IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an Appeal from the Judgment of Their Lordships of the Court of Appeal delivered on 19.11.2013 in C.A. Writ Application No. 974/2008.

S.C. Appeal No: 98/2015	Miramara Beach Hotel PLC, No. 137, Vauxhall Street, Colombo 02.
SC/CA/SPL/LA/Application No:	**PETITIONER**
312/2013	**Vs.**
CA Writ Application No: 974/2008	1. People's Bank, No. 75, Sir Chittampalam A. Gardiner Mawatha, Colombo 02.
	2. The Sri Lanka Tourist Board, No. 80, Galle Road, Colombo 03.
	3. The Monetary Board of Sri Lanka, No. 30, Janadhipathi Mawatha, Colombo 01.
	RESPONDENTS

AND NOW BETWEEN

1. People's Bank,
No. 75, Sir Chittampalam A.
Gardiner Mawatha,
Colombo 02.
1st RESPONDENT-APPELLANT

Vs.

Miramara Beach Hotel PLC,
No.137, Vauxhall Street,
Colombo 02.
PETITIONER-RESPONDENT

2. The Sri Lanka Tourist Board,
No. 80, Galle Road,
Colombo 03.

3. The Monetary Board of Sri Lanka,
No. 30, Janadhipathi Mawatha,
Colombo 01.
2nd and 3rd RESPONDENT-RESPONDENTS

Before : Mahinda Samayawardhena, J.

: Menaka Wijesundera, J.

: Sampath B. Abayakoon, J.

Counsel	:	Kushan D' Alwis, P.C., with Milinda Munidasa and Missaka Munasinghe instructed by Deepika Premadasa for the 1st Respondent-Appellant.
	:	Kuvera De Zoysa, P.C., with Randeewari Arangala instructed Mayomi Ranawaka for the Petitioner-Respondent.
	:	Fazly Razik, D.S.G., instructed by Nimalika Wickramasinghe, S.S.A., for the 2nd and 3rd Respondent-Respondents.
Argued on	:	05-05-2026
Written Submissions	:	26-10-2016 and 30-06-2026 (By the Petitioner-Respondent)
	:	07-08-2015 and 30-06-2026 (By the 1st Respondent-Appellant)
Decided on	:	07-09-2026

Sampath B. Abayakoon, J.

This is an appeal preferred by the 1st respondent-appellant (hereinafter referred to as the 1st respondent) on being aggrieved by the judgment dated 19-11-2013 pronounced by the Court of Appeal.

From the impugned judgment, the Court of Appeal, having considered a writ application preferred by the petitioner-respondent (hereinafter referred to as the petitioner), issued writs in the nature of writ of certiorari, quashing the decision taken by the Board of Directors of the 1st respondent bank by way of a bank as shown in the document marked P-11, and also issued mandates in the nature of writ of mandamus directing the 1st respondent bank to grant the concessions made available to the petitioner by way of documents marked P-04(a) to P-04(e) and P-10.

When this matter was considered on 09-06-2015 before this Court for the purpose of granting special leave to appeal, leave was granted on the questions of law as set out in paragraph 12(a) to (j) of the petition dated 20-12-2013.

The said questions of law read as follows -

> 12. (a) Have Their Lordships of the Court of Appeal erred in law in interpreting that the loan granted to the Petitioner-Respondent by the 1st Respondent-Appellant is not a loan within the meaning of Section 29 of the People's Bank Amendment Act No. 32 of 1986 as amended?
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> (b) Notwithstanding the default on the part of the Petitioner-Respondent, have Their Lordships of the Court of Appeal erred in law in holding that the 1st Respondent-Appellant is not entitled to proceed in terms of Section 29D of the People's Bank Act as amended by Act No. 32 of 1986 in view of the Refinance Agreement marked '1R1' by the 1st Respondent-Appellant?
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> (c) Have Their Lordships of the Court of Appeal erred in law in taking into consideration the doctrine of the legitimate expectation in granting the Petitioner-Respondent the relief prayed for in prayer (c), (d), and (e) of the Petition, notwithstanding the Petitioner-Respondent executing Mortgage Bond bearing Nos. 754 and 3687 dated 08.11.2005 and 25.04.2006 attested by Ms. I.D.H.L. Perera and Ms. M. Nandani Perera Notaries Public respectively in favour of the 1st Respondent-Petitioner and thereafter defaulted on making payments thereof?

(d) Have Their Lordships of the Court of Appeal failed to take into consideration that the 1st Respondent-Appellant remains liable to the Central Bank as its debtor for the due payment of the Refinance Loan whether or not the Petitioner-Respondent has fulfilled its obligation to the 1st Respondent-Petitioner in terms of the loan granted by the 1st Respondent-Appellant to the Petitioner-Respondent?

(e) Have Their Lordships of the Court of Appeal erred in law that the documents marked P4(a) to (e) and P10 disentitled the Board of Directors of the 1st Respondent-Appellant to sell by public auction in terms of section 29D of the People's Bank Act as amended by Act No. 32 of 1986, the property mortgaged to the 1st Respondent-Appellant by the Petitioner-Respondent in terms of the mortgage bonds bearing Nos. 754 and 3687 dated 08.11.2005 and 25.04.2006 attested by Ms. Ms. I.D.H.L. Perera and Ms. M. Nandani Perera Notaries Public respectively?

(f) Have Their Lordships of the Court of Appeal erred in law in holding that the Petitioner-Respondent is not guilty of willful suppression and/or misrepresentation of material facts and documents in light of the averments contained in the petition of the Petitioner-Respondent?

(g) Have Their Lordships of the Court of Appeal erred in law in failing to dismiss the application of the Petitioner-Respondents for prerogative Writs on the ground that the Petitioner-Respondent has failed to act with *uberrima fides* towards Court?

(h) Have Their Lordships of the Court of Appeal erred in law in failing to take into consideration that in any event, the purported relief sought for by the Petitioner-Respondent could not have been granted since necessary parties are not before Court?

(i) Is the 1st Respondent-Petitioner entitled in law to proceed with the provisions of section 29D of the People's Bank Amendment Act No. 32 of 1986 in view of the default on the part of the Petitioner-Respondent?

(j) If so, is the finding of Their Lordships of the Court of Appeal contained in the judgment marked 'X10' with the petition contrary to law?

At the hearing of this appeal, this Court heard the submissions of the learned President's Counsel who represented the 1st respondent and that of the learned President's Counsel who represented the petitioner. This Court also heard the submissions of the learned Deputy Solicitor General (DSG) who represented the 2nd and 3rd respondents, namely The Sri Lanka Tourist Board and The Monetary Board of Sri Lanka. At the conclusion of the arguments, all parties were permitted to file post-argument written submissions, if they so wish, in addition to the pre-argument written submissions for the consideration of Court.

The Facts

The petitioner filed this writ application before the Court of Appeal by the petition dated 28-11-2008 seeking writs in the nature of certiorari and mandamus against the 1st respondent, namely the People's Bank, and the other two respondents named in the petition.

The petitioner is a company that owns the hotel called Kosgoda Beach Resort. The said hotel had been severely damaged due to the tsunami that struck the island on 26-12-2004. Admittedly, the petitioner has received a sum of Rs. 64,500,000/- from its insurers for the damages caused, and has begun the reconstruction process of the hotel.

In October 2005 and March 2006, the petitioner has obtained loans from the 1st respondent for a sum of Rs. 40,000,000/- and Rs. 10,000,000/- respectively under the Susahana Loan Scheme. This was a special loan scheme initiated by the 3rd respondent, The Monetary Board of Sri Lanka, with a special rate of interest under the supervision of the Central Bank in order to assist the tsunami affected small and medium-scale enterprises.

As acknowledged, the petitioner has defaulted on the re-payment of the said loan installments as agreed upon with the 1st respondent bank. It has been the allegation of the petitioner that the 1st respondent bank, acting in contravention of the concessions granted to the petitioner, passed a resolution to sell by public auction the property mortgaged in order to obtain the loan.

The relevant averment 16 of the petition filed before the Court of Appeal reads as follows -

> 16. In light of the above, none of the above concessions were granted to the petitioner by the 1st respondent. Further, in contravention of the operating instructions marked P-04(a) to P-04(e) and the circular marked P-10(a), the 1st respondent passed a resolution in terms of section 29D of the People's Bank Act No. 29 of 1961 at a meeting of the board of directors to auction the property morefully described in the schedules of the said mortgage bonds.

The position of the petitioner had been that the money granted as a loan by the 1st respondent bank was not from the funds of the bank, but from the funds allocated by the 3rd respondent, The Monetary Board of Sri Lanka, for the purpose of the earlier-mentioned Susahana Loan Scheme. On the basis of the alleged failure by the 1st respondent bank to act under the reliefs provided by the document marked P-10(a) and also on the basis that the petitioner had a legitimate expectation of being granted such reliefs, failing which the petitioner and the other public shareholders will suffer irreparable loss and damage, the petitioner has sought the reliefs as prayed.

After having heard the parties, the Court of Appeal, by the impugned judgment, has determined that although the 1st respondent's argument that the petitioner misrepresented facts to Court could be correct, that seems to be a careless mistake which does not amount to a willful suppression of facts, and the petitioner cannot be held liable for deception.

It has been determined that section 29 of the People's Bank Act applies only in relation to the loans granted by the bank out of its own funds, and since the loan granted to the petitioner was from a fund allocated by the 3rd respondent for the purpose of a special loan scheme, the said section cannot be made use of by the bank to auction off the property mortgaged as a security for the loan.

It has also been determined that there was no agreement between the 3rd respondent who provided the funds and the 1st respondent, that the 1st respondent can resort to the provisions of section 29D of the People's Bank Act, and accordingly, the security provided by the borrower had to be held in trust for the 3rd respondent.

For matters of clarity, I would now reproduce the relevant portions of the Court of Appeal judgment, which reads thus -

> *"The above section would no doubt in all circumstances and situation apply where the Bank which is the <u>People's Bank grant loans</u> or other facilities stated there in as section 29(1). There is no doubt that on a perusal of the refinance agreement and the other documents relied upon by the petitioner indicate that the loan had been made available by the 3rd respondent, the Monetary Board of the Central Bank. There is no dispute that the money granted by the 1st respondent was from and out of the fund allocated by the 3rd respondent for the purpose of the Susahana loan scheme, and not out of the funds of the People's Bank. The refinancing agreement 1R1, the 3rd respondent agreed to grant the 1st respondent with a loan for the purpose of providing sub loans to those affected by the tsunami of 26th Dec. 2004. We have also been made aware of the following clause 4.8 in 1R1. The Participatory Financial Institution agrees that as on and from the date of this Agreement and for so long as the refinance or any part thereof remains outstanding and owing to the Central Bank it holds and will continue to hold in trust for the Central Bank all securities, goods and items forming security and security documents obtained to it from the sub-borrower and all other*

securities, goods and items forming security and security documents which the Participatory Financial Institution may take thereafter from the sub borrower in respect of loans and shall deal with the same as the Central Bank may direct…"

"There is no authority placed before this Court that the 3rd respondent agreed with the 1st respondent that statutory steps could be taken under section 29(D) of the People's Bank Act. No doubt the arrangement between two organs of the state the 1st and 3rd respondents contemplate a refinancing transaction and the security provided by the borrower had to be held in trust for the 3rd respondent."

Having determined as above, the Court of Appeal has come to a finding that it was the 3rd respondent named in the petition who played the pivotal role in relation to this transaction although there was no representation on its behalf in the Court. It has been determined that the money lent by the 1st respondent bank was not money belonging to it, but allowed by the 3rd respondent to use for the special loan scheme, and hence, the bank cannot resort to the provisions of section 29 of the People's Bank Act.

It was also held that since the security provided by the borrower had to be held in trust for the 3rd respondent and since there was no proof that the 3rd respondent agreed to allow the 1st respondent bank to proceed under section 29D, the actions of the 1st respondent bank were *ultra vires* and therefore, invalid. It has been determined that in view of the special concessions granted to tsunami affected industries, the actions of the 1st respondent bank were highly unreasonable, arbitrary and/or capricious when it decided to proceed under *parate* execution.

It has been observed that it can be argued that the documents marked P-04(a) to P-04(c) and P-10(a) and (b), which were directives in relation to the granting of concessions to the affected industries, are not legally enforceable documents to attract a writ of mandamus. However, it has been held that the Court can give due consideration regarding the purpose of those documents and has the power to remedy the injustices caused to the petitioner by issuing writs of mandamus in relation to the said documents.

Considering the doctrine of legitimate expectation, the Court has cited the observations made by **Dr. Ranaraja, J.** in the case of **Multinational Property Development Ltd Vs. Urban Development Authority (1996) 2 SLR 51**, where it was held;

> *"In the public law field, individuals may not have strictly enforceable rights but they may have legitimate expectations. Such expectations may stem either from a promise or representation made by a public body…Decisions affecting such legitimate expectations are subject to judicial review."*

On the above basis, the Court of Appeal has proceeded to determine that the petitioners before the Court had a legitimate expectation that they would be granted special concessions in relation to the loans obtained by them. Hence, since the 1st respondent bank has acted contrary to the said expectations, the petitioner is entitled to the remedy of certiorari and mandamus as prayed for in the petition, which has resulted in issuing the same as per sub-paragraph (c), (d), (e) of the prayer to the petition.

Consideration of The Questions of Law and The Conclusion

This Court allowed 10 questions of law as set out in paragraph 12 of the petition for determination at the hearing of this appeal. I find that some of the questions of law are mere repetitions, although the said questions have been put forward in a different context. Having considered the relevant questions of law, I find that the questions of law allowed need to be considered under the following headings.

1. Whether the Court of Appeal erred in law when it determined that the suppression or misrepresentation of facts and documents before the Court by the petitioner does not amount to misrepresentation as to the material facts since it was obvious to the Court that those

were careless mistakes which have not caused prejudice to parties. (Questions of Law (f) and (g))

2. Whether the Court of Appeal erred in law in the manner the Doctrine of Legitimate Expectation was considered in favor of the petitioner. (Question of Law (c))
3. Whether the Court of Appeal erred in law in interpreting the provisions of section 29 of the People's Bank Act, determining that the 1st respondent bank cannot proceed under the said section since the money lent by it to the petitioner does not belong to the bank, and there was no agreement between the 1st respondent and the 3rd respondent who provided the money to the 1st respondent bank that it can proceed in terms of section 29. (Questions of Law (a), (b), (e) and (i))
4. Whether the Court of Appeal failed to take into consideration the provisions of the refinance agreement between the 1st respondent bank and the 3rd respondent in the correct perspective when allowing the writs sought by the petitioner. (Question of law (d))
5. Whether the necessary parties were before the Court of Appeal when the writs sought by the petitioner were granted. (Question of Law (h))

It was undisputed that the petitioner sought the financial facilities as mentioned in the petition in order to rebuild the hotel which was damaged due to the tsunami. This was under a special loan scheme made available with the directions of the Central Bank of Sri Lanka and the 3rd respondent mentioned in the petition before the Court of Appeal.

After having obtained Rs. 40,000,000/- and Rs. 10,000,000/- respectively as loans, and agreeing to repay the same under the conditions agreed upon with the 1st respondent bank, admittedly, the petitioner has defaulted, which has resulted in the 1st respondent bank taking action as provided for in terms of section 29 of the People's Bank Act.

In the petition filed before the Court of Appeal, the petitioner has claimed that the 1st loan amounting to Rs. 40,000,000/- was granted to it by the 1st respondent bank prior to signing the loan agreement dated 18-11-2005. However, the 1st respondent bank has brought to the attention of the Court that the account statements marked P-05(c) to P-05(q) by the petitioner in itself show that there was no entry relating to such a payment before the agreement. It has been submitted by the 1st respondent bank that the said loan was released in three stages, whereas the petitioner has failed to disclose that fact to the Court. It has also been the contention of the 1st respondent bank that the petitioner willfully suppressed material from the Court by failing to produce operating instruction marked P-04(e), whereas the petitioner has claimed that the said document was pleaded as part and parcel of the petition.

It appears from the judgment of the Court of Appeal that the said omissions have been considered irrelevant when considering the application of the petitioner. It appears that the Court has only proceeded to consider the document marked P-04(a) to P-04(d), without giving its mind to the fact that the petitioner has pleaded another document apparently marked as P-04(e), but has failed to produce the same in order to rely on the said operating instructions relating to the loan facility granted to it by the 1st respondent in seeking discretionary remedy of writ from the Court of Appeal.

It is well settled law that a party who comes before a Court seeking a discretionary remedy must disclose all material facts fully and frankly so that the Court can determine the matter.

In the case of **Blanca Diamonds (Pvt) Ltd. Vs. Wilfred Van Else and Others (1997) 1 SLR 360 at page 362**, **Jayasuriya, J.** observed as follows;

> "*In filing the present application for discretionary relief in the Court of Appeal Registry, the petitioner company was under a duty to disclose uberrima fides and disclose all material facts to this Court for the purpose of this Court arriving at a correct adjudication of the issues arising upon this application. In the decision in Alponso Appuhamy Vs. Hettiarachchi 77 NLR 121, Justice Pathirana, in an erudite judgment, considered the*

landmark decisions on this province in English Law and cited the decisions which laid down the principle that when a party is seeking discretionary relief from this Court upon an application for a writ of certiorari, he enters into a contractual obligation with the Court when he files an application in the Registry and in terms of that contractual obligation he is required to disclose uberrima fides and disclose all material facts fully and frankly to this Court."

In the above-mentioned case of **W.S. Alphonso Appuhamy Vs. L. Hettiarachchi (supra)**, it was held;

> "*When an application for a prerogative writ or an injunction is made, it is the duty of the petitioner to place before the Court, before it issues notice in the first instance, a full and truthful disclosure of all the material facts; the petitioner must act with uberrima fides.*"

The 1st respondent bank has raised objections as to the maintainability of the application before the Court of Appeal, claiming that the petitioner has failed to disclose full material facts required for the Court of Appeal to come to a finding as to the application before the Court.

Although the Court of Appeal has determined that the petitioner has failed to submit the correct picture as stated by the 1st respondent, such error has been attributed to a careless mistake or misstatement of facts, rather than to any willful suppression of material facts.

However, I find that the petitioner has filed this application before the Court of Appeal in order to prevent the auctioning of the property it mortgaged as security for two loans, where the petitioner has admittedly defaulted the loan. Therefore, it is my considered view that on the face of the said admission, any application for a prerogative writ in order to prevent the respondent bank from exercising its legal rights has to be carefully considered, and the party who seeks the writ must place sufficient material facts before the Court in that regard.

The petitioner in the petition dated 28-11-2008, although has admitted that it took two loans for a sum of Rs. 40,000,000/- and 10,000,000/- respectively, has only produced the loan approval letter dated 18-11-2005 in relation to the loan facility for Rs. 40,000,000/-. It is apparent from the said letter that the loan has been approved requiring the petitioner to repay the same in 47 monthly installments of Rs. 834,000/- and one installment of Rs. 802,000/- inclusive of the interest. However, the petitioner has failed to disclose the conditions under which the other loan of Rs. 10,000,000/- was granted and what was the monthly installment that was required to be paid. According to the petition, the 1st loan had been obtained in October 2005, while the 2nd loan had been obtained on 23-03-2006 (paragraph 10 of the Court of Appeal petition).

It is quite clear from the petition that the petitioner's claim for prerogative writs had been based on the alleged loan agreements and the mortgage bonds obtained as security for the said loan agreements.

In my view, it was paramount for the petitioner to produce the said mortgage bonds before the Court. Although the petitioner has given the details of the said mortgage bonds, it had been claimed that the copies of the said bonds are not available with the petitioner and the originals are in the custody of the 1st respondent bank. This appears to be an excuse that cannot be accepted since the said documents are notarial executed and land registry registered documents, where copies can be obtained without any hassle. I find no reason to accept that a person who obtained Rs. 50,000,000/- in total, pledging the property owned by that person who obtained the loan as security, will not obtain copies of the mortgage bond entered between the borrower and the grantor of such a loan.

In paragraph 14 of the petition before the Court of Appeal, the petitioner has averred that as of 01-07-2008, it had repaid Rs. 11,500,000/- as capital and interest. In my view, it was the duty of the petitioner to fully disclose to the Court what was the amount due in relation to the two separate loans and how and when the claimed Rs. 11,500,000/- was paid to the 1st respondent bank.

It is also my view that under the circumstances, it was the duty of the petitioner to produce sufficient material to establish before the Court that the 1st respondent bank acted in violation of the special reliefs scheme under which the loans were obtained and granted to justify the application for writs in the nature of certiorari and mandamus.

I am of the view that the Court of Appeal has failed to give due weight to the 1st respondent's contention that the petitioner has failed to disclose material facts in full, enabling the Court to come to its decision.

Be that as it may, since the Court of Appeal has proceeded to grant the writs sought, I will now proceed to consider whether the said decision can be justified in the context of the material placed before the Court of Appeal by the petitioner and also the objections raised in that regard by the 1st respondent.

In his post-argument written submissions, the learned President's Counsel appears to have heavily relied on the claim that the petitioner had a legitimate expectation that it would be granted concessions in relation to the defaulted loans on the basis of the documents relied on by the petitioner, namely P4(a) to P4(e), P10(a) and P10(b). It appears that the petitioner is contending that even when the loan was granted, it was not in accordance with the special scheme under which it was granted, where special concessions as to the rate of interest, grace period, etc. have been mentioned.

It is abundantly clear from the judgment of the Court of Appeal that the Court has considered the doctrine of substantive legitimate expectations in favour of the petitioner to hold that the 1st respondent bank had violated such legitimate expectations, holding that the bank has failed to follow the specific instructions given by the Central Bank in relation to the considered loan disbursement and its recovery.

However, the documents that were made available to the Court clearly demonstrate that it was not so. As I have considered earlier, there is no document as P-04(e) that has been produced, and hence, there was no basis before the Court of Appeal to consider a document which was not before the Court.

In the operating instructions as to the conditions upon which sub-loans should be granted to such industries from the money allocated by the Central Bank of Sri Lanka for the purpose of granting relief to affected industries enabling them to recommence their businesses, it has laid down the rate of interest, grace period, repayment period, and how the other basic requirements should be met, apart from the conditions under which the approved Participating Financial Institutions (PFIs) could be granted access to the fund created for the credit period.

Although it has been claimed that the 1st respondent bank violated the said conditions when it entered the loan agreement with the petitioner, I find no basis to agree with such a contention. The sub-loan has been granted at the rate of interest authorized by the Central Bank, giving the maximum grace period that could be allowed. The repayment conditions have also been within the limits, and it is very much clear that the bank has been very much mindful of the nature of the project for which the sub-loan was obtained by the petitioner. I find there was no acceptable basis to consider that the 1st respondent bank violated any legitimate expectation of the petitioner as the borrower in relation to the conditions under which the two loans were granted. The other documents marked P-04(b), (c) and (d) do not provide any basis for a legitimate expectation in favor of the petitioner.

In my view, a person who admittedly defaulted on loans granted to him/her on special concessionary rates cannot claim that he/she had any legitimate expectation that a borrower should give further concessions or stop demanding that the loan agreement should be honoured, which appears to be the contention of the petitioner.

The documents marked P-10(a) and P-10(b) are not documents exchanged between the 1st respondent or the relevant division of the Central Bank that provided funds to the 1st respondent bank under given specific conditions as to how they should be utilized. Even if the document marked P-10(b) is to be considered somewhat relevant, it should be considered as a document that is applicable to a party who has made an attempt to pay the required loan installments regularly, which was not the case in relation to the petitioner. For the petitioner to claim that it had any expectation that the recovery of the loan would be delayed further, it was the duty of the petitioner to show at the minimum, that it attempted continuously to settle the loans by making at least some payments regularly, although it may not have been the monthly repayment agreed upon.

For the reasons as considered above, I find no merit in the arguments based on the alleged legitimate expectations of the petitioner.

Having come to the above conclusions, I will now proceed to consider whether the Court of Appeal has given a correct interpretation as to the provisions of sections 29(1) and 29D of the People's Bank Act and also in determining that it has no applicability to the loan granted to the petitioner.

The relevant sections 29(1) and 29D of the People's Bank Act as amended read as follows -

> **29. (1) Where default is made in the payment of any sum due on any loan, overdraft, advance or other accommodation granted by the Bank on the mortgage of movable or immovable property, whether that sum is due on account of principal or interest or both, default shall be deemed to have been made in respect of the portion that remains unpaid of that loan, overdraft, advance or other accommodation and the interest due thereon upto date of default.**
>
> **(2) Any instrument to secure a loan by the Bank may provide that if the borrower fails or neglects to pay, on the due date, the instalment and interest or to make the equated or other payment, as the case may be, then due in respect of the loan, then interest shall be payable on the loan at such rate in excess of that at which the loan has been granted as may be prescribed:**

Provided, however, that the Board may, in its absolute discretion, waive the payment of interest at the prescribed rate referred to in the preceding provisions of this section, and may, in lieu thereof, determine that interest up to double the agreed rate shall be payable on the instalment in default, for the period commencing on the date on which the instalment was due and ending on the date on which the instalment was paid.

29D. Subject to the provisions of section 29E, the Board may by resolution to be recorded in writing authorize any person specified in the resolution to sell by public auction any immovable or movable property mortgaged to the Bank as security for any loan in respect of which default has been made in order to recover the whole of the unpaid portion of such loan, and the interest due thereon up to the date of the sale, together with the moneys and costs recoverable under section 291, and thereafter it shall not be competent for the borrower or any person claiming through or under any disposition whatsoever of the right, title or interest of the borrower to and in the property made or registered subsequent to the date of the mortgage to the Bank, in any court to move to invalidate the said resolution for any cause whatsoever, and no court shall entertain any such application.

It is clear from the judgment that the view of the Court of Appeal has been that, in terms of section 29(1) of the Act, the People's Bank can only proceed to recover loans granted by utilizing its own money by resorting to the provisions of section 29D. Accordingly, it has been determined that the sum granted as a loan by the 1st respondent Bank was not out of the bank's own funds, but out of the funds provided by the 3rd respondent, namely, The Monetary Board of the Central bank. In my view, this was a very narrow interpretation given to the relevant sections in order to suit the application before the Court, whereas it should not have been.

There was ample evidence before the Court to satisfy itself that although the sum that was granted as a loan to the petitioner has been from a fund allocated by the Central Bank in order to create a special loan scheme as considered above, it was the 1st respondent bank that has granted the loan in terms of the statute under which it can disburse such a loan.

The evidence has clearly provided that the Central Bank has granted funds after entering into a specific refinancing agreement between The Monetary Board of the Central Bank and the 1st respondent bank as the participatory financial institution. It is clear that the funds allocated have been distributed among the PFIs in the form of a loan with specific operating instructions as to how and what manner the said allocated loan sums can be distributed as sub-loans to the intended parties. The said agreement has provided strict instructions that should be adhered to by the relevant PFIs and has required the PFIs to repay the sums allocated to it at a rate of 3% per annum and also with a specific time period under which it should repay the refinance loan to the Central Bank.

The agreement clearly provides that for all intended purposes, the PFI who obtained the refinance loan from the Central Bank shall remain a debtor to the Central Bank until the loan is fully repaid with interest. It has also provided for the manner under which the security should be taken from the borrower to secure the sub-loan the said borrower obtained from the PFI. The agreement provides that it should be the PFI that should take the whole responsibility of recovering the sub-loan granted by it to a party entitled to receive the said loan under concessionary terms, and whether the said PFIs fail to recover the loan or not, it is the responsibility of the PFI to repay it to the Central Bank as agreed.

It needs to be noted that the 1st respondent bank, which is a licensed commercial bank, is bound by the laws of the country, specifically the People's Bank Act under which it has been established. It is clear that when the petitioner obtained the relevant loans from the 1st respondent bank, it had agreed to abide by the terms and conditions of the loan agreement. The document marked P-06, which is one of the loan agreements, clearly establishes the said fact.

In my view, since it is an admitted fact that the petitioner defaulted on the repayment of the sub-loan as agreed, the 1st respondent bank is legally entitled to act under the terms of the statute that govern it. I find no basis to agree with the narrow interpretation given by the Court of Appeal in this regard.

The Court of Appeal has determined that the refinance agreement marked 1R1 does not specifically give power to the 1st respondent bank to act under section 29D of the People's Bank Act, and hence, any defaulted amount cannot be recovered under the said provisions. I find no justification for such a determination under any circumstances. It is clear from the refinance agreement entered between the Central Bank and the 1st respondent bank that by allocating funds to the 1st respondent, the Central Bank has not intended to create any hindrance to any of the PFIs as to the recovery process of the sub-loans granted using the funds made available. If it was the intention of the Central Bank that the sub-loans should not be recovered from a defaulter in accordance with the normal banking practices, the refinancing agreement should have given specific instructions in that regard. It is clear from the agreement as well as the operating instructions marked P-04(a), the purpose has been to grant special concessions to tsunami affected industries under the lowest possible rates of interest and under special grace periods, so that such industries can recover from the damages suffered as a result of the tsunami.

It is clear that licensed commercial banks like the 1st respondent bank cannot afford to grant loans on such low interest rates as they are duty bound to provide higher interest rates to the depositors who invested their money with the bank hoping for a good return. If they are to provide loans under interest rates less than the interest rates they pay for the depositors, undoubtedly it will contribute to heavy losses to such financial institutions. That is the very reason why the Central Bank has intervened and has provided funds to the

PFIs at a low interest rate of 3% per annum requiring them to disburse the said funds as sub-loans at a fixed rate of 6% per annum. However, it is very much clear that the default interest that can be charged from a defaulter should not be the same.

It is therefore abundantly clear to me that, if a Court of law is to determine that a loan granted by the 1st respondent bank, although under special concessionary terms cannot be recovered acting in terms of section 29D and other relevant provisions of the People's Bank Act, it would lead to a situation of absurdity where the bank would not be able to recover the sub-loan from the defaulter. At the same time, the bank is required to repay the fund allocated to it for the purpose of granting sub-loans at the given interest rate to the Central Bank, which in turn would have to be from their own funds. Such a situation would lead to losses to the PFI as in this case.

For the reasons as considered above, I am of the view that the Court of Appeal has failed to consider the facts relating to this case in the correct perspective and has failed to give a proper interpretation to the agreements between the 1st respondent bank and the 3rd respondent, namely The Monetary Board of the Central Bank.

Another matter that concerns me is the determination by the Court of Appeal that the securities agreed upon between the 1st respondent bank and the borrower, namely the petitioner, in the form of two mortgage bonds should be held by the 1st respondent bank in trust for the 3rd respondent, and therefore, the 1st respondent bank is not entitled to take any action in relation to the two mortgage bonds provided as security. I find that this was a wrong interpretation given to the refinance agreement marked 1R1.

For matters of clarity, I would now reproduce the relevant section 4.8 of the Refinance Agreement, which reads thus -

> **4.8 The Participatory Financial Institution agrees that as on and from the date of the agreement and for so long as the refinance or any part thereof outstanding and owing to the Central Bank it**

holds an will continue to hold in TRUST for the Central Bank al securities, goods and items forming security and security documents obtained by it from the sub-borrower and all other securities, goods and items forming security and security documents which the Participatory Financial Institution may take thereafter from the sub-borrower in respect of loans and shall deal with the same as the Central Bank may direct.

The careful reading of the said sub-section clearly provides that this refers to a situation where as long as the sum granted by the Central Bank to the PFIs for the purpose of granting sub-loans under the scheme remains unsettled to the Central Bank, and not to a situation where the borrower defaults on the sub-loan that should be paid to the PFI.

For the reasons as considered, I am of the view that the Court of Appeal erred as to the facts and the relevant law when it was decided that the reliefs should be granted to the petitioner as prayed for and in issuing mandates in the nature of a writ of certiorari and a writ of mandamus.

In view of the above, I find it unnecessary to consider any further whether the petitioner has failed to name the necessary parties before the Court of Appeal, since the Court of Appeal judgment should in any way stand set aside.

Accordingly, I answer the questions of law (a), (b), (c), (d), (e), (f), (g), (i), and (j) in the affirmative. The question of law (h) is answered as not considered in view of the affirmative answers provided for the other questions of law.

Accordingly, the judgment dated 19-11-2013 pronounced by the Court of Appeal is hereby set aside and the application preferred to the Court of Appeal by the petitioner is dismissed.

The appeal preferred by the 1st respondent is allowed.

The parties shall bear their own costs.

Judge of the Supreme Court

Mahinda Samayawardhena, J.

I agree.

Judge of the Supreme Court

Menaka Wijesundera, J.

I agree.

Judge of the Supreme Court