf of the principal and bind him in transactions with third parties. Reference may be had to the case of Zakiuddin Vs. Rajendra Kumar and Another, (reported as 2012 SCC OnLine MP 8453), wherein the Madhya Pradesh High Court identified the relationship as follows:

"agency in its broadest sense include every relation in which one person acts for or represents another by his authority - In more restricted sense, in which term was used in law of principal and agent, agency may be defined as relation, which results where one party, called principal, authorizes another, called agent, to act for him in business dealing with third persons..."

It is stated that a perusal of the contracts entered between the answering respondent and the promoters / agents / sellers of real estate projects clearly show that there is no imputation of grant of any authority (express or implied) by the latter to the answering respondent to represent them in real estate transactions. The capacity of both parties, i.e. the answering respondent and the promoters, is as principal vis-a-vis principal in respect to advertisement space in the answering respondent's web portal. Apart from the same, it is again reiterated that the answering respondent is not performing the functions of an agent as required under Section 10 of the RERA Act. The answering respondent merely post / shares the information provided by third parties on its platform.

Furthermore, the answering respondent also gives a valid declaration in its terms of use whereby it has stated that it does not represent any parties involved in the transaction. This declaration is given to all such parties (including promoters, developers, sellers, agents, buyers etc.), and State &

its authorities. This is declarative of the answering respondent's intention to not engage in the business of a real estate agent and shine an illuminative light on the intention of answering respondent and promoter's contract of providing advertisement service exclusively.

It is stated that merely because the remuneration of the answering respondent is fixed such a service cannot in any way lead to the inference that the answering respondent is any way an agent of the real estate project i.e. of promoter. The remuneration is a basic premise of any service contract, without which a service becomes gratuitous in nature. The answering respondent being a commercial enterprise is bound to charge remuneration for such service, as do all similar entities in print media also. Furthermore, and without prejudice to the above, the substance of the contract being not in the nature of establishing a relationship of agency, the mere mention of the word remuneration will not transform it into so.

18. Commercial object behind entering the contract:

In a recent case, *Novartis Vaccines & Diagnostics Inc. v. Aventis Pharma Limited* (reported as 2009 SCC OnLine Born 2067), the Bombay High Court has enumerated the principle of interpretation of commercial contracts as under:

- a. **Ordinary Meaning:** There is a presumption that the words to be construed should be construed in their ordinary and popular sense, since the parties to the contract must be taken to have intended, as reasonable men, to use words and phrases in their commonly understood and accepted sense. The object of the inquiry is not necessarily to probe the 'real' intention of



the parties, but to ascertain what the language they used in the document would signify to a properly informed observer.

- b. Business like Interpretation: It is an accepted canon of construction that a commercial document should be construed in accordance with sound commercial principles and good business sense, so that its provisions receive a fair and sensible application. If a detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense.
- c. Commercial Object: The commercial object or function of the clause in question and its relationship to the contract as a whole will be relevant in resolving any ambiguity in the wording.
- d. Construction to avoid unreasonable results: If the wording of a clause is ambiguous, and on reading produces a fairer result than the alternative, the reasonable interpretation should be adopted. It is to be presumed that the parties, as reasonable men, would have intended to include reasonable stipulation in their contract.

The agreement executed between the answering respondent and the users is a commercial contract. Applying the principles enunciated by the Hon'ble Bombay High Court (*supra*), it is stated that the contract between the answering respondent and promoters of real estate projects has to be interpreted in light of its

predominant and substantial commercial object. It is further stated that the commercial advertisement and there is no intention (express or implied) of the parties to create any principal-agent relationship.

Therefore, any interpretation which would seek to bring the answering respondent within the scope of 'real estate agent', apart from doing violation to the statutory provisions, would also amount to changing the nature of the obligations of the contract between the answering respondent and the promoter of real estate project, without the consent and volition of the parties to the contract, which is impermissible in law and a blatant violation of Section 62 of the Indian Contract Act, 1872.

19. Answering respondent doesn't provide information as required under RERA:

As per Section 10(d) of the RERA Act, a real estate agent is statutorily required to facilitate the possession of all documents and information, as the allottee is entitled to, at the time of booking any apartment, plot, or building as the case may be. Various details are required by the allottees at the time of booking of his apartment, etc. however, the answering respondent neither has the expertise nor the bandwidth as per its business model, which is purely advertising, to provide such services to the buyers. The said section is extracted hereunder:

"Every real estate agent shall facilitate the possession of all the information and documents, as the allottee, is entitled to, at the time of booking of any plot, apartment or building, as the case may be

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and discharge such other functions as may be prescribed. Reference further is made to Section 19 in Chapter IV of the RERA Act which deals with the rights and duties of allottees. Under this Section, the allottee is entitled to information relating to the project. The said sections 19(1) and 19(2) are extracted hereunder for ease of reference:

"Section 19. Rights and duties of allottees -

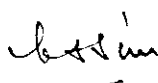
(1) The allottee shall be entitled to obtain the information relating to sanctioned plans, layout plans along with the specifications, approved by the competent authority and such other information as provided in this Act or the rules and regulations made thereunder or the agreement for sale signed with the promoter.

(2) The allottee shall be entitled to know stage-wise time schedule of completion of the project, including the provisions for water, sanitation, electricity and other amenities and services as agreed to between the promoter and the allottee in accordance with the terms and conditions of the agreement for sale.”

The above two provisions impose a clear-cut mandate and obligation on the part of the promoter / real estate agent to provide information pertaining to the project as mentioned in Sub-sections (1) and (2) of Section 19 above. A real estate agent, being representative of the promoter, is legally and statutorily bound to comply with the mandate of the above-mentioned provisions in discharge of its functions as an agent of the promoter. These functions form the foundation on which a real estate agent's entire

existence is regulated. They form the essential requisites for identifying the true nature and scope of a real estate agent. Any entity which wishes to be recognized as a real estate agent must necessarily partake the characteristic functions mentioned above, so as to be brought within the fold of the definition in Section 2(zm) of the RERA Act. And any entity not performing the same, must necessarily, by virtue of the strict language of the statute be considered as not falling within the definition of the term 'real estate agent'.

It is stated that the answering respondent is not performing, out of its own volition, any of the characteristic functions, statutorily recognized, of a real estate agent. The answering respondent does not provide information pertaining to sanction plans, layout plans etc. in relation to a project as part of its business model (unless information is posted by the users themselves). Further, as required by Section 19(2) of RERA, the answering respondent does not provide information pertaining to the provisions for water, sanitation, electricity and other amenities and services, unless the said information is provided by the promoters themselves on the platform. Such a clear-cut absence of statutory functions, from the scope of activity of the answering respondent, is a clear indicator of the fact that the answering respondent is not transgressing on any of the statutorily recognized fields of a real estate agent, but rather operates in the limited sphere of providing a digital platform for advertising. Therefore, under no circumstances, factually or legally,



can the answering respondent be considered to partake any character, howsoever remote, of a real estate agent.

20. Intermediaries under Information Technology Act:

It is submitted that the answering respondent is governed under specific statute or a body with elaborate mandates and is subjected to serious repercussions in the event of a breach. The answering respondent is an intermediary as defined under Section 2(w) of the Information Technology Act, 2000 ("IT Act") and is answerable to the Ministry of Communications and Information Technology, having severe repercussion on the non-compliance.

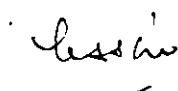
The answering respondent is governed and regulated by Section 79 read with Section 82 of IT Act and Information Technology (Intermediaries and Guidelines) Rules, 2011 ("IT Rules"). Section 79 of the IT Act provides that an intermediary shall not be liable for any third-party information, data, or communication link made available or hosted by him. Further, Section 83 of the aforementioned act provides the Central Government with the power to give directions to any State Government as to the carrying into execution in the State of any of the provisions of this Act or of any rule, regulation or order made thereunder.

It is submitted that the due diligence exercised by the answering respondent like providing the RERA Registration number for certain advertisements is for the purpose of complying with the IT Rules which mandates the answering respondent to

exercise due diligence while discharging its obligations under the IT Act and IT Rules and not for any other purposes.

In compliance with IT Rules, the answering respondent has also appointed a 'Grievance Officer' to redress the grievances of the users of the platform expeditiously.

In the case of Jitendra Singh Yadav Vs Union of India and others (reported as WP No. 4682/2015), the High Court of Madhya Pradesh held that: "The websites merely provide an online service allowing users to post classified advertisement and is a platform which facilitates interaction between buyers and sellers. By virtue of being an online market place, Respondent Nos. 3 to 5 fall within the definition of an "intermediary" as defined under Section 2 (1) (w) of the Information Technology Act, 2000. " "Being an intermediary, under Section 79 of information Technology Act, 2000, the Respondents are not liable for any third-party information, data made available or hosted by them, as they do not create, or cause to create content nor do they play any direct or indirect role in selection of content or the receiver of such content. Thus, the transaction impugned by the Petitioner is completely independent of the Respondents' involvement and they have no role in facilitating the transaction. The Company has no control over the outcome of the transactions and has no right, title or interest in any of the products/items being listed by third party users and all such listings are therefore "third party information " as defined in the Explanation to Section 79 of the IT Act.



In the case of Kent RO Systems Limited and others Vs Amit Kotak, (Reported as 2017 SCC OnLine Del 7201), the Hon'ble High Court of Delhi made the following observations- IT Rules oblige the intermediaries to remove / disable the information hosted on the portal only on receipt of the complaint. The Court further said that "had the intention of the Legislature been to require the intermediaries as the Defendant no. 2 eBay herein to be vigilant as the Plaintiff reads the IT Act and the Rules to require it to be, the Legislature would have merely observed that the intermediary will not permit to be hosted on its website any information infringing intellectual property rights of any other person if such person had informed the intermediary of the same. However, the Legislature has not done so and has required the intermediaries as the Defendant no. 2 to only declare to all its users its policy in this regard and advise them not to host any infringing information on the website of the intermediary and to on receipt of complaint remove the same within 36 hours.

The Court was of the view that to require an intermediary to do such screening would be an unreasonable interference with the rights of the intermediary to carry on its business.

In the case of Shreya Singhal Vs Union of India (UOI)(Reported as 2015 SCC OnLine SC 248) the Hon'ble Supreme Court of India made the below mentioned relevant observations with respect to the exemptions granted to intermediaries:

"Section 79 is valid subject to Section 79(3)(b) being read down to mean that an intermediary upon receiving actual knowledge from

a court order or on being notified by the appropriate government or its agency that unlawful acts relating to Article 19(2) are going to be committed then fails to expeditiously remove or disable access to such material. Similarly, the IT Rules are valid subject to Rule 3 Sub-Rule (4) being read down in the same manner as indicated in the judgment by this Court..

A division bench of the Delhi High Court, in *Myspace Inc. versus Super Cassettes Industries Ltd.* (reported as 2016 SCC OnLine Del 6382), observed that:

"In this case MySpace, the appellant, facially falls within Section 2(l)(w) and qualifies as an intermediary / Internet service provider because it acts as a "conduit" /portal for information where users can upload and view content. This brings the court to the second part of the discussion i.e. whether MySpace can claim protection from liability as an Internet intermediary under Section 79. MySpace's business enables third parties to enter into a contract with it to upload content. Undoubtedly such content can be both infringing or not infringing / original or copyrighted. What MySpace seeks to achieve is create a platform-without adding or contributing any information on its own, where users can freely exchange data in the form of songs, videos, documentaries etc. By this model all content is uploaded by users and qualifies as "User Generated Content" (UGC) and all that MySpace does is provides a neutral platform. To access or stream songs hosted by MySpace no subscription or signing up is required; users



have to register with it and sign up under the terms and conditions to upload content or comment on the songs and videos. While signing up, Myspace requires its users to agree to its user agreement as well terms and conditions which expressly states that up-loaders are required to respect the IP Rights of others and not post infringing content.

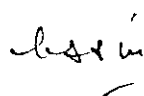
The court observed that Section 79 of the IT Act is neither an enforcement provision nor does it list out any penal consequences for non-compliance. It sets up a scheme where intermediaries have to follow certain minimum standards to avoid liability; it provides for an affirmative defense and not a blanket immunity from liability. In this regard, this court made an important observation with respect to the exemption granted to intermediaries under the IT Act - "If a strict regime is implemented with respect to intermediary liability, such intermediaries could conveniently migrate to a location where data protection laws are not as rigorous and the content would still be accessible. Under such circumstances while the economic loss is one aspect, it would become near impossible to trace intermediaries to take down content.."

Court further observed that storage is an essential part of the transmission / hosting process and MySpace only provides access to system to third parties enabling transmission of information. It is necessary to distinguish made between "transmitted", "temporarily stored" and "hosted".

"Furthermore, under Section 79(2)(b) an intermediary should not initiate the transmission, select the receiver of the transmission and

select or modify the information. It is reasonably clear that MySpace complies with the first and second sub-clauses; it has a "free for all" platform, which by itself does not initiate the sharing feature. While it has created the "share" option that per se does not mean that it "initiates" an action. Content, which is shared can be both lawful and unlawful and in any case at a prima facie stage, this Court does not discern that MySpace initiates the transmission; the usage of that feature rests purely in the hands of third-party users. Similarly, it does not choose its audience/receiver. Anyone with Internet access can open its website and be a receiver/viewer of the data being transmitted. Now, on the third sub-clause of whether MySpace selects or modifies information, this court at a prima facie stage finds that firstly the modification is to the format and not to the content and secondly even the process of modifying the format is an automatic process without either MySpace's tacit or expressed control or knowledge. In the circumstances this Court concludes that Myspace prima facie complies with the requirements of Section 79(2)(b). "

"The other aspect that needs to be complied with is the "due diligence" clause under Section 79(2)(c). Here once again, the Intermediary Rules are relevant-especially Rule 79(3). My Space's website - for purposes of viewing does not require the user subscription to its terms and conditions. However, for the purpose of uploading, sharing, commenting etc. subscription with Myspace is needed and for this purpose an agreement is entered into between the parties. To comply with the due diligence procedure specified



in the Rules, Myspace has to publish its rules, regulations, privacy policy and user agreement for access of usage. These agreements and policies on the appellant's website must comply with Sub Rule 2 of the Rules. MySpace has annexed its user agreements and privacy policies which suggest due compliance with the said rules. It requires its users to comply with its privacy policy and user agreements before they can create their accounts with the appellant in order to modify, add, host, upload, and transmit etc. their data..

In this case, the court held that:

1. Sections 79 and 81 of the IT Act and Section 51(a)(ii) of the Copyright Act have to be read harmoniously. Accordingly, it is held that proviso to Section 81 does not preclude the affirmative defence of safe harbour for an intermediary in case of copyright actions.
2. Section 51 (a)(ii), in the case of internet intermediaries contemplates actual knowledge and not general awareness. Additionally, to impose liability on an intermediary, conditions under Section 79 of the IT Act have to be fulfilled..

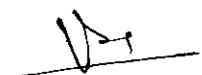
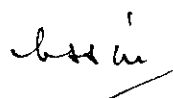
While discussing the liability of intermediaries in the case of Google India Private Limited versus Visaka Industries Limited and Ors.(Reported as 2016 SCC OnLine Hyd 393), the High Court for Telangana and Andhra Pradesh provided that a web-hosting service provider would fall within the definition of intermediary. The Court then pointed out that it is difficult to attach liability to the intermediaries and propounded the theory of due diligence based on Section 79 (3) of the IT Act and the law declared by the Apex Court in Shreya Singhal Vs Union of India is binding on the courts in

India. Various theories of liability like strict liability standard cannot be applied to the provisions of Information Technology Act, 2000.

21. It is submitted that the answering respondent is an intermediary under the IT Act. In view of the judgments cited above, it is apparent and clear that the answering respondent, being an intermediary under the IT Act, is not responsible for third party information posted on its website.

22. Why the answering Respondent does not want to be brought within the ambit of RERA:

First and foremost, the answering respondent does not provide any of the services or perform any of the functions as enumerated in Section 9 and 10 of RERA or any other part thereof. In essence, the answering respondent's business is not that of a business agent and that is stated on the touchstone of the definition of the real estate agent. It is a settled principle of law that any business is a sole decision of businessman and no extraneous body or entity including court of law can foist any business on a businessman. In other words, the answering respondent is not a real estate agent and by extending the reach of this act, such business cannot be foisted on the answering respondent. Further, it would be unconstitutional and against all cannon of law to do so. Without prejudice to the above, there is no principal and agent relationship between the answering respondent and the advertiser for a purpose closely intertwined with an agent. It is purely a principal to principal relationship where the answering respondent merely acts as a medium. Assuming a hypothetical situation where the answering

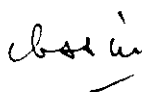


respondent registers under the ambit and umbrella of the act, in such a situation the following is a likelihood-

- (a) It would amount to a complete novation of the contract between the answering respondent and promoter / agent / seller, without their volition and in violation of Section 62 of the Indian Contract Act, 1872, as the entire basis of the contractual relationship has been changed to the detriment of each contracting party.
- (b) Since no contract can be changed without consent of both contracting parties, the terms of engagement of the answering respondent would cease to exist in all cases. In fact, it would amount to a forced closure of business for the answering respondent as all previously concluded contracts would cease to operate, as no promoter would accept a forced imposition of an agent.
- (c) In case the answering respondent has to perform the functions of a real estate agent, such services are not provided by the answering respondent and this would firstly entail abandoning of its incumbent business model, which will render all the previous investments, monetary and intellectual, redundant. The loss would be immense and almost tantamount to closure of business.
- (d) In case such drastic effects are somehow withstood by the answering respondent, the answering respondent would then require an overhaul and massive remodeling of its business

model, strength and expertise. In addition, the answering respondent would be compelled, expressly or impliedly to develop the requisite infrastructure / paraphernalia and resources, including manpower to import a new business and function it in a commensurate manner of international level performed, amongst other. The answering respondent will have to maintain a dedicated department which would ensure statutory compliances e.g., whether the project is RERA compliant; determination of the truthfulness of a promoter and other such requisites as emerging from RERA. These entail massive monetary expenditure, which as it stands right now, the answering respondent is in no position to afford.

- (e) In fact, it would not be exaggeration to state that if the answering respondent is brought within the fold of a 'real estate agent' under Section 2(zm) of the RERA Act, it would amount an indirect ban on the existence of digital advertisements in the realm of real estate.
- (f) Additionally, this will not be in line with the incorporation documents of the answering respondent. The answering respondent will be required to amend its incorporation documents, which can't be done without relying on the provision of the Companies Act, 2013.
- g) Since the answering respondent is a medium, transformation of its role to that of a real estate agent would lead to a situation where the answering respondent would be compelled to work in competition with agents. This will disrupt, amongst others,



the market scenario and dynamics pertaining to transparent functioning of the real estate agents inter alia the advertising through the medium of the answering respondent.

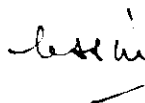
Further, the public interest functions would get gravely disrupted and depleted in as much as the answering respondent would become an interested party and any attempt providing transparent news on real estate by the answering respondent would thus be colored by vested interests (due to contractual disability by reason of principal-agent relationship). This will be very prejudicial to the existing situation today where the answering respondent plays a public role and acts in public interest by disseminating transparent, accurate and truthful representations, news item and analysis.

- (h) From a business perspective, the answering respondent would lose investors and partners who have invested and/or partnered with the answering respondent for the present business and are likely to withdraw in the event the answer respondent has to assume the business of real estate agent. This will be very prejudicial to the business, economic interests and reputation of the answering respondent and in equity and law this must be precluded and avoided. It is reiterated that there are reciprocal obligations to be fulfilled to these investors and change in business model would result in non-compliance of such obligations.
- (i) Even though there is a vast difference between the activities of answering respondent and agents; all the acts of the answering

respondent will be regulated as a real estate agent under RERA. Further, the answering respondent would be required to comply with the legal liabilities emerging from the statute and undertake a business imposed on it by a statute. This is a pure infringement of Article 19(1)(g) of the Constitution of India and not acceptable on fairness of reasonable restriction.

- (j) The RERA Act is enacted by the Central Government by the power vested in it by virtue of Entry 6 in List III (Concurrent List) of the Seventh Schedule of the Constitution dealing with contracts and the transfer of property and IT Act is enacted by the Central Government by the power vested in it by virtue of Entry 97 in List I (Union List). Both these acts operate in separate field and each is sovereign in its respective field. RERA can't encroach on the exclusive regulatory competence of the authority under IT Act otherwise it would lead to conflict of statutes where under the provision of IT Act would prevail. Legislature specifically excluded the liability of web-hosting platforms / intermediaries under IT Act. The doctrine of harmonious construction clarifies that only the interpretation which gives effect to the exemption granted to the intermediaries suitably harmonizes both the acts.

- (k) It is submitted that the answering respondent has foreign investors and 100% FDI is permitted in the answering respondent as per the National Industrial classification aligned with the RBI policies. It is further submitted that the intent of the respondent has always been to indulge in the advertising



business alone. In view of the foregoing, it should be noted that the answering respondent has expressly sought permissions from RBI only qua information technology related activities and advertising business. This leads to an affirmative conclusion that it is engaged in information technology related services and

advertising business alone, as legally that's the only business it is allowed to engage in as of now. This would actuate deemed violations of regulations of Reserve Bank of India pertaining to FDI investments in India.

23. Restrictions on business activities should be reasonable:

As described above, the cascading effects of bringing entities like the answering respondent, within the scope of the definition of a 'real estate agent' under Section 2(zm) of the RERA Act, apart from suffering the vice of constitutional and statutory lack of jurisdiction, would also amount to a complete wiping out of a specific field of digital advertising from the realm of real estate business. In fact, it would amount to an indirect ban on the business of digital advertising.

It is submitted that such a drastic effect renders the proposed attempt by the authority as incapable of being sustained on the constitutional touchstone of reasonableness and fairness as no interpretation can be given to a statutory provision, which renders the conduct of business completely impossible. In fact, it is a settled principle of law that such a stringent interpretation of law will always have to be avoided at all costs, as it would lead to absurd results, not intended by the Legislature.

In the case of *Rustom Cavasjee Cooper Vs Union of India*, (reported as (1970) 1 SCC 248), the Supreme Court of India made the following observations:

"This Court has the power to strike down a law on the ground of want of authority, but the Court will not sit in appeal over the policy of the Parliament in enacting a law. The Court cannot find fault with the Act merely on the ground that it is inadvisable to take over the undertaking of banks which, it is said by the petitioner, by thrift and efficient management had set up an impressive and efficient business organization serving large sectors of industry. By section 15 (2) (e) of the Act, the Banks are entitled to engage in business other than banking. But by the provisions of the Act, they are rendered practically incapable of engaging in any business. By the provisions of the Act, a named bank cannot even use its name, and the compensation which is to be given will, in the absence of agreement, be determined by the Tribunal and paid in securities which will mature not before ten years. A named bank may if it agrees to distribute among the shareholders the compensation which it may receive, be paid in securities an amount equal to, half the paid-up share capital, but obviously the fund will not be available to the Bank. It is true that under section 15(3) of the Act the Central Government may authorize the corresponding new banks to make advances to the named banks for any of the purposes mentioned in Section 15(2). But that is a matter which rests only upon the will of the Central

Government and no right can be founded upon it. Where restrictions imposed upon the carrying on of a business are so stringent that the business cannot in practice be carried on, the Court will regard the imposition of the restrictions as unreasonable".

It is submitted that an interpretation of the definition of real estate agent to include the answering respondent within its ambit would tantamount to imposing such stringent restrictions upon the carrying on of a business that the business cannot in practice be carried on and thus being inconsistent with the spirit of Article 19(1)(g) of the Constitution of India. It is further submitted that it is a cautious decision of the answering respondent to not undertake the business of brokerage.

Any attempt by the authority to therefore, impede such a voluntary decision on the part of the answering respondent, apart from suffering the vice of constitutional and statutory lack of jurisdiction, would also run the risk of violating fundamental guarantees under the Constitution and being declared as ultra vires the Constitution of India.

Our Reasons and conclusion.

24. In order to deal with the above referred submissions of the learned advocates of parties and in order to understand their purport, it is

necessary to keep in mind the background of the Act and its relevant provisions.

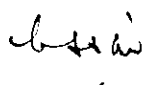
The Statement of Objects and Reasons' of RERA.

The 'Statement of Objects and Reasons' briefly explain the purpose, objectives, contents of a proposed legislation and helps in understanding the necessity and scope thereof. The Statement of Objects and Reasons' appended with the Real Estate (Regulation and Development) Bill, 2013 introduced before the Rajya Sabha on August 14, 2013 reads as follow:

"The real estate sector plays a catalytic role in fulfilling the need and demand for housing and infrastructure in the country. While this sector has grown significantly in recent years, it has been largely unregulated, with absence of professionalism and standardization and lack of adequate consumer protection.

Though the Consumer Protection Act, 1986 is available as a forum to the buyers in the real estate market, the recourse is only curative and is not adequate to address all the concerns of buyers and promoters in that sector. The lack of standardization has been a constraint to the healthy and orderly growth of industry. Therefore, the need for regulating the sector has been emphasized in various forums.

In view of the above, it becomes necessary to have a Central legislation, namely, the Real Estate (Regulation and Development) Bill, 2013 in the interest of effective consumer protection, uniformity and standardization of business practices and transactions in the real estate sector. The proposed Bill provides for the establishment of the Real Estate Regulatory Authority (the Authority) for regulation and promotion of real estate sector and to ensure sale of plots, apartments or buildings, as the case



may be, in an efficient and transparent manner and to protect the interest consumers in real estate sector and establish the Real Estate Appellate Tribunal to hear appeals from the decisions, directions or orders of the Authority. The proposed Bill will ensure greater accountability towards consumers, and significantly reduce frauds and delays as also the current high transaction costs. It attempts to balance the interests of consumers and promoters by imposing certain responsibilities on both. It seeks to establish symmetry of information between the promoter and purchaser, transparency of contractual conditions, set minimum standards of accountability and a fast-track dispute resolution mechanism. The proposed Bill will induct professionalism and standardization in the sector thus paving the way for accelerated growth and investments in the long run.

Shri. K. C. Venugopal in his speech during the 'Discussion on the motion for consideration of the Real Estate (Regulation and Development) Bill, 2016' before 16th Lok Sabha mentioned –

"Now-a days there are a lot of agents in the real estate sector and there is no regulation for them. But now the real estate agents must register themselves in order to regulate the sale and purchase of properties in real estate projects that have been registered. Registered agents must not facilitate the sale of unregistered projects nor can mislead buyers regarding services offered. This would also provide transparency in this sector.."

Best tools which help to understand the letters and spirit of the enactment is its preamble. Preamble of the Act reads-

"An Act to establish the Real Estate Regulatory Authority for regulation and promotion of the real estate sector and to ensure sale of plot, apartment

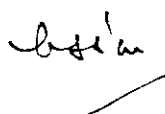
or building, as the case may be, or sale of real estate project, in an efficient and transparent manner and to protect the interest of consumers in the real estate sector and to establish an adjudicating mechanism for speedy dispute redressal and also to establish the Appellate Tribunal to hear appeals from the decisions, directions or orders of the Real Estate Regulatory Authority and the adjudicating officer and for matters connected therewith or incidental thereto."

From the above, it is evident that RERA is a law governing the acts and conduct of sellers, buyers and agents in the real estate sector - with the objective of creating transparency, fair dealings and protection of buyers' interests.

25. Importance of web portals and their functions.

Before entering into arena of controversy it is necessary to know as to how the digital platform / website functions and its importance in the modern market of real estates. Earlier, the marketing / advertising sector was dominated by the print media where advertisements, commercials, information etc. about products / services were given in newspapers, magazines, classifieds, posters, billboards etc. Now, with the advent of technology and its up-gradation, emergence of innovative concepts and their reach to general public, the marketing & advertising business has taken different shape and form including digital media in the form of online platforms / web portals providing comprehensive and in-depth information — on the click of a button. Their immense contribution in the development and prosperity of housing industry cannot be ignored.

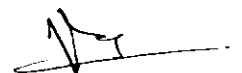
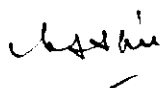
26. The web portals in one voice submit that they simply advertise the real estate projects of their clients by making them digital space



available on their portals and they charge their clients for the same. Their fees do not depend upon success of sale transaction. In order to appreciate these submissions in their perspective it is necessary to see as to how the web portals function in respect of real estate projects. There are some common activities of the web portals and some of them have distinct features. However, the portals appearing before us mainly submit that the portals function as follows:

- A. Portals merely publish content provided by the advertisers/developers. They do not make any statement or representation of their own relating to any Real Estate Project. Their role is like that of a traditional advertisement medium like a newspaper, magazine, billboard, hoarding, television, etc. They only pass on information as has been prepared and submitted by the advertiser.
- B. Paid advertisement are referred to as "Sponsored Advertisement". Some persons post Sponsored advertisements on the website and some persons post free advertisements. Paid advertisements are given priority and are classified.
- C. A developer or a real estate agent or an owner of a property approaches/visits the portal website, for advertising property, which may be either residential or commercial;
- D. A Visitor of website gets to explore a bouquet of properties, some of which are advertised for an advertising fee paid to portals, some of which are posted for free of cost (by individual owners of property). Some portals in addition, post properties based on their own research, only for the purpose of information. Such properties do not have any value indicated nor the contact details of owners/agents are indicated and hence are not advertisements;

- E. Portals do not charge any fee from the any visitors on its website;
- F. For Sponsored Advertisement some portals require a Customer (only Developer/Real Estate Agent) to fill in a physical order form and also endorse online terms and conditions including Privacy policy forming part thereof.
- G. The Visitors to the website have two options. Under the first option a Visitors log on and simply browse the site checking their requirements, educating themselves with the information available and exit the website. In such circumstances portals have no means to identify such users. Such Visitors are not required to provide any information or contact details to the portals.
- H. Under the second option, Visitors while browsing the Website may want to know more details of a particular property, for which the Visitors may request for the contact details of the advertiser. For such request the Visitors are not required to pay any consideration to portals. Once the Visitors click the tab / button, users need to submit their contact details i.e. Name, Email, Mobile, and their mobile numbers which are authenticated by sending OTPs to the mobile numbers as has been provided by the Visitors. The Visitor has to put in that OTP and the system checks the OTP to verify the phone number. Once the veracity is checked, the mobile number or any other phone number or contact details that the advertiser may have put on the website is made available on the screen of the Visitor.
- I. In the said two options stated above, portals have no visibility or any knowledge whether any contact was made between the Visitor to the Website and the Customers who posted properties on its Website.
- J. Under second option stated hereinabove, providing of the phone number is of importance because in most of the cases there is skeletal



information about the property. Since large number of the properties are advertised by real estate brokers they do not want to divulge all details of the property. Simple information would not really lead to identification of the property and the skeletal information would be in the abstract form which is equivalent to no information. This is akin to newspaper advertisement where skeleton details are provided together with mechanism of identification of the property.

K. Further, the portals being advertisement portals, they generate revenue from developers/real estate agents posting their property on their websites to record and enable the Customer to know how many visitors sought information or showed interest on an advertisement listed by such Customers;

L. Portals contend that the objective to require the Visitors on the website to feed in their mobile number and email id is to ensure that the website is not hacked and that the information available on the website is not scraped.

M. The Customer/ advertiser is also provided with the phone number of the Visitor making an enquiry of a particular property to enable them to know the number of responses they get against their advertisement put on the Website. In the modern internet world there is no other or better mechanism by virtue of which the advertiser would be able to gather any information as to the productivity of an advertisement through an electronic medium.

N. Thereafter it is for the Visitor and the advertiser to connect with each other, if they so desire. Portals do not have any visibility whether any such connection is made or not, or whether the transaction is successful because this is outside the ambit of the portals.

O. Some portals on their website recommend and advise their Visitors/viewer to refer to the RERA website to see complete information with respect to any Project/Property developed, built by a Developer/Builder and/or initiated/referred to by a real estate agent which is required to be registered with Specified Authorities under RERA before making any Buy/Sell or any other decisions;

P. Some portals do not make representations or warranties of any kind, express or implied about the completeness, accuracy, reliability or suitability with respect to the information, services or related information provided by Developer/Builder on its site with respect to any property or project;

Q. Portals offer various packages of advertisements to its Customers;

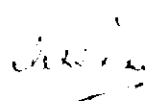
R. The Customer makes payment of the fees to portals for booking an advertising space on their websites;

S. Upon payment being made, the advertisement as provided by the Customer is put up on the websites of portals;

T. Portals submit that the fees they receive from the Customer who wants to advertise his property on the website is not at all linked or dependent on the sale of a property which is advertised on the Website. The fees payable by the Customers to portals is fixed for all that to for their advertisement.

U. If the customer is a developer of a real estate project, then all the material advertised on the web portal pertaining to the real estate project of the developer, is not generated or made by portals. The same is provided by the Developer.

V. Portals submit that the developer who provides content for advertisement is governed by the provisions of The Real Estate (Regulation



and Development) Act, 2016 ("RERA") and hence if the developer violates any provisions of RERA then he would be liable to face action thereunder.

X. Besides the abovementioned services, if the visitor of the website has left his number on the website of some portals, then by way of assistance and without any charge whatsoever, an assistance is provided to the Visitor where representatives of such portals calls the Visitor to provide all the options already available on the website, orally to ensure the Visitor has full visibility of all products advertised. This is to help particularly those Visitors who may be technologically less knowledgeable than others. When the representative of portal calls the visitor it does not solicit or represent or advice or lead the visitor to buy a particular project over another. The representative only informs the visitor of further advertisements which are published which matches or pertains to the search which the visitor would have made on their websites.

Y. Further, portals do not give any deals or discounts in a project to its visitors of the website. If the developer is offering any deal or discount for its project and has requested that the same also be advertised on the web portal, then the same is advertised on the website.

Z. Portals state that a visitor cannot buy or sell or deal with properties on their web portals. This is the one group of activities.

27. However, we have come across another group of activities of some portals like Squareyards.com. Squareyards.com deals with various other functions, it guarantees lowest price of the real estate units, provides comparative market analysis, exclusive inventory, arranges project site visits, indulges in negotiation and documentation, helps in obtaining home loans and insurance, provides post sales services without charging any buyer. It has registered itself as real estate agent with MahaRERA bearing registration number A51800000454.

28. Relevant provisions relating real estate agent and advertisement.

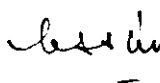
Now it is necessary to get ourselves acquainted with relevant provisions of RERA.

Section 2(b) "**advertisement**" means any document described or issued as advertisement through any medium and includes any notice, circular or other documents or publicity in any form, informing persons about a real estate project, or offering for sale of a plot, building or apartment or inviting persons to purchase in any manner such plot, building or apartment or to make advances or deposits for such purposes;

Section 2(zm)- "**real estate agent**" means any person, who negotiates or acts on behalf of one person in a transaction of transfer of his plot, apartment or building, as the case may be, in a real estate project, by way of sale, with another person or transfer of plot, apartment or building, as the case may be, of any other person to him and receives remuneration or fees or any other charges for his services whether as a commission or otherwise and includes a person who introduces, through any medium prospective buyers and sellers to each other for negotiation for sale or purchase of plot, apartment or building, as the case may be, and includes property dealers, brokers, middlemen by whatever name called."

Section 9 of RERA relating to registration of Real Estate Agents provides -

. (1) No real estate agent shall facilitate the sale or purchase of or act on behalf of any person to facilitate the sale or purchase of any plot,



apartment or building, as the case may be, in a real estate project or part of it, being the part of the real estate project registered under section 3, being sold by the promoter in any planning area, without obtaining registration under this section.

(2) Every real estate agent shall make an application to the Authority for registration in such form, manner, within such time and accompanied by such fee and documents as may be prescribed.

(3) The Authority shall, within such period, in such manner and upon satisfying itself of the fulfillment of such conditions, as may be prescribed –

(a) grant a single registration to the real estate agent for the entire State of Union territory, as the case may be;

(b) reject the application for reasons to be recorded in writing, if such application does not conform to the provisions of the Act or the rules or regulations made thereunder: Provided that no application shall be rejected unless the applicant has been given an opportunity of being heard in the matter.

(4) Whereon the completion of the period specified under sub-section (3), if the applicant does not receive any communication about the deficiencies in his application or the rejection of his application, he shall be deemed to have been registered.

(5) Every real estate agent who is registered as per the provisions of this Act or the rules and regulations made thereunder, shall be granted a registration number by the Authority, which shall be quoted by the real estate agent in every sale facilitated by him under this Act.

(6) Every registration shall be valid for such period as may be prescribed, and shall be renewable for a period in such manner and on payment of such fee as may be prescribed.

(7) Where any real estate agent who has been granted registration under this Act commits breach of any of the conditions thereof or any other terms and conditions specified under this Act or any rules or regulations made thereunder, or where the Authority is satisfied that such registration has been secured by the real estate agent through misrepresentation or fraud, the Authority may, without prejudice to any other provisions under this Act, revoke the registration or suspend the same for such period as it thinks fit:

Provided that no such revocation or suspension shall be made by the Authority unless an opportunity of being heard has been given to the real estate agent.

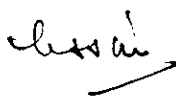
Section 10 of RERA prescribes the functions of the Real Estate Agents. It reads as under:

Section 10. Every real estate agent registered under section 9 shall –

(a) not facilitate the sale or purchase of any plot, apartment or building, as the case may be, in a real estate project or part of it, being sold by the promoter in any planning area, which is not registered with the Authority;

(b) maintain and preserve such books of account, records and documents as may be prescribed;

(c) not involve himself in any unfair trade practices, namely: –



- (i) the practice of making any statement, whether orally or in writing or by visible representation which –
 - (A) falsely represents that the services are of a particular standard or grade;
 - (B) represents that the promoter or himself has approval or affiliation which such promoter or himself does not have;
 - (C) makes a false or misleading representation concerning the services;
- (ii) permitting the publication of any advertisement whether in any newspaper or otherwise of services that are not intended to be offered.
- (d) facilitate the possession of all the information and documents, as the allottee, is entitled to at the time of booking of any plot, apartment or building, as the case may be;
- (e) discharge such other functions as may be prescribed.

Rule 17 of Maharashtra Real Estate (Regulation and Development) (Registration of real estate projects, Registration of real estate agents, rates of interest and disclosures on website) Rules, 2017 (hereinafter referred to as the “Maha-RERA Rules”) reads-

17. Other functions of real estate agent.

The real estate agent shall provide assistance to enable the allottee and promoter of each real estate project, to exercise their respective rights and fulfill their respective obligations at the time of marketing and selling,

purchase and sell of any plot, apartment or building as the case may be and not involved himself in any unfair trade practices namely:

i) Making any statement, whether orally or in writing or by visible representation which -

(A) falsely or knowingly represents that services of amenities are of a particular standard or grade;

(B) represents that promoter or himself has approval or affiliations which such promoter or himself does not have;

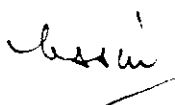
© makes a false or misleading representation concerning the services which the promoter does not have

ii) permitting the publication of any advertisement whether in any newspaper or other media, of services that are not intended to be offered by the promoter.

(d) Facilitate the possession of all the information and documents as the allottee, is entitled to, at the time of booking any plot, apartment or building or as the case may be;

e) Discharge such other functions as prescribed by regulations of the Authority.

These provisions are sufficient to demonstrate that legislature intends to rectify / cure the existing mischief and the fraudulent activities undertaken by some of the real estate agents involved in the real estate transactions and to bring a regulatory mechanism governing their actions. The intent is to suppress the mischief that would be created



by real estate agents as understood commonly in the real estate business and to advance the remedy in respect thereto.

29. Submissions relating to interpretation of statute.

Now we shall turn to the issues raised and argued before us. The learned senior Counsel of MGP Mr. Khambatta submits that the definition of the Real Estate Agent defined by Section 2 (zm) of RERA consists of three parts namely-

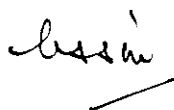
- I) **"real estate agent" means any person, who negotiates or acts on behalf of one person in a transaction of transfer of his plot, apartment or building, as the case may be, in a real estate project, by way of sale, with another person or transfer of plot, apartment or building, as the case may be, of any other person to him and receives remuneration or fees or any other charges for his services whether as a commission or otherwise**
- II) **(Real estate agent) includes a person who introduces, through any medium prospective buyers and sellers to each other for negotiation for sale or purchase of plot, apartment or building, as the case may be,**
- III) **(Real estate agent) includes property dealers, brokers, middlemen by whatever name called."**

Mr. Khambatta further submits that each part is independent and includes separate activity of a person who can be termed as Agent. He further submits that the web portals act like real estate agents because they negotiate and act for the promoter in the transaction of sale of real estate and they receive remuneration /fees /or other charges whether named as commission or otherwise. The definition includes a person who introduces

the buyers and sellers to each other for negotiation for sale or purchase of real estate. The web portals are not using simply the space for putting advertisements of the real estate projects on their portals but they have gone further and they introduce the parties for sale or purchase of the real estate by using internet as media. The portals act like middlemen. He emphasizes on the middle part of the definition to submit that a person who **introduces**, through any medium prospective buyers and sellers to each other for negotiation for sale or purchase of plot, apartment or building, as the case may be, comes under the definition of real estate agent which uses the phraseology like "means" "and includes" . Therefore, it becomes necessary to look at the cases relating to interpretation of statutes to know whether the Real Estate Agent defined by Section 2 (zm) of RERA consists of three separate parts having independent existence.

Khambata relies upon State of Bihar - v/s - Tata Iron and Steel Co. Ltd. 1995 Supp (2) SCC 4 in support of his submission. The factual matrix of the reported case is, Tata Iron and Steel Co. Ltd. has its registered office at Bombay and its integrated steel plant at Jamshedpur. The captive coking coal mines of the Company are in the Jharia Coal Fields and at West Bokaro in the State of Bihar. The coking coal extracted and raised from the mines is beneficiated in the coal washing plants, sterilized at Jamadoba and West Bokaro and thereafter the entire production is transferred to the Company's coke oven plants at Jamshedpur for converting the same into hard coke meant for use in the blast furnaces.

Colliery Control Order, 1945 and Bihar Trade Articles (Licenses unification_ Order 1984 were before the Hon'ble Supreme Court.



Particularly the definition of colliery defined in Colliery Control order 1945. Its definition defined under Clause 2(2) of the order.

Learned counsel for the State of Bihar vehemently contended that the coke oven plants of the Company having been constructed within the factory premises at Jamshedpur, it cannot be considered to be a part of the coal mine and as such cannot come within the definition of 'colliery' under the Order. To appreciate the argument, it would be useful to examine the definition of 'colliery' given under clause 2(2) of the Order which is as under:

“‘colliery’ means any mine or open working where the getting of coal is the principal object of the mining, quarrying or other operations carried on therein and includes a plant for the production of coke or for the washing of coal.”

While incorporating this definition the Hon'ble Supreme Court has observed that:

‘A plain reading the above-quoted definition makes it clear that it specifically includes “a plant for the production of coke or for the washing of coal”. The inclusive definition has been given with a purpose. Ordinarily, the coke oven plant is at a place where coking coal is converted into hard coke for the purposes of using the same in the industry. Coke oven plants are, therefore, set up at various places where hard coke is needed for the industry. Since hard coke also comes within the definition of ‘coal’ under the Order and is subject to control by the Central Government Authorities, the coke oven plants which produce hard coke have been rightly included in the definition of ‘colliery’.

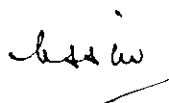
Mr. Khambata about the interpretation of law having the terminology "includes" has relied upon *Black Diamond Beverages and Another-v/s-Commercial Tax Officer* (1998) 1 SCC

Supreme Court observes in the context of Section 2(d) of West Bengal Sales Tax Act 1954 which reads as follows:

"2. (d) 'sale price' used in relation to a dealer means the amount of the money consideration for the sale of notified commodities manufactured, made or processed by him in West Bengal, or brought by him into West Bengal from any place outside West Bengal, for the purpose of sale in West Bengal, less any sum allowed as cash discount according to trade practice, but includes any sum charged for containers or other materials for the packaging of notified commodities."

The Hon'ble Supreme Court held that "definition of "sale price" in section 2 (d) of W.B. Sales Tax Act, 1954 uses the words "means and includes". The first part of the definition defines the meaning of the word 'sale price and must be given its ordinary, popular or natural meaning. The interpretation thereof is in no way controlled or affected by the second part which "includes" certain other things in the definition. Therefore, the inclusive part of the definition cannot prevent the main provision from receiving its natural meaning."

Portals have referred to *Maharashtra University of Hill Sciences and other V/s Sat Chikitsa Prasarak Mandal and ors.* (2010) 3 SCC 786 wherein the Hon'ble Supreme Court has explained *Ejusdem generis* Rule and its limitation as follows:



27 “The Latin expression “*eiusdem generis*” which means “of the same kind or nature’ is a principle of construction, meaning thereby when general words in a statutory text are flanked by restricted words, the meaning of the general words are taken to be restricted by implication with the meaning of the restricted words. This is a principle which arises ‘from the linguistic implication by which words having literally a wide meaning (when taken in isolation) are treated as reduced in scope by the verbal context”. It may be regarded as an instance of ellipsis, or reliance on implication. This principle is presumed to apply unless there is some contrary indication [see Glanville Williams, *The Origins and Logical Implications of the Eiusdem Generis Rule*.

This *eiusdem generis* principle is a facet of the principle of *noscitur a sociis*. The Latin maxim *noscitur a sociis* contemplates that a statutory term is recognized by its associated words. The Latin word “*sociis*” means ‘society’. Therefore, when general words are juxtaposed with specific words, general words cannot be read in isolation. Their colour and their contents are to be derived from their context. (See similar observations of Viscount Simonds in *Attorney General vs. Prince Ernest Augustus of Hanover*, AC at p.461.)

But like all other linguistic canons of construction, the *eiusdem generis* principle applies only when a contrary intention does not appear.

“If the legislative purpose of a statute is such that a statutory series should be read *eiusdem generis*, so be it; the rule is helpful. But, if it not, the rule is more likely to defeat than to fulfil the purpose of the statute. The rule, like many other rules of statutory interpretation, is a useful servant but a bad master.”

This Court while construing the principle of ejusdem generis laid down similar principles in Kavalappara Kottarathil Kochuni v. State of Madras. A Constitution Bench of this Court in Kochuni speaking through Subba Rao, J. (as His Lordship then was) opined: (AIR p. 1103, para 50)

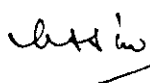
"50. The rule is that when general words follow particular and specific words of the same nature, the general words must be confined to the things of the same kind as those specified. But it is clearly laid down by decided cases that the specific words must form a distinct genus or category. It is not an inviolable rule of law, but is only permissible inference in the absence of an indication to the contrary."

Again this Court in another Constitution Bench decision in Amar Chandra Chakraborty v. Collector of Excise, speaking through Dua, J. reiterated the same principles in para 9, at p. 1868 of the Report. On the principle of ejusdem generis, the learned Judge observed as follows: (SCC p. 447, para 9)

"9. The ejusdem generis rule strives to reconcile the incompatibility between specific and general words. This doctrine applies when (i) the statute contains an enumeration of specific words; (ii) the subjects of the enumeration constitute a class or category; (iii) that class or category is not exhausted by the enumeration; (iv) the general term follows the enumeration; and (v) there is no indication of a different legislative intent."

30. We have also referred to the submissions of parties relating to **Mischief Rule & Purposive Interpretation of Statutes:**

It provides that it is a well-established principle that while interpreting a statute take into consideration for which the statute



was enacted. In this regard, in the matter of U.P. Secondary Education Service versus State of U.P. (Special Appeal No. 146 of 2010, reported as (2011) 2 All LJ 149), the Hon'ble Allahabad High Court reiterated the mischief rule for statutory interpretation as laid down in Heydon's case (reported as [1584] EWHC Exch J36) which provided as under:

"that for the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law) four things are to be discerned and considered: (1) what was the common law before making of the Act; (2) what was the mischief and defect for which the common law did not provide; (3) what remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth: and (4) the true reason of the remedy...

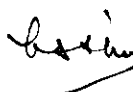
The Allahabad High Court stated that the mischief as used in statutory interpretation means a legal defect which is sought to be rectified or the factual condition that is causing concern. It is the duty of the judge to rationalize the law and to attune it with the object and purpose for which the law is enacted. It is not necessary in every case to strike down the rule, if it can be saved by subtle intervention without causing damage to the contents, with purpose and save it from the vice of unconstitutionality.

- (iv) In the matter of Badshah versus Urmila Badshah Godse and Others (reported as AIR 2014 SC 869), the Hon'ble Supreme Court has observed that

- (a) while interpreting a statute where alternative constructions possible the Court must give effect to that which will be responsible for the smooth working of the system for which the statute has been enacted rather than one which will put a roadblock in its way: and
 - (b) one should avoid a construction which would reduce the legislation to futility and should accept the bolder action based on the view that Parliament legislate only for the purpose of bringing about an effective result.
- (v) Apart from the mischief rule, under various judicial pronouncements the Hon'ble Supreme Court has laid down the importance of purposive / contextual interpretation of statutes. Relevant observations from some of the key judicial pronouncements are extracted here under:

Chief Justice of Andhra Pradesh and Others versus L.V.A. Dixitulu and Others (reported as AIR 1979 SC 93):

"If the language, or the phraseology employed by the legislation is precise and plain and thus by itself proclaims the legislative intent in unequivocal terms, the same must be given effect to, regardless of the consequences that may follow. But if the words used in the provision are imprecise, protean or evocative or can reasonably bear meanings more than one, true meaning of the rule of strict grammatical construction ceases to be a sure guide to reach at the real legislative intent. In such a case, in order to ascertain the true meaning of the terms and phrases employed, it is legitimate



for the Court to go to each portion throwing light on the purpose of the legislation, the object sought to be achieved and the consequences that may flow from the adoption of one in preference to the other possible interpretation. Where two alternative constructions are possible, the Court must choose the one which will be in accord with the other parts of the statute and ensure its smooth, harmonious working, and eschew the other which leads to absurdity, confusion, or friction, contradiction and conflict between its various provisions, or undermines, or tends to defeat or destroy the basic scheme and purpose of the enactment."

Kehar Singh and Others versus State (Delhi Administration)
(reported as AIR 1988 SC 1883):

"But, if the words are ambiguous, uncertain or any doubt arises as to the terms employed, we deem it as our paramount duty to put upon the language of the legislature rational meaning. We then examine every word, every section and provision. We examine the Act as a whole. We examine the necessity which gave rise to the Act. We will consider the provisions to ensure coherence and consistency within the law as a whole and to avoid undesirable consequences."

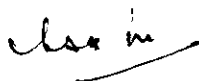
It was observed in *Oregano Chemical Industries and Another versus Union of India and Others* (reported as (1979) 4 SCC 573), *East India Hotels Ltd. and Another versus Union of India and Another* (reported as (2001) 1 SCC 284), and *Prakash Kumar versus State of Gujarat* (reported as (2005) 2 SCC 409) art or word of a statute should

not be construed in isolation. An Act has to be read as a whole, the different provisions have to be harmonized and the effect has to be given to all of them. Each provision of the statute should be construed with reference to other provisions to make the provision consistent with the object sought to be achieved.

It was held by the Hon'ble Supreme Court in *State of Haryana and others versus Sampuran Singh and others* (reported as (1975) 2 SCC 810), *Reserve Bank of India versus Peerless General Finance and Investment Co. Ltd. and Others* (reported as (1987) 1 SCC 424), and *High Court of Gujarat and Another versus Gujarat Kishan Mazdoor Panchayat and Others* (reported as [2003] 2 SCR 799), that:

Interpretation of statute must depend on their text and the context, which are the basis of interpretation and both are important. A statute is best interpreted when we know why it was enacted. With this knowledge, the statute must be read, first a whole and then section by section, clause by clause, phrase by phrase and word by word.

By no stretch of imagination a court is entitled to add something more than what the statute intended. The cardinal principle of construction of statute is that the true or legal meaning is derived by considering the meaning of words used in light of the apparent object sought to be achieved.



31. Cases on interpretation of Term "means and includes"

"-Web portals have relied upon the matter of **Vanguard Fire & General Insurance Co. Ltd. AIR 1960 SC 971**, wherein the Supreme Court has laid down that when a word is defined to 'mean' such and such, the definition is prima facie restrictive and exhaustive. A restrictive definition means that the meaning so defined in the statute for a particular word has a very restrictive ambit, so much so that its meaning cannot go beyond what has been defined. There is nothing that can be included in the meaning beyond what has been stated. There is seldom any scope for interpretation in case of a restrictive definition.

The Supreme Court in *Bharat Co-Operative Bank (Mumbai) Ltd. v. Co-Operative Bank Employees Union*, reported as 2007 4 SCC 685 has laid down that when in the definition clause given in any statute the word "means" is used, what follows is intended to speak exhaustively. it is a "hard and fast" definition and no meaning other than that which is put in the definition can be assigned to the same. When the word "includes" is used in the definition, the legislature does not intend to restrict the definition; makes the definition enumerative but not exhaustive. That is to say, the term defined will retain its ordinary meaning but its scope would be extended to bring within it matters, which in its ordinary meaning may or may not comprise. Therefore, the use of the word "means" followed by the word "includes" in the definition is clearly indicative of the legislative intent to make the definition exhaustive.

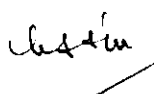
After going through the law on interpretation of statute we find that the intention of the legislature (as discussed above) in including real estate agents within the ambit of RERA was to rectify / cure the existing mischief of the fraudulent activities undertaken by some of the real estate agents

involved in the real estate transactions and to bring a regulatory mechanism governing their actions. We find it difficult to agree with Mr. Khambata that the second part of the definition namely "Real Estate Agent means and includes a person who introduces, through any medium, prospective buyers to each other for negotiation for sale or purchase of plot, apartment or building as the case may be" is a separate category. We find that the first clause relates to 'negotiation or acting on behalf of one person in a transaction of transfer of plot, apartment or building of any other person and receives remuneration or fees cannot be ignored. If the second part is separated from the first one, it will create absurd result. Any person acquainted with the buyer and the seller, if wants to help them and introduces them with each other will be covered by the definition though such person might not have received any commission, remuneration or fee as the case may be. It is impractical to think of such situation. Therefore, we find that the first part of the definition must be read along with the second part of it to gather the correct meaning particularly relating to remuneration, fees, commission, otherwise.

32. Functions performed by the digital platforms.

Now the next question which attracts our attention is the functions performed by the digital platforms because they contend that they are simply medium and put advertisements on their web portals on fixed rates. All the parties have tried to interpret the terms like "negotiate, commission, remuneration, introduce, facilitate" appearing in the definition of real estate agent with the help of their dictionary meanings and case law. Therefore, we shall clarify these terms.

33. Whether digital portals "introduce" seller with buyer in sale of real estate?



Dictionary meaning of "introduce" –

- To present someone by name to another person or two or more people to each other; to cause to experience for the first time; to bring in, establish. (Collins Dictionary _Seventh Edition)
- To tell two or more people who have not met before what each other's names are; the act of bringing something into use or existence for the first time, or of bringing something to a place for the first time; the act of making one person formally known to another, in which you tell each the other's name (Oxford Advanced Learner's Dictionary of Current English - Eighth Edition)
- To bring forward formally or in an official manner; to bring forward one person to the presence of another as an equal (Advanced Law Lexicon - Fifth Edition)
- The term "facilitate" has been used in Sections 9 and 10 of RERA, and it very importantly describes the role of a real estate agent.

On this backdrop it has been admitted by the web portals that when a viewer visits the portal and shows his interest in any particular project then he has to share with the portal his identity by leaving his name, cellphone number or email address which is verified by generating OTP. Thereafter the details of the developer are provided if the viewer is found to be a genuine person. Similarly, the leads of buyers are given to the promoter/advertiser. According to the learned advocates of the portals this is done to save their site being hacked at the hands of mischievous persons and also to give feed back

to the advertiser about the responses received. The fact remains that the details of the viewer and the advertisers are supplied by the portals to each other (buyer and seller) obviously for the purpose of selling the units of the project listed with them. Since portals use advance technology, it is not necessary to introduce both the parties by procuring their physical presence. Similarly, the physical presence of introducer is also not required. This process is done with the help of computer inbuilt software/system of the digital portals. Therefore, we agree with MGP when it submits that the portals when they collect the details of the viewer and share them with advertiser/seller and also disclose the information of promoters to buyers, they introduce the parties to the sale transaction.

34. Whether digital portals "negotiate" in sale of real estate?

Dictionary meaning of "negotiate"

Black's Law Dictionary - Tenth Edition "negotiate" means

- to communicate with another party for the purpose of reaching an understanding; to bring about by discussion or bargaining.

Collins Dictionary Seventh Edition - "negotiate" means

To work or talk with others to achieve a transaction, agreement etc.; to succeed in passing through, around, or over.

- Oxford Advanced Learner's Dictionary of Current English - Eight Edition "negotiate" means to try to reach an agreement by formal discussion; to arrange or agree something by formal discussion; formal discussion between people who are trying to reach an agreement. ()

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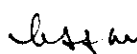
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The Hon'ble Bombay High Court, in the case of Devkubai Mankar vs Rajesh Builders AIR 1997 Bom. 142 on which Mr. Khambatta relies upon has interpreted the term 'negotiate' as under to put the controversy at rest:

- "7. The word "negotiate" is a technical word and as used with reference to commercial paper, it is almost a word of art. It may be used in two senses, as meaning to discuss or arrange for a sale or bargain, or the preliminaries of a business transaction, and also to sell or discount negotiable paper, or assign or transfer it by endorsement or delivery. In law and law books, it is sometimes used in both senses. The word "negotiate" used in connection with business transactions ordinarily means to bargain with another respecting a transaction or to conduct communication or conferences with a view to reaching a settlement or agreement. It is that what passes between the parties or their agents in course of or incident to the making of a contract and is also conversation in arranging terms of a contract. It also means "to discuss or arrange a sale or a bargain; to arrange the preliminaries of a business transaction". According to Black's Law Dictionary (Sixth Edition), negotiation is a process of submission and consideration of offers until acceptable offer is made and accepted. It means the deliberations, discussion or conference upon the terms of a proposed agreement or the act of settling or arranging the terms and conditions of a bargain, or sale, or other business transaction.
- Negotiation is thus a communication process used to put deals together. The job of the negotiator in case of negotiation for sale is to obtain all the terms and the conditions, including the price, and

to place the same before the owner. With that his job as a negotiator "to negotiate" comes to an end. It is not within his domain to strike a bargain and perform the deal. It is for the owner to accept or not to accept the deal arrived at by the agent or attorney by negotiation."

The portals deny that they negotiate in the sale transaction of the products listed with them. It is clear from the above quoted definitions that the negotiations must relate to the transaction of the sale for fixing the terms and conditions of the transaction relating to the property to be sold. When we look at the style of digital portals functioning, we find that once the viewer visits the site of the portal, the portal collects the information of his requirement namely his budget, the area of the property/size and its location etc. It is also admitted by them that they also supply the information of the real estate project listed with them and provide the comparative prices of the similar properties located nearby. Portals submit that they help the consumer for taking the right decision and they do not have any relation with the advertiser/developer as their principal. They act on principal to principal basis. They do not take any part in settling the terms and conditions of the sale transaction. They cannot offer discount of their own but communicate to the buyer only those discounts which are offered by the promoter. The viewer or the promoter, as the case may be, contact each other independently and settle the terms and conditions of their transaction, that too, without their knowledge and indulgence. In view of this factual aspect, we find it necessary to refer to the definition of advertisement defined by Section 2 (b) of RERA which has been quoted earlier. We keep in



mind that an advertisement is integral part of the marketing activities of every business. RERA permits advertisements about the real estate projects, offering them for sale or inviting persons to purchase them or to make advances or deposit for such projects. The advertising through any medium or publicity of any form is permissible as it informs the persons about the real estate project and its sale. Therefore, there is a very sharp line between the activities of advertisement agencies and those of real estate brokers. If the portals simply provide the information about the real estate project, its offering for sale to the public at large, then they are simply the agencies engaged for advertisements and when an individual buyer is targeted by contacting and persuading him by the portals for sale and purchase of listed properties they travel beyond. Hence we have drawn the conclusion that if the activities of the portals do not travel beyond providing the information regarding the real estate project and sale, and if they do not negotiate then they are covered under the category of advertisement agencies but once they travel beyond this limit, their interactive, persuasive activities come under the legal term of 'negotiation.'

35. Whether digital portals "facilitate" sale of real estate sale?

Dictionary meaning of "facilitate"

To make the occurrence of something easier or less difficult; (Black's Law Dictionary - Tenth Edition)

.To make easier; assist the progress of (Collins Dictionary Seventh Edition)

.To make an action or a process possible or easier. (Oxford Advanced Learner's Dictionary of Current English .Eighth Edition)

Portals have relied upon *Jitendra Singh Yadav v. Union of India and others*, reported as WP No. 4682/2015 wherein the High Court of Madhya Pradesh held that the websites provide an online service allowing users to post classified advertisement and is a platform which facilitates interaction between buyers and sellers by virtue of being an **online market place**. There remains no doubt in our minds after taking into consideration the activities of the portals that they facilitate the sale of the real estate projects because they introduce the buyer and seller with each other, they provide the information of the project to the buyer, they arrange virtual tour of the project and also provide other information useful for taking an informative decision. The digital portals offer their research results. The portals also make him aware of the other facilities like insurers and financiers. Hence definitely they facilitate the sale of real estate project.

36. Whether digital portals collect charges/ fess/ remuneration/ commission-?

Black's Law Dictionary (Eight Edition, South Asian Edition) provides, **commission** means- A fee paid to an agent or employee for a particular transaction, usu. as a percentage of money received from the transaction".

The remuneration is a basic premise of any service contract, without which a service becomes gratuitous in nature. The digital portals being commercial enterprises are bound to charge remuneration for such service, as do all similar entities in print media. Definition of Real Estate Agent provides that the person who receives remuneration or fees or any other charges for his services, negotiate or acts on behalf of one person in a transaction of his plot, apartment or building in a real estate project; by way

of sale, is an Agent. We have already come to the conclusion that if any person who receives remuneration or fees or any other charges for introducing prospective buyers and sellers for each other for negotiation for sale or purchase plot, apartment or building in a real estate project; is also covered by the definition of real estate agent.

The portals submit that they avail the digital space on their portals for putting the advertisement and charge the fixed fees. The fees do not depend upon the fructification of the transaction of a sale. In other words, they submit that they charge their clients only the fees for advertising their products irrespective of their sales. Hence, portals submit that unless and until they get any fee, commission or remuneration depending upon the success of sale transaction, it cannot be said that by facilitating sale of the real estate, by introducing the buyer with the seller they earn. They earn commission/fees only for listing the listed advertisements that too, from the advertiser and not from the viewer/buyer.

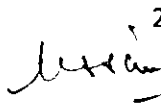
The definition of real estate agent does not provide that the fees/ commission should be paid by both buyer and seller. The receipt of remuneration or fees or any other charges for his services whether as commission or otherwise is sufficient requirement of law. The portals admittedly collect charges/ fees/ remuneration for listing the real estate projects as 'sponsored' / 'classified' advertisements from the advertisers. At this juncture, it is necessary to note that squareyards.com is the registered agent. It has published the advisement in Sunday times of 18/08/2019 wherein it clearly mentioned 'zero brokerage fees'. Same thing appears on its webpage. We find that to publish an advertisement on the front page of Sunday Times, having great circulation is an expensive matter. Obviously

squareyards.com has not done it for charity purpose. Similarly, when the portals charge their clients under whichever name, it comes under the category of charges/ fess/ remuneration. We do not find any force in their submission that those charges/ fess/ remuneration are fixed and therefore they do not depend upon fructification / consummation of the transaction and therefore, they do not come under said category. Once any monitory gain is derived for the purpose of performing any act of the real estate agent by whichever name, it amounts to receipt of charges/ fess/ remuneration irrespective of the result, whether the transaction succeeds or fails. However, we are conscious enough to exclude 'advertising charges,' if the activities are confined to advertisement only.

37. Is there any conflict between the definitions of real estate agent and agent under RERA and contract Act?

The learned advocates of the portals argue that there is the relation of principal to principal between the advertiser and the portals. For agency as defined by section 182 of the Indian Contract Act, 1872 there must be relation between the parties as principal and agent. We find that RERA has defined Real Estate Agent, it being the special law has overriding effect over the provisions of general law namely the Indian Contract Act, 1872. Therefore, when the activities of any person/ agency are covered by the definition of real estate agent defined by RERA, he or it can be said to be the Real Estate Agent. Hence, we do not agree with the learned advocates of the portals in this context.

38. Whether digital portals can be exempted from the definition of real estate agent, they being intermediary under IT Act?

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The portals submit that they are governed by information Technology Act they being intermediary. Hence it is necessary to look at the relevant provisions of IT Act.

Section 2(w) of the IT Act defines the term "Intermediary" as under -
Section 2 (w): "Intermediary" with respect to any particular electronic records, means any person who on behalf of another person receives, stores or transmits that record or provides any service with respect to that record and includes telecom service providers, network service providers, internet service providers, web hosting service providers, search engines, online payment sites, online-auction sites, online market places and cyber cafes.

Section 2(za) of IT Act defines the term "Originator" as under
Section 2(za): "Originator" means a person who sends, generates, stores or transmits any electronic message or causes any electronic message to be sent, generated, stored or transmitted to any other person but does not include an intermediary;

Section 79 in Chapter XII of the Information Technology Act is crucial and the same reads thus:

"Section 79: Exemption from liability of intermediary in certain cases-

(1) Notwithstanding anything contained in any law for the time being in force but subject to the provisions of sub-sections (2) and (3), an intermediary shall not be liable for any third party information, data, or communication link made available or hosted by him.

(2) The provisions of sub-section (1) shall apply if- (a) the function of the intermediary is limited to providing access to a communication system over which information made available by third parties is transmitted or temporarily stored or hosted; or (b) the intermediary does not- (i) initiate the transmission, (ii) select the receiver of the transmission, and (iii) select or modify the information contained in the transmission; (c) the intermediary observes due diligence while discharging his duties under this Act and also observes such other guidelines as the Central Government may prescribe in this behalf.

(3) The provisions of sub-section (1) shall not apply if- (a) the intermediary has conspired or abetted or aided or induced, whether by threats or promise or otherwise in the commission of the unlawful act; (b) upon receiving actual knowledge, or on being notified by the appropriate Government or its agency that any information, data or communication link residing in or connected to a computer to a computer resource controlled by the intermediary is being used to commit the unlawful act, the intermediary fails to expeditiously remove or disable access to that material on that resource without vitiating the evidence in any manner.

Explanation-For the purposes of this section, the expression "third party information" means any information dealt with by an intermediary in his capacity as an intermediary.

Section 67 (c) of the IT Act is also relevant. It reads

- (iv) Further, Section 67C of the IT Act mandates the intermediary to preserve and retain information for the described period and

this section reads thus:

“Section 67C. Preservation and retention of information by intermediaries-

(1) Intermediary shall preserve and retain such information as may be specified for such duration and in such manner and format as the Central Government may prescribe.

(2) Any intermediary who intentionally or knowingly contravenes the provisions of sub-section (1) shall be punished with an imprisonment for a term which may extend to three years and also be liable to fine.”

39. On perusal of these provisions we find no difficulty to agree with the learned advocates of the portals that in case of advertisements the advertiser who sends advertisement to the portals can be said to be originator, if the portals do not have any control over its contents. On similar lines the portals come under the definition of intermediary. It has been argued on behalf of the portals that section 79 of Information Technology Act, 2000. begins with non absente clause and therefore it has overriding effect over the provisions of The Real Estate (Regulation and Development) Act 2016(RERA). We find that section 89 of RERA provides that the provisions of this act (RERA) shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force. MGP relies upon Sarvan Singh Vs. Shri Katuralal (1977) 1 SCC 750 holding that the conflict must be resolved by referring to object and purpose of the laws under consideration. In Ashoka Marketing Ltd. Vs. Punjab National Bank, (1990) 4 SCC 406 it is held that such conflict can be resolved by determining which of the two special statues is more special law. The Supreme Court has held in Solidaire India Ltd. Vs. Fairgrowth financial

Services Ltd. (2001) 3 SCC 71 that when there are two special statutes with its own non obstante clause, the later law prevails. After considering the provisions of both Acts we find that the object and purpose of RERA is to protect the interest of the home buyers and to bring transparency in the housing sector. It wants to bridle the unlawful and unregulated activities of the real estate brokers. IT Act is enacted in 2000 whereas RERA is enacted in 2016. We have to presume that when the parliament enacted RERA in the year 2016, it was aware of the non obstante clause provided by it in Section 79 of IT Act. The Parliament has not carved out any exception to the application of the provisions of RERA. Hence, we hold that RERA overrides section 79 of IT Act.

40. The learned advocates of the portals further argue that the portals are 'advertising' agencies and their activities are covered by sub clause (2) of section 79, their liability is as mentioned in sub clause (3) of it and under section 67C regarding preservation and reservation of information. We don't dispute these legal provisions. If the activities of the portals are confined to 'advertisement' defined by RERA then the portals are definitely entitled to exemption provided by section 79 of IT Act. We don't want to stretch the point further. Therefore, there is no conflict in the definitions of Real Estate Agent defined by RERA and intermediary defined by IT Act.

41. It has been discussed with the parties, their advocates during hearing of the matter to know whether it is possible for the portals to advertise only those projects which are registered with The Real Estate Regulatory Authority because the promoter cannot advertise, market or sell any plot or apartment or building in any real estate project without registering the project as per section 3 of RERA. It has been submitted by

them that it is not possible for them to decide as to which project is eligible for registration and to ascertain whether it is registered with any of the state Real Estate Regulatory Authority because their activities are spread over the entire country. They have brought to our notice the case of Kent RO Systems Limited and others v. Amit Kotak (240 (2017) DLT3). In this case_Kent RO Systems Ltd. alleged that Defendant No.1 was the manufacturer and/or trader of water purifier systems, the shape, look and appearance of which were deceptively similar to the registered design of the water purifiers of the Plaintiffs - Kent RO Systems Ltd ("**Kent RO**"). Defendant No. 2 - eBay permitted Defendant No.1 to advertise, offer for sale and sell its water purifiers through its portal. Kent RO had alleged infringement of its rights under Section 19 of the Designs Act by both the Defendants. Kent RO brought the infringements to the notice of eBay along with notifying eBay about several other products advertised or offered for sell on eBay which infringed the rights of Kent RO. Ebay removed the infringing products brought to its notice but failed to remove the other products which were claimed by Kent RO to infringe its registered designs.

Plaintiff sought directions against eBay to take down, remove and delist all products infringing the registered designs of Kent RO; and sought prohibitory injunction against the sell / offer for sell of products infringing the registered designs of Kent RO on eBay.

Having informed eBay of infringing products been hosted on its platform, eBay should before hosting any similar product screen and verify if it infringes the design of Kent RO. (even without any receipt of complaint in that regard).

The Plaintiffs by relying on the Information Technology (Intermediaries and Guidelines) Rules, 2011 ("**IT Rules**") suggested Ebay as an intermediary to devise programs to detect infringement and piracy in accordance with Rule 3(8) of IT Rules requiring intermediaries to take reasonable measures and follow reasonable security practices. It was alleged that eBay, by allowing infringing products to be sold from newly appearing URL/s would be abetting and aiding infringement within the meaning of Section 79(3) of the IT Act.

The Court rejected the contention of Kent RO saying that in order to make a case under Section 79(3) of IT Act, thereby making the exemption under Section 79(1) inapplicable, Kent RO have to plead and prove conspiracy or abetment or aiding or inducing within the meaning of Section 79(3) of the IT Act. The words conspired, abetted, aiding and inducing are legal terms meaning whereof has been settled for long. They require pleading and proof of common intention. The Court considered whether the business of eBay was automatic i.e., without any human intervention in order to decide if eBay can be directed to screen all the information hosted on its website. To hold that an intermediary, before posting any information on its computer resources, is required to satisfy itself that the same does not infringe the intellectual property rights of any person would amount to converting the intermediary into a body to determine whether there is any infringement of intellectual property rights or not. All persons claiming any intellectual property rights will then, intimate the intermediaries of their claims and the intermediaries then, before hosting any material on their computer resources would be required to test the material vis-a-vis all such claims lodged with them, else would be liable for infringement.

The Court further observed that in its view IT Rules don't oblige the intermediary to, of its own, screen all information being hosted on its portal for infringement of the rights of all those persons who have at any point of time complained to the intermediary.

The Court further said that had the intention of the Legislature been to require the intermediaries as the Defendant no.2 eBay to be vigilant as the Plaintiff reads the IT Act and the Rules to require it to be, the Legislature would have merely observed that the intermediary will not permit to be hosted on its website any information infringing intellectual property rights of any other person if such person had informed the intermediary of the same. However, the Legislature has not done so and has required the intermediaries as the Defendant no.2 to only declare to all its users its policy in this regard and advise them not to host any infringing information on the website of the intermediary and to on receipt of complaint remove the same within 36 hours.

The Court was of the view that to require an intermediary to do such screening would be an unreasonable interference with the rights of the intermediary to carry on its business.

In this context, reliance has also been placed on *Shreya Singhal v. Union of India* 2015 5 SCC observing-

"10. Online intermediaries provide significant economic benefits and this is why across the world major economies provide a safe harbour regime to limit liability for online intermediaries when there is unlawful behavior by intermediary users. Online intermediaries

organize information by making it accessible and understandable to users. Intermediaries enhance economic activity, reduce costs and enable market entry for small and medium enterprises, thereby inducing competition, which eventually leads to lower consumer prices and more economic activity.

11. Online intermediaries do not have direct control of information that is exchanged on their platforms. Legal regimes across the world prescribe exemptions from liability for intermediaries and these safe harbour provisions are regarded as a necessary regulatory foundation for intermediaries to operate.

12. In the wake of representations by the information technology industry following the arrest in 2004 of Avnish Bajaj, the CEO of Baazee.com, an auction portal, Parliament with effect from 27-10-2009 substituted Chapter XII of the IT Act comprising Section 79. This new safe harbour protection to intermediaries was introduced to protect intermediaries from burdensome liability that would crush innovation, throttle Indian competitiveness and prevent entrepreneurs from deploying new services that would encourage the growth and penetration of the internet in India.

D. Important features of Section 79

13. Section 79 in Chapter XII of the IT Act comprises a self-contained regime with respect to intermediary liability.

14. The object of Section 79 is to exempt an intermediary from liability arising from “third-party information”. An intermediary is exempt from all liability (civil and criminal) for any third-party information, data or communication link made available or hosted by him. The purpose of this wide exemption from liability is to protect intermediaries from harassment or liability arising merely out of their activities as an intermediary.

15. The opening words of Section 79 are a widely worded non obstante clause which overrides “anything contained in any law for the time being in force”. (Section 81 gives overriding effect to the Act in relation to inconsistent provisions contained in any other law.) The clear intent of Parliament is to insulate intermediaries as a class from civil as well as criminal liability.

16. The exemption from liability granted by Section 79(1) is subject to the provisions of sub-sections (2) and (3) of Section 79.

17. Section 79(2)(c) provides that in order to ensure exemption from liability under Section 79(1) the intermediary “observes due diligence while discharging his duties under this Act and also observes such other guidelines as the Central Government may prescribe in this behalf”. The mandate of this provision empowers the Central Government to frame statutory guidelines for a specific objective, that is, to ensure observance by an intermediary of his duties

under the IT Act. This is clearly brought out by the underlined expressions, particularly the words “in this behalf”.

18. The duties of an intermediary under the IT Act include (i) the duty to preserve and retain information as set out in Section 67-C; (ii) the duty to extend all facilities and technical assistance with respect to interception or monitoring or decryption of any information as envisaged in Section 69; (iii) the duty to obey government directions to block public access to any information under Section 69-A; (iv) the duty to provide technical assistance and extend all facilities to a government agency to enable online access or to secure or provide online access to computer resources in terms of Section 69-B; (v) the duty to provide information to and obey directions from the Indian Computer Emergency Response Team under Section 70-B; (vi) the duty to not disclose personal information as envisaged under Section 72-A; and (vii) the duty to take down any information, data or communication link, etc. used to commit an unlawful act as envisaged under Section 79(3)(b)”.

42. In view of these judgments we find ourselves unable to give direction to the digital portals to advertise the advertisements of only registered real estate projects. However, we have noticed that some portals have taken the precaution to inform the viewers to verify the information from the RERA websites and also provided the disclaimer clauses. They

submit that they shall remove the data or shall disable the access only upon receiving actual knowledge from a court order or on being notified by the appropriate government or its agency that unlawful acts are being committed.

Before parting with this issue we want to place on record the fact that the portals which involve in the activity of “Market Research” and store on its website for its transmission cease to be intermediary but come under the definition of originator.

43. Articles 14 and 19 of the Constitution of India.

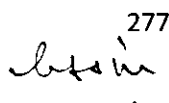
Learned Advocates of the portals submit that if the portals would be required to register as real estate agent, article 14 and 19 of the Constitution of India will be violated. We agree with them that Article 19(1)(g) of the Constitution of India provides to all citizens the freedom to profess any profession, trade, occupation or business. However, this fundamental right is subject to the limitation imposed under Article 19(6) which permits the law to impose reasonable restrictions on the exercise of such right, in the interests of the general public. Further, such right shall be subject to any law relating to: (i) the professional or technical qualifications necessary for practicing such profession, trade, occupation or business or (ii) the State itself (or by a corporation owned or controlled by the State) to carry on any such profession, trade, occupation, business, industry or service, to the exclusion of citizens.

Learned advocates have submitted that while interpreting the phrase "reasonable restriction" the Indian courts have observed that the said phrase connotes that the restriction / limitation imposed on the person in

enjoyment of the right should not be arbitrary or of an excessive nature, and beyond what is required in the interest of public. It has been further observed that a restriction which has no relation with the object which the legislation seeks to achieve cannot be regarded as a reasonable restriction on such freedom / right. For this purpose, they have placed reliance on Lala Hari Chand Sarada versus Mizo District Council and Others (reported as AIR 1967 SC 829), Mohammad Faruk versus State of Madhya Pradesh and Others (reported as AIR 1970 SC 93), M. J. Sivani and Others versus State of Karnataka and Others (reported as AIR 1995 SC 1770).

In our opinion any profession, trade, occupation, business can be regulated, or be subjected to reasonable restrictions, in public interest.

Article 14 of the Constitution of India provides that the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India. However, this general rule is subject to reasonable classification. Reliance has been placed on Kedar Nath Bajoria and Others Vs State of West Bengal (reported as AIR 1953 SC 404), State of Kerala Vs Haji K. Haji K. Kutty Naha and Others (reported as AIR 1969 SC 378), State of Kerala and Others Vs N.M. Thomas and Others (reported as AIR 1976 SC 490) on the point of reasonable classification. In these judgments, Supreme Court observed, that the law can classify and set apart the classes according to the needs and exigencies of the society and as suggested by experience. Such classification must not be arbitrary but must be rational, that is to say (i) the classification must be founded on an intelligible differentia which distinguishes those that are grouped together from others; and (ii) the differentia must have a rational relation to the object sought to be achieved by the Act.

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44. After giving thought to the submissions of learned advocates and the cases on which they have relied upon, we find that only because some portals travel beyond their role of advertising agency and caught under the definition of Real Estate Agent, their rights under Articles 14 and 19 cannot be said to be infringed. Moreover, in Neelkamal Realtors suburban private Ltd. Vs. Union of India RERA has stood the test of constitutionality before the Hon'ble Bombay High Court. We are also aware of the fact that the digital portal like squareyard.com also operates in 10 different countries and yet it has registered itself as Real Estate Agent with MahaRERA. Hence, the fear of the digital portals of being discriminated is groundless.

45. The learned advocates of the portals submit that the activities of the portals are spread over the entire country and it would be difficult for them to register with a particular real estate regulatory authority of a state. We find that the portals will have to register themselves with real estate regulatory authority of a state where their activities are going on until the registration at national level is made permissible.

46. It is submitted on behalf of the portals that it is not possible for them to discharge the functions provided under section 10 of RERA namely to maintain and preserve books of account, facilitate the possession and the documents. As we have observed above, some digital portals have been providing these services. Those portals which want to indulge in the activity of agent will have to discharge these functions provided under law. If they do not want to discharge those functions, then it is up to them to confine their activities as advertising agency namely to give information

about the real estate project for offering it for sale or inviting persons for purchasing it and not more than that.

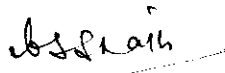
47. Before parting with this order now we shall refer to grievance of builders. They contend that the digital portals provide incorrect information of their project without they being informed. We find that it is necessary for the digital portals to maintain self-imposed discipline for the fair practice, so that wrong information of non-listed properties is not disseminated by them which ultimately may result into prejudicing the interest of both the buyers and the promoters.

48. To conclude, we hold that the portals whose activities are simply confined to advertisements defined by section 2(b) of RERA, need not register themselves as real estate agents, provided in disclaimer they declare that they are simply advertising agencies and advise the viewers to cross check the information from other sources including RERA websites.

Other portals which carry the function of real estate agent as discussed above need registration. Such digital portals are directed to register themselves with MahaRERA within next two months, if their activities are spread within the territorial jurisdiction of it.

Mumbai.

Date: 03.10.2019.



Dr. Vijay Satbir Singh,

Member I, MahaRERA, Mumbai.



B.D. Kapdnis,

Member II, MahaRERA, Mumbai.