

IN THE HIGH COURT OF SINDH AT KARACHI

C.P. NO.S-291 of 2021

Petitioner : Hammad Sheikh,
through Mr. Rajender advocate,

Respondents : Senior Superintendent of Police, East, Karachi, and
others,
Through Mr. Adnan Memon advocate for
respondents No.3, 4 and 5.

Date of hearing : 21.05.2021.

Date of announcement: 28.05.2021.

J U D G M E N T

SALAHUDDIN PANHWAR, J. Through instant petition, the petitioner

Hammad Sheikh has sought for following relief (s):-

- 1) Restrain the Respondents No.1 & 2 from arresting the petitioner without permission of this Honourable Court;
- 2) Restrain the respondents No.1 & 2 from registering any FIR against the petitioner on the basis of the fake complaints of the private respondent without permission of this Honourable Court and may take legal action against private respondents for their illegal and unlawful acts, as per law;
- 3) To direct respondent No.3 not to wrongfully restrain the petitioner from excess / entering into this classic Danim Mills being joint property;
- 4) To grant any other relief as Hon'ble Court deems proper, fit and necessary in prevailing circumstances of the matter;

The background, for pleading said relief (s), per petition, are that petitioner started his business in the name & style of "CLASSIC DENIM MILLS", a registered Partnership Firm bearing No.2002/08 (comprising upon 04 Partners) at Plot NO.14, Sector 20, Korangi Industrial Area Karachi which partnership was registered with Registrar of Firms for Karachi in September, 2002. Said Mills, hereinafter, be referred to as '**the Mills**'. The Partners

purchased all lease hold rights in the Industrial plot of land; later with consent of all four partners the status of firm was changed from partnership firm to Private Limited Company however, plot still exists in name of the partnership firm, being its title holder. To meet business requirements, the petitioner along with other partners availed financial facilities by mortgaging property along with all fittings, fixtures, machines etc from M/s Soneri Bank Ltd. Korangi Industrial Area Branch. The petitioner intended to set up spinning unit but failed because of financial losses which also resulted in litigation by various financial institutions, including Soneri Bank Ltd. Respondent no.3, being brother of petitioner, approached him and agreed to rescue and invest so that unit could be run at its full capacity as well agreed to pay all outstanding liabilities of the **the Mills** to M/s Soneri Bank Ltd., other private creditors from his personal overseas assets and reimbursement of petitioner's share on actual basis subject to transfer of assets of **the Mills** in his favour after payment of entire outstanding liabilities. Per petitioner, it was also agreed that regular income of **the Mills** shall also be adjusted towards decree and share of the petitioner shall be reimbursed on actual basis after adjustment of entire liabilities of **the Mills** but prior to recording change of management of **the Mills**. Being assured, the petitioner approached Soneri Bank for amicable settlement; entered into settlement agreement in Suit No.B-71 of 2008, filed by Bank for recovery of rs.402.871 Millions along with Mark-up, cost of fund with prayers for sale of mortgaged property and hypothecated assets which was decreed on 27.8.2015.

2. It is further pleaded that respondent No.3 despite promise and assurances not only failed to invest and run said unit on its full capacity but

also failed to pay decretal amount in terms of compromise decree, so also failed to pay liabilities of **the Mills** to financial institutions and private creditors from his personal assets as was agreed, rather respondent no.3 illegally sold out various hypothecated assets of **the Mills** for millions and collected rent of open plot at Rs.2,500,000/- per month since December 2015 and adjusted the said amount towards partial satisfaction of decree on his own accord and on the other hand the respondent no.3 kept the petitioner on false hopes and instead of adjustments against decree mismanaged, misappropriated and misused the regular income of **the Mills** for his personal gain since 2015. In terms of promises and assurances the respondent no.3 was required to pay upto 31.12.2020 an amount of rs.397.257 (M) to M/s Soneri Bank Ltd. in terms of compromise decree but he paid only Rs.110,285,825/- to Soneri Bank which amounted default under clause NO.5 of compromise decree but Bank neither informed petitioner about default nor filed execution application for satisfaction of decree rather in collusion with respondent no.3 had filed on 05.8.2019 an application Under Order 23 Rule 3 R.W Section 151 CPC for amendment in compromise decree. Respondent no.3 in active collusion and connivance with Bank got shares illegally transferred in month of April 2019 from SECP in his favour and in favour of his nominee despite existing charge duly registered with SECP in violation of section 23 (2) of Financial Institutions (Recovery of Finances) Ordinance, 2001 and clause No.6 of compromise decree, passed in Suit No.B-71 of 2008 as well written objection dated 21.02.2017 filed by one of the partner available on record of SECP without affording an opportunity of hearing in derogation of settled principles of law. Respondent Nos.3 to 5 in collusion and league with each other have mismanaged and

misappropriated the funds of **the Mills** and have also opened fake / ghost accounts with banks in name of **the Mills** in violation of law for personal gain. The respondent no.3, per petitioner, also inserted fake liabilities of **the Mills** in Share Sale / Purchase agreements which, in fact, executed much after passing of decree in Suit No.B-71 of 2008 for sake of satisfaction of respondent no.3. The respondent NO.3 himself filed statement along with affidavits on 18.4.2016 in Suit No.B-71 of 2008 which clearly shows that the securities were to be transferred after payment of entire liabilities. Value of **the Mills** was shown Rs.1,410,500,000/ as on 11.08.2015 as determined by M/s M.J Surveyors Pvt. Ltd but in Share Sale / Purchase agreements the value of each share was determined @ Rs.0.10 per share contrary to its actual value.

3. The petitioner further pleaded that respondent no.3 mala fide approached to respondent no.2 filed bogus written complaint against petitioner and also has deputed his personal guards at factory Gate for restraining , harassing, abusing petitioner. Due to fear of death the petitioner also approached to P.S Sharafi Goth reported the matter to respondent no.2 with request to take action against the respondent no.3 and his accomplices and to provide protection to petitioner and his family but without any action. The petitioner while claiming infringement of guarantee, provided by Articles4,9,24,25 & 35 of Constitution of Islamic republic of Pakistan, filed instant petition for said relief (s).

4. The respondent nos.1 and 2 through separate comments denied receipt of any application / complaint from any of the parties at PS Sharafi

Goth. They denied to have caused any harassment, however, assured providing legal help to petitioner.

5. The respondent Nos.3 to 5, having caused their appearances, filed para-wise comments. In comments, while challenging the maintainability of the petition, stated that petitioner had availed different finance facility from M/s Soneri Bank Ltd. but on account of economic condition failed to repay so Bank filed Suit NO.B-71 of 2008. The petitioner and respondent no.3 are real brothers so respondent no.3 was approached by petitioner to rescue. During pendency of suit matter was settled between petitioner and bank and was recorded vide order of this honourable court dated 27.8.2015. The petitioner, being unable to repay liabilities, entered into agreement with respondent no.3 vide Share Purchase Agreement dated 24.10.2012 & 21.9.2015 whereby sold out his shares to respondent no.3. It was further pleaded that because of huge financial losses **the Mills** resolved in meeting of Board of Directors on 28.9.2015 that shares be sold out to respondent no.3 and it was further resolved that respondent no.3 will be responsible for management of the company and shall also collect securities, title deeds of **the Mills**. Having resolved so, the petitioner entered thrice into Share Purchase Agreement with respondent no.3 and sold out 906685 shares to respondent no.3 on 24.10.2012 and again entered into share Purchase Agreement with respondent no.3 and sold out 234671 shares and lastly sold out 672,01. Having resolved so, the petitioner entered thrice into Share Purchase Agreement with respondent no.3 and sold out 906685 shares to respondent No.3 on 24.10.2012 and again entered into share Purchase Agreement with respondent no.3 and sold out 234671 shares and lastly sold

out 672,014 shares to respondent no.3 on 21.9.2015; such Shares Transfer Deeds were also executed in favour of respondent no.3 by the petitioner. Petitioner, having sold out his entire shares to respondent no.3 as well shifting his liabilities upon respondent no.3, swore an affidavit in Suit NO.B-71 of 2008 declaring that respondent no.3 will pay to Bank the balance amount and after payment the bank will transfer the security in name of respondent no.3. Having purchased shares, the respondent no.3 informed to SECP about change of directors of the company and in this respect Form '29 & Form 28' were submitted to SECP. Respondent no.3 launched a company with name and style of "Lala Private Ltd." and continuously making payment to Bank from account of such company. It was added that since petitioner admits sale of shares to respondent no.3 hence he (petitioner) should approach to civil court and for criminal grievance, if any, can file private complaint under Section 200 Cr.P.C.

6. Learned counsel for petitioner argued that petition is maintainable because the respondent no.3, per para-iv of para-wise comments, was / is responsible for the management of the company (**the Mills**) and undeniably at the time of execution of Sale Purchase Certificate Agreement the *Shares of* were hypothecated / pledged with M/s Soneri Bank Ltd which even is mentioned in such agreement as Term-1, therefore, such sale -purchase was not perfect but was / is subject to satisfaction of liabilities of petitioner. Till such time, the respondent no.3 was / is not legally justified and authorized to restrain the entry of petitioner couple with his right and authority to examine *management of the Mills* so that acts and omission of respondent no.3 may not prejudice the compromise decree, particularly when proper

management of **the Mills** was to bring benefits, so detailed in the compromise terms, mentioned as term No.4 as:

“4. The mark-up calculated from 31.08.2015 shall be kept separately, however, if the Defendants pay a sum of Rs.397,255 (Rupees: Three Ninety Seven Millions, Two Hundred Fifty Five thousands only) in a period of 3 years instead a period of seven years as specified in paragraph No.2 & 3 above, the plaintiff will accept the same as full and final payment and the plaintiff will waive Cost of the Suit and remaining cost of funds / mark-up both past and future.”

He added that when the consequences of failure in satisfying the decree was / is to be faced by the petitioner then till such time, the respondent no.3 legally can't take advantage of Sale-Purchase Agreement (s) particularly when the same also includes the term of referral to arbitration in case of any dispute / breach. He added that respondent no.3 and Bank *mala fide* rescheduled the facility though in existence of the *decree* it was not within competence of the Bank to enter into any such document or to reschedule the facility. He also pleads that petitioner was / is not being paid agreed share rather he (petitioner) is being restrained from his, *otherwise*, guaranteed rights which, *prima facie*, constitutes an act of **harassment** therefore, petition is maintainable *least* to extent of his right to pursue his rights towards his own property which is not limited but includes an entry and examination of management.

7. In rebuttal, learned counsel for the respondent Nos.3 to 5 that petitioner has an alternate remedy and Article 199 cannot be invoked without first availing the remedies, prescribed by law, thus petition is not maintainable and liable to be dismissed. He, while referring to factual controversies, contended that petitioner and respondent No.3 are real brothers; petitioner was in serious financial crises, so contacted respondent

no.3 to help him out. Being unable to continue, the resolution was passed in meeting of the Board of Directors and then petitioner entered into Share Purchase Agreements dated 24.10.2012 and 21.9.2015, so also executed Share Transfer Deeds, affidavit in Suit No.B-71/2008 in favour of respondent no.3. The petitioner, having sold his shares, shifted his liabilities upon respondent no.3 who (respondent no.3) intimated SECP about change of Directors of the company. Finally, he added that petitioner has concealed material facts; has approached with unclean hands and that petition appears to be one of harassment which can't be invoked for private persons hence the merits dismissal.

8. At the outset, it is material to mention here that while forming the Article 199(1)(b)(c) of the Constitution, the legislature has not confined the powers and jurisdiction of this Court but clothed this Court with an authority to issue appropriate directions to any **person** or **authority** if there is a denial to any of the **Fundamental Rights**. The deliberate use of the phrase '**any person**' in addition to words '**authority, including any Government**', itself shows that exercise in such like matter can well be exercised regardless the character and status of one which may be '**private**' or of '**an authority, including government**'. I may safely say that it is the duty of the Court to protect Fundamental Rights, guaranteed in the Constitution and Article 199 of the Constitution empowers this Court to issue any appropriate directions for the enforcement of Fundamental Rights, conferred by the Constitution in its Chapter-I of Part-II *even* against private persons. Reference is made to the case of Human Rights Commission of

Pakistan v. Govt. of Pakistan (PLD 2009 SC 507) wherein it was made clear by saying :

“33. ... We are therefore clearly of the view that the High Court has plenary powers to positively enforce fundamental rights not merely against public authorities but even private parties. Accordingly direction for positive enforcement of fundamental rights against private parties could only be given by the High Court in respect of rights guaranteed, inter alia, by Article 11, 22 etc, which might in most cases require enforcement against such parties.”

The petitioner, while referring to Articles 4,9,24,25 & 35 of Constitution, claimed infringement thereof, therefore, it would not be appropriate to straight away dismiss the petition unless there appears no infringement of any of the fundamental rights of the petitioner which, *too*, without stepping into any factual controversies but floating facts *only*, therefore, I do not find any substance in the plea of the respondents that petition, seeking relief (s) against private persons, is not maintainable.

9. It is an admitted position that petitioner and respondent no.3 are real brothers and both claim that entry of the respondent no.3 was to help the petitioner out of financial difficulties which, *too*, with reference to liabilities of the M/s Soneri Bank Ltd, as is evident from para-i and ii of para-wise comments, so filed by respondent Nos.3 to 5 which reads as:-

“i. That the petitioner had availed different Finance Facility from the M/s Soneri Bank Limited but on account of economic condition in the country failed to repay his liability, therefore, M/s Soneri Bank Limited filed a Suit No.B-71 of 2008 (Soneri Bank Limited v. Classic Denim Mills Pvt. Ltd. & others) before this Hon’ble Court. It is worthwhile to mention that Petitioner and Respondent No.3 are real brothers and the Respondent No.3 being a well reputed businessman used to stay abroad. The Petitioner having availed finance facility was in blue and contacted the Respondent No.3 being his elder brother and mainstay to help him out.”

ii. That during pendency of the suit the matter was settled between the Petitioner with the bank and the same was recorded by this Hon’ble Court vide order dated 27.08.2015.

(copy of the memo of Suit No.B71 of 2008 and the order dated 27.8.2015 are filed herewith and marked as annexures "A" & A-1)."

This, *prima facie*, makes it quite clear and obvious that respondent no.3 *even* was in knowledge of status of property in question as well '*decree*' recorded against the property in question as well petitioner and his partners which, *categorically*, includes:-

"Clause/Term No.6.

That, the securities created in favour of the plaintiff as described below shall remain in full force and effect until the entire settlement amount strictly as per repayment schedule as payable to the plaintiff have been received by the plaintiff and shall continue to remain security for all such amounts. Details of securities created in favour of the plaintiff are as under:-

- i) All that piece and parcel of lease hold rights in open industrial plot of land bearing No.14, situated at Sector 20, Korangi Industrial Area, Karachi measuring 20,00 sq. yards having registered charge of SECP for Rs.800.00 M.
- ii) A charge by way of Hypothecation over moveable and receivables in terms of letter of hypothecation dated 21.11.2005 (Registered charge of SECP for Rs.430.M)
- iii) Personal Guarantees of Defendant No.2, 3 & 4 all dated May 29, 2007
- iv) Demand Promissory Notes (Two) dated May 29, 2007.

Clause /Term no.7.

That **the decree passed on the terms of this settlement shall be final decree** for sale of all the assets charge and property mortgaged as mentioned in paragraph 8 above in favour of the Plaintiff. The defendants shall provide all assistance to the Plaintiff in sale or disposal of the mortgaged property, hypothecated Assets and all other movable and immovable assets and properties of the defendants and defendants shall execute all such further documents and Defendants shall execute all such further documents and do such things which may be necessary to give effect to such sale or disposal or incidental thereto & personal guarantee of defendant No.1."

Above clauses / Terms of the undisputed *Decree*, *prima facie*, establish that property in question was pledged hence, seller knowing such fact, can't claim any exception to such status of property in question as well *legal*

liabilities / obligations, arising out of such *decree* of the court of law, therefore, claim of respondent no.3 to have purchased the shares of *the Mills* shall always be subject to satisfaction of terms / clauses of the *final decree* because legal position shall always remain, as is affirmed in the case of Muhammad Ramzan v. Ali Hamza (PLD 2016 Lahore 622) that:-

“6. There is yet another important aspect which pertains to the execution of decree against a person who is not a party to the suit. **Law is settled on this point that no decree can be executed against a person who is not a party to the proceedings. Even otherwise, the executing Court cannot go beyond the decree.** Reliance in this respect can be placed on “Shafqat Ullah and 2 others v. Land Acquisition Collector (D.C.), Haripur and 2 others” 2006 CLC 1555, “Irshad Masih and others v. Emmanuel Masih and others 2014 SCMR 1481.”

The legal position, being so, would not be changed even by statement of the petitioner made in shape of Affidavit in the suit No.B-71 of 2008 that:-

“3. That the intervenor (intervener) Mr. Lalil Rakhani will pay to the decree holder Bank the balance of the Decretal amount and after payment of that amount bank will transfer the security in the name of Mr. Lalit Rakhani or his nominee.”

Be that as it may, it is not a disputed position that the respondent no.3 entered into document (s) or understanding, if any, knowing the status and liability of the petitioner which, per decree, includes:-

“Clause 10. Defendant shall provide access for valuation and submit valuation report of assets of the company as required under SBP regulation every year until the settlement amount is fully repaid.

Clause 11. **Defendant shall provide annual accounts duly certified by Chartered Accountants within 15 days from the date,** accounts of the company are finalized; **till defendant pays entire decretal amount to the plaintiff.**”

Thus, the petitioner was / is to ensure compliance of the clause-11 of the *decree* which includes allowing audit of the accounts of the company through *Chartered Accountants* and submission of such *certified accounts* to the bank and which obligations of the petitioner, should not be resisted by the respondent No.3 or anybody claiming under him particularly when he (respondent No.3), being elder brother of the petitioner, had come forward to help the petitioner out. The respondent No.3 never claimed to be *ignorant* of the *Decree* therefore, he (respondent No.3) can't escape the liability of petitioner in submitting '*accounts of the Mills, duly certified by CA*' till complete payment of the *decretal* amount which, *otherwise*, would amount prejudicing the guarantee, assured by Article-4 of Constitution as well guarantee, provided by Article 9 of the Constitution because *life* is not limited to mere act of breathing but includes liberty, freedom, dignity as well right to do what law permits him to do and same, if prejudiced / infringed, would allow a room to invoke Constitutional Jurisdiction of this Court. Reference is made to case of *Mst. Rohaifa through her sons & another v. Federation of Pakistan & Ors* (PLD 2014 SC 174) wherein it is held as:-

"Under Article 9 of the Constitution of the Islamic Republic of Pakistan, 1973 , it is a Fundamental Right of every citizen of Pakistan that he shall not be deprived of life and liberty save in accordance with law. State of Pakistan being guardian of its citizen is bound to implement the Constitution provisions in letter and spirit particularly the Fundamental Rights, which are guaranteed by the Constitution."

10. I do not want to go in details of the claims of the Share Purchase Shares Agreements, so raised by the respondent no.3 though out of three two are pertaining to year **2012** when the petitioner was neither authorized by Board of Directors for selling shares of the company; the referred *Shares Transfer Deed (s)*, being un-witnessed as well in respect of pledged property,

can't also be commented rather legality thereof both such documents are left open to be decided by proper forum.

11. However, what floats on surface is that the respondent no.3 while entering into *third Share Purchase Agreement* dated **21.9.2015** himself acknowledges the status of present petitioner as "*owner of 1813370 shares*". The acknowledgment of petitioner to be a competent owner of shares of such numbers by the respondent no.3 *himself* appears to be letting earlier agreement (s) to be faded else he would not have mentioned status of petitioner to be owner of **1813370 shares**.

12. Be that as it may, what floats on surface is that while entering into third and last Share Purchase Agreement, the respondent no.3 *himself* claims to have purchased only **672,014 shares** out of total owned shares by petitioner i.e **1813370**. Since, this Share Purchase Agreement is last one hence the same, *even*, leaves the petitioner with ownership of **1,141,356 shares** in *the Mills* , particularly when such Share Purchase Agreement dated 21.9.2015 *itself* makes status of parties quite clear as:

"WHEREAS M/S Classic Denim Mills Private Limited (hereinafter referred to as the "Company") is a company existing under the laws of Pakistan, having an authorized share capital of Rs.213,337,000/- divided into 2133370 shares of Rs.100/- each.

AND WHEREAS, the Seller is the owner of **1813370 shares** of the Company, constituting of 85% percent of the paid up share capital (hereinafter referred to as the "Shares"."

Not only this, but parties to such Agreement also specify liabilities as '*proportionately*' that:-

"That M/s Classic Denim Mills Private limited has accumulated huge financial losses which exceed the Capital of the company (including Land, Building, Machinery and all fitting and fixtures constructed and / or installed therein and / or thereon) which indicates existence of material uncertainty that may cast doubt on the

company's ability to continue as a going concern realize its assets and discharge its liabilities in the normal course of business, hence the seller has agreed to **sell 672,014 shares** and the **Buyer shall pay to the Seller an amount @ Rs.0.10 per share in all Rs.67,201/-(Rupees Sixty Seven Thousand Two Hundred One)** as consideration for the purchase of the shares against Land, Building Machinery and all fitting and fixtures constructed and / or installed therein and / or thereon proportionately (hereinafter referred to as the "Consideration".)

The use of *proportionately* is deliberate one whereby the liabilities of parties are, *prima facie*, kept alive and even till last Share Purchase Agreement the petitioner, per respondent no.3, himself owned **1813370 shares** out of which the respondent no.3 *only* purchased **672,014 shares**. Thus, *even*, such document shows rights, interests and entitlement of the petitioner in *the Mills*. Such status, if is viewed, with factum of obligations of petitioner towards *decree*, was / is sufficient to establish that petitioner can't be denied his rights, guaranteed by Articles 23 and 24 of the Constitution which rights always includes the rights, as guaranteed by Articles 15 and 18 of the Constitution. The position, being so, makes the petition maintainable *least* to extent of prayer clause (C) of the petition.

13. In addition to above, the Share Purchase agreement of year **2015** includes clause-7 which reads as:-

"7. Either Party agrees to indemnify the other Party from any loss or damage which the other Party may incur due to the indemnifying Party's breach of this agreement."

and when undeniably the satisfaction of decree by petitioner or anybody claiming under him, including respondent no.3, would have saved him from legal consequences so arising out of *decree* because of non-satisfaction of *decree* in time which, admittedly, is not satisfied till date. Thus, petitioner does have a right to press clause 8 of the Agreement regarding *Arbitration*

but at proper forum however in view of above floating facts as well undeniable obligation of the petitioner to submit *certified accounts of the Mills* I do not find any legal hitch in allowing the petitioner an *access to the Mills* couple with his right to get the accounts of *the Mills* examined by recognized Chartered Accountants, being his fundamental rights, as guaranteed by the Article 4,9,15,18,23 and 24 of Constitution.

14. Accordingly, the respondent No.3 or anybody claiming under him shall not cause any hindrances in access of the petitioner in *the Mills* which right, if resisted by respondent no.3 or anybody claiming under him, shall be assured by respondent no.2. Further, since the examination of the accounts of the *Mills* is the requirement of law and owned *legal* obligations, arising out of the *decree* therefore, the accounts of *the Mills* shall be got audited and cost whereof shall be paid by *the Mills* for submission thereof to the *Bank* as per clause-11 of the *decree*.

15. Needless to add that since the property in question is pledged with bank couple with a *decree* (unchallenged) in its favour hence none, including Bank but not limited to the respondent no.3 and petitioner shall not create any third party interest in any manner till satisfaction of decree. This order, however, shall not cause any prejudice to rights and claims of respective parties against each other with reference to documents and legal consequences thereof.

The petition stands allowed, accordingly.

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