

# The Practise of Defendant Masking in India: An Overview

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## **Introduction**

Defendant Masking is a strategy used in India by plaintiffs in IPR suits to avoid detection of the matter in the Cause List by masking the '**main defendant**' with the other defendants. The Cause List in Indian jurisprudence are schedules of cases to be heard by the courts on the following day(s). It gives details such as the Court Number, the bench dealing with the cases and the case details like case number, petitioner/respondent, respective advocates, etc. Consequently, the plaintiffs succeed in obtaining ad interim ex parte injunctions in initial hearings due to absence of main defendant's counsel.

The practise of Defendant Masking came up recently in the case of **Bata India Ltd vs Chawla Boot House and Anr.**<sup>[1]</sup> The court took notice of the impugned practise and directed the Registry to control it in all IPR suits. As a result, Plaintiffs are directed to file an undertaking that the defendant mentioned in the suit is the 'main defendant'.

The practise of Defendant Masking was discussed by the Delhi High Court first in the case of **Microlube India Ltd vs Maggon Auto Centre and Ors,**<sup>[2]</sup> wherein the court found the underlying objective of this practise- "*When the counsel for the main defendants scan the list of cases, they would not be able to know as to whether any case has been filed against them so as to enable them to appear on the very first date on which the case is listed before court.*"

## **How the Practise of Defendant Masking works?**

Under Order 39 Rule 3 of Civil Procedure Code,1908, grant of an interim ex parte injunction is provided which is not a rule but only an exception. The Court can grant an ex parte injunction, i.e without issuing any notice to the opposite party, and record reasons for it in cases where it appears that the object of granting an injunction would be defeated by the delay. In addition, the court has to consider:

- Whether the plaintiff has a prima facie case and came to the court with utmost good faith and clean hands
- Whether irreparable or serious injury will be suffered by the plaintiff if the injunction prayed is not immediately issued by the court.

After issuance of an ex- parte injunction, plaintiffs are required to send a copy of the application for injunction together with the supporting materials to the defendants as well submit an affidavit to the court that such copy has been delivered.

## **Bata India Ltd Case: Background**

The case of ***Bata India Ltd vs Chawla Boot House and Anr*** involved a trademark infringement and passing off suit filed by Bata Ltd against use of the mark POWER FLEX and the tagline 'The Power of Real Leather' by the 'main defendant' Leayan Global for footwear. The registered Trademark of Leayan Global is RED CHIEF in respect of footwear and it has applied for trademark application for mark POWER FLEX in respect of leather footwear. The court found the mark "POWER FLEX" to be infringing the plaintiff's house mark "POWER" which has been in use for almost 50 years.

The court held that the plaintiff has a prima facie case. The use of the impugned mark by defendants was found to be sketchy and it tactically diluted the goodwill and reputation of the Plaintiff because of following reasons-

- Sales turnover of POWER FLEX range products was not mentioned in written statement by the Defendant no. 2
- Absence of major publicity to the mark POWER FLEX.
- The mark POWER FLEX was used independently by Leayan Global without the trademark RED CHIEF.

## **Arraignment of Defendants**

However, the Delhi High Court identified the practise of Defendant Masking in this case. The *Chawla Boot House*, impleaded as Defendant no. 1 by the Plaintiff, was merely a retailer of goods in Gandhi Nagar, New Delhi. The 'main defendant' was *Leayan Global* which was impleaded as Defendant no. 2. This was done by the Plaintiff to mask the 'main defendant' under the name of Chawla Boot House and to obtain an ex parte injunction in the initial hearing.

## **Is this the end of "Defendant Masking"?**

The practise of "Defendant masking" has been considered improper by the Indian courts. The Delhi High Court shunned such practise and asked the plaintiffs to come up with clean hands without concealing material facts. Consequently, the Court directed the Registry by issuing a circular<sup>[3]</sup> to ensure strict compliance with the judgment in the *Microlube* case and to seek an undertaking from all the plaintiffs in IPR suits where there are multiple defendants that the Defendant arraigned as no.1 is the 'main defendant' in the suit.

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<sup>[1]</sup> DE/1368/2019

<sup>[2]</sup> 2008 (38) PTC 271 (Del)

<sup>[3]</sup> Ensure Main Contesting Defendant Is Listed As Defendant No 1 In IPR Cases: Delhi HC To Registry,