

**ICAC**  
**V**  
**State Bank of Mauritius Ltd**

**2021 Intermediate Court (Financial Crime Division)**

**Cause No 19/2020**

**ICAC**  
**V**  
**State Bank of Mauritius,**  
**now known as SBM Bank (Mauritius) Ltd**  
**as represented by Iswarduthial Basant Rai.**

**Charge:** - Limitation of Payment in Cash in breach of section 5(1) and 8 of the Financial Intelligence and Anti Money Laundering Act, coupled with section 44(2) of the Interpretation and General Clauses Act.

**JUDGEMENT**

Accused company is represented by Mr Iswarduthial Basant Rai and he has pleaded not guilty to the charge and was assisted by counsel. The particulars of the charge are to the effect that on 20<sup>th</sup> of October 2008, in the district of Grand Port, accused company willfully, unlawfully and criminally accepted a payment of Euro 20,000 in cash from one Mrs Priadevi Ballchand Udhin, which sum was in excess of the prescribed limit of Rs 500,000.

Mr Shaheel Seeburrun, of the Registrar of Companies, explained that State Bank of Mauritius Ltd is a registered company and on 20<sup>th</sup> of October 2008 was a live company. It has now changed name to SBM Bank (Mauritius) Ltd; he produced the certificate of change of name, document A refers. The information was amended and accused company maintained his plea of not guilty.

Mr Ahmud Nooranee Bussun, Court Manager produced a file, certified as true copy, containing a copy of a FX purchase voucher, bearing serial number 0596582, document B refers. The document was initially produced in the case of ICAC v Priadevi Balchand-Udhin, vide cause No 76/12.



Chief Investigator Mungur produced a letter issued by the accused company authorising Mr Iswarduthial Basant Rai to represent the company in the present case; document C refers. He also produced two statements made by the accused party; documents D and D1 refer. He identified document B as an FX purchase of Rs 20,000 Euros in cash by accused company from Mrs Priya Devi Balchand Udhin; which sum is equivalent to Rs 810,000. The document was produced by the accused company by virtue of a Disclosure Order.

In cross examination, he explained that document C is a letter issued under the signature of the acting chief executive of the accused company purporting to delegate Mr Iswarduthial Basant Rai to represent the accused company in the enquiry at the ICAC. He said that the version of the accused was that the transaction was an exempt transaction but according to him, it was not an exempt transaction. He added that Mrs Priya Devi Balchand Udhin had a savings account in Mauritian currency; he could not say when the account was opened but confirmed that Mrs Udhin took a loan in 2004. Following the Disclosure Order, the bank remitted certain documents to the ICAC, but none of the documents specified that accused is an exempt customer and according to him and his many investigations carried out, a bank must have a list of exempt customers and each transaction are not subject to a unique test to decide whether it is an exempt transaction or not. He admitted that the bank did a KYC (Know Your Client enquiry) for Mrs Udhin and the bank produced the related document and same has already been produced in court in another case. It also came to light that Mrs Udhin made a withdrawal from her bank in Sweden, which showed the source of the funds and this document was produced at the bank; subsequently, the document was produced to the ICAC and same was secured and was marked as DR 0111 and according to him, the document was in the prosecution file. The witness was given the opportunity to look into the file and he finally said that the document was no longer in the file. It further came to light that there is a statement given showing that Mrs Udhin was working in Sweden; that she had an account in a Swedish bank where she saved her money and, in the past, Mrs Udhin effected repayments of her loan in Mauritius by bank transfer from the Swedish bank to the accused bank. That statement also shows that Mrs Udhin justified the source of her funds and she had produced documentary evidence to that effect to the bank and she explained that she brought the money as she was in Mauritius and did not effect a transfer. It was precisely that money which was remitted to Mr Bassant Rai for the repayment of the loan. However, in the opinion of the ICAC investigator, Mrs Udhin first sold the foreign currency to the bank and this was a separate transaction and SUBSEQUENTLY she credited the amount received in her account to pay her loan. For the investigator, these are two separate transactions and hence the bank committed an

offence. The witness added "... and it is difficult to say whether it is the same money she has withdrawn, Your Honour. Because the transaction has occurred in Sweden....". According to the investigator, Mrs Udhin used to service her loan by bank transfers and withdrawing her money from Sweden and bring it to Mauritius to pay is not an exempt transaction.

### **ANALYSI OF THE CASE**

Accused is charged for "Limitation of Payment in Cash" as provided under section 5(1) and 8 of the Financial Intelligence and Anti Money Laundering Act (FIAMLA), which reads as follows-

#### ***Limitation of payment in cash***

*(1) Notwithstanding section 37 of the Bank of Mauritius Act 2004, but subject to subsection (2), any person who makes or accepts any payment in cash in excess of 500,000 rupees or an equivalent amount in foreign currency, or such amount as may be prescribed, shall commit an offence.*

*(2) Subsection (1) shall not apply to an exempt transaction.*

In the case of **Beezadhur v Independent Commission Against Corruption 2013 SCJ 292**; the Supreme Court enumerated the elements of the offence, which the prosecution must prove and these are :-

1. Accepting a payment
2. In cash
3. Beyond the prescribed amount of Rs 350,000 (now the prescribed amount is Rs 500,000).

Over and above these three elements, the prosecution must also prove the guilty intention of the accused. In the case of **Meaajun MJ v State 2011 SCJ 141**, the Supreme Court said "*It follows, then, that the charge under section 5(1) of the Act is a criminal offence requiring mens rea and not a technical offence irrespective of the existence of mens rea.*"

In the present case, it is not disputed that the accused has accepted a payment in cash of a sum of 20,000 EUR which is equivalent to Rs 810,000 and therefore above the prescribed limit of Rs 500,000. However, the guilty mind of the accused company when he received the money is being

denied and he is claiming that it was an exempt transaction. This court must determine whether or not, the impugned transaction was an exempt one.

In the case of **Beezadhur v Independent Commission Against Corruption 2013 PRV 83**, the Judicial Committee of the Privy Council clearly stated that “...it was for the defendant to show that the transaction was within one of the exempt categories.”

Section 2 of the FIAMLA defines “Exempt transaction” as follows –

- (a) *between the Bank of Mauritius and any other person;*
- (b) *between a bank and another bank;*
- (c) *between a bank and a financial institution;*
- (d) *between a bank or a financial institution and a customer where –*

- (i) *the customer is, at the time the transaction takes place, an established customer of the bank or financial institution; and*
- (ii) *the transaction consists of a deposit into, or withdrawal from, an account maintained by the Customer with the bank or financial institution,*

*where the transaction does not exceed an amount that is commensurate with the lawful business activities of the customer; or*

- (e) *between such other persons as may be prescribed;*

In the present case, accused is relying on the provision of sub-section (d) of the above exempt categories and he has made it a live issue since the start of the investigation, in his out of court statement, vide document D1. As such he must prove that the transaction -

1. was between a bank and an established customer of the bank;
2. was a deposit into an account maintained by the customer with the bank; and
3. does not exceed an amount that is commensurate with the lawful business activities of the customer;

**1. Was the transaction between a bank and an established customer of the bank?**

It is not disputed that accused is a registered bank. In his out of court statement, accused explained that Mrs Udhin was an established customer of the bank; she has contracted a loan and the appropriate KYC was made for her; that she works in Sweden; she often transferred money from her Swedish bank to the accused bank. Mr Mungur, the investigator confirmed that Mrs Udhin was a client of the bank. He admitted that the bank did a KYC (Know Your Client enquiry) for Mrs Udhin and the bank produced the related document and same has already been produced in court in another case.

This Court is therefore satisfied that Mrs Udhin was an established client on the accused bank.

**2. Was the transaction a deposit into an account maintained by the customer with the bank?**

The version of the defence is that on 20.10.08, Mrs Udhin called at the bank and asked to change 20,000 EUR and to deposit the equivalent in rupees in her account to pay for her loan. On the other hand, Chief Investigator Mungur identified document B as an FX purchase of Rs 20,000 Euros in cash by accused company from Mrs Priadevi Balchand Udhin; which sum is equivalent to Rs 810,000. According to the investigator, Mrs Udhin first sold the foreign currency to the bank and this was a separate transaction and SUBSEQUENTLY she credited the amount received to her account to pay her loan and hence these were two separate transactions and therefore the bank committed an offence of accepting a payment of Euro 20,000 in cash, which sum was in excess of the prescribed limit of Rs 500,000. A close scrutiny of document B supports the version of the defence and not the version of the prosecution. The document contains the following words-

a. FX-PURCHASE-AGAINST ACCOUNT

and further down it reads

b. Please credit my account with 810,000.00

The underlined part is mine and shows that it was only one transaction and not 2 transactions as deposed by Mr Mungur. This means that in ONE TRANSACTION, the 20,000 EURO was exchanged and deposited in the account of Mrs Udhin.

In the case of **Meeajun MJ v State 2011 SCJ 141**, the Appellant exchanged GBP at Shibani Finance Money Changer four times and was charged with four counts; Appellant then deposited the corresponding amount in rupees at the IOIB (the Bank). The Supreme Court explained that the transactions with Shibani Finance Money Changer and the Appellant, were distinct and

constituted the offences charged; while the deposits of the money in IOIB came after the commission of the offences and the Court said "...The short answer to the first point is that the IOIB only came into scene after the events giving rise to the offences...." WHEREAS, in the present case, the exchange and the deposit were in one transaction. It stands to reason that Mrs Udhin could not deposit 20,000 EUROS in her savings account maintained in rupees; part of the transaction was the exchange as it appears on document B.

This Court therefore finds that the transaction was a deposit into an account maintained by the customer (Mrs Udhin) with the bank (the accused company).

**3. Did the transaction exceed an amount that is commensurate with the lawful business activities of the customer?**

In his statement, the accused said that Mrs Udhin produced documentary evidence of withdrawals from her bank in Sweden showing the source of the funds from her savings. Chief Investigator Mungur stated that these documents were secured during the course of enquiry and ought to be in the prosecution file, however, same was no longer in the file. In a nutshell, the documents purporting to show that the transaction was an exempt one was no longer available for inspection by this court. **Only the statement of accused was produced but not the document which purports to innocent him.**

Further, Chief Investigator Mungur admitted that the bank did a KYC (Know Your Client enquiry) for Mrs Udhin and the bank produced the related document and same has already been produced in court in another case. I do realise that this is a two staged prosecution and that Mrs Udhin was prosecuted first; but I also realise that the accused company has already produced the required documents to show the KYC enquiry and the lawful activities of Mrs Udhin. This document formed part of the statement of the accused but this document also has not been produced. The statement of the accused company has been produced but not the document justifying his action.

In such circumstances, it cannot be said that the amount of 20,000 EUROS is not commensurate with the lawful business of the customer (Mrs Udhin).

**Other Flaws in the case of the prosecution**

1. Mr Mungur stated that none of the documents produced by the bank did specify that Mrs Udhin was an exempt customer and according to him and his many investigations carried

out, a bank must have a list of exempt customers and each transaction are not subject to a unique test to determine whether it is an exempt transaction or not. This court has looked at the whole law but has not seen anything about an “*exempt customer*” and the alleged duty of a bank, as interpreted by the officer but on the contrary, has seen exempt transaction and its interpretation and that each transaction has to be assessed on its own. Therefore, the interpretation of Mr Mungur is erroneous. At any rate the opinion of Mr Mungur is not evidence, In the case of **Meeajun MJ v State 2011 SCJ 141**, witnesses were of the opinion that the impugned transaction constituted an exempt transaction and the court held “.....*the question whether the transaction was exempt or not was not a question of facts as such but a question in law. The transaction had to comply with section 2 of the Act, which they did not, independently of the personal views of the witnesses who obviously had an interest to serve in making such a statement....*” No weight is therefore attached to the views of Mr Mungur.

2. The missing document also showed that the source of the funds came from the savings of Mrs Udhin from her bank in Sweden and to that Mr Mungur said “.... *And it is difficult to say whether it is the same money she has withdrawn, Your Honour. Because the transaction has occurred in Sweden....*”. In his own answer, the Officer showed that he had doubts as to the source of the funds and this goes to the benefit of the accused as the Prosecution bears the burden of proving his case beyond reasonable doubt.
3. Accused is a registered company and hence the charge under section 5(1) of the FIAMLA was coupled with section 44(2) of the Interpretation and General Clauses Act. Further, it is incumbent on the prosecution to ensure that the right accused is in the dock for trial. Section 44(2) reads as follows-

#### **44. Offence by agent or body corporate**

(1) .....

(2) (a) Where a company, société or other corporate body is charged with an offence, a representative may appear before the appropriate court and enter a plea of guilty or not guilty on behalf of the company, société or other corporate body.



(b) For the purposes of paragraph (a), “representative” means a director, or the secretary, of the corporate body or a person duly authorized by the corporate body to represent it. (The underlying is mine).

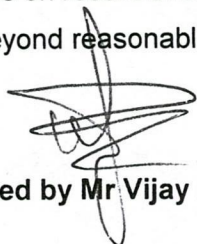
The law as underlined shows that when a body corporate stands as accused, he must be properly represented by a representative as defined above. This has been often laid down by the Supreme Court as in the case of **The Central Electricity Board v The State 2010 SCJ 75** where the court said *“There is no evidence that those who appeared were duly authorized by the corporate body to represent it”*.

In the present case, the issue is “was Mr Iswarduthial Basant Rai duly authorized to by the accused company to represent him at trial? The prosecution relied on a letter issued by the accused company authorising Mr Iswarduthial Basant Rai to represent the company; document C refers. A reading of the letter shows that it dates back the 13.01.2012, when the acting CEO and the Secretary of the accused company duly authorized Mr Iswarduthial Basant Rai to represent the accused company at the ICAC for enquiry.

Who were the directors and who was the secretary at the time when the plea was taken? Has Mr Iswarduthial Basant Rai been mandated to plead and to represent accused company at trial? Can the plea of Mr Bassant Rai and his acts and doings, at the time of trial, bind the accused company without him being duly authorized to act as representative?

This Court holds that, when the prosecution avers section 44 (2) of the IGCA, there should be strict adherence to subsection 44 (2) (b), when the plea is taken and trial follows. It is the duty of the prosecution to ensure that the right accused is in the dock.

For all these reasons and after having considered all the facts and circumstances of the case, the evidence on record and the submissions of counsel, I hold that the prosecution has not proved its case beyond reasonable doubt and the charge is dismissed.

  
Delivered by Mr Vijay Appadoo

President Intermediate Court (Financial Crime Division).

29.09.2021.