

IN THE HIGH COURT OF KARNATAKA, BENGALURU

DATED THIS THE 3RD DAY OF DECEMBER, 2021

BEFORE

THE HON'BLE MR. JUSTICE KRISHNA S.DIXIT

WRIT PETITION NO. 22003 OF 2021(GM-PASS)

BETWEEN:

LI DONG,
D/O LI JING HUA,
AGED ABOUT 42 YEARS OLD,
RESIDING AT SCOTT'S BUNGALOW,
B113, WARD 8, SRIRANGAPATNA,
MANDYA, KARNATAKA,
PINCODE – 571 438.

...PETITIONER

(BY SRI. AJESH KUMAR S, ADVOCATE)

AND:

1. UNION OF INDIA,
MINISTRY OF EXTERNAL AFFAIRS,
REPRESENTED BY ITS CHIEF SECRETARY,
CENTRAL REGISTRY,
SO (R&D), 74B, SOUTH BLOCK,
NEW DELHI – 11.
2. FOREIGNERS REGIONAL REGISTRATION OFFICE ("FRRO")
REPRESENTED BY MR. LABHU RAM, OFFICER
BMTC BUS STAND, 5TH FLOOR, 'A' BLOCK,
TTMC BUILDING, K H ROAD,
SHANTI NAGAR, BENGALURU,
KARNATAKA – 560 027.

... RESPONDENTS

(BY SRI. H SHANTHI BHUSAN, ASG)

THIS WRIT PETITION IS FILED UNDER ARTICLES 226 AND 227 OF THE CONSTITUTION OF INDIA PRAYING TO DIRECT THE RESPONDENT AUTHORITIES TO PROCESS AND ISSUE THE PETITIONER HER VISA EXTENSION PURSUANT TO ANNEXURE-M, N AND P.

THIS PETITION COMING ON FOR ORDERS THIS DAY,
THE COURT MADE THE FOLLOWING:-

ORDER

Petitioner a national of People's Republic of China is once again knocking at the doors of Writ Court seeking an appropriate order that would facilitate the extension of her stay on Indian soil indefinitely, the extension of her Visa granted on a few occasions having already expired; she also seeks to lay a challenge to the Leave India Notice that eventually resulted into issuance of a series of Exit Permits, the latest being dated 11.11.2021.

2. Learned Asst. Solicitor General of India Mr. Shanthi Bhushan on request having accepted notice for the respondents, opposes the writ petition making submissions in justification of the impugned orders and the circumstances that resulted into their issuance.

3. Having heard the learned counsel for the parties and having perused the Petition Papers, this Court declines to grant indulgence in the matter for the following reasons:

(a) Petitioner admittedly is a foreigner; the rights & obligations of the foreigners are *inter alia* governed by the Foreigners Act, 1946 and the Orders promulgated thereunder; she was granted the *e-Visa* dated 22.06.2019

valid for a period of 365 days in terms of Annexure-C, subject to the condition that the '*continuous stay during each visit should not exceed 180 days*'; petitioner was issued Leave India Notice on 30.10.2019; however, in her letter dated 21.04.2021, she specifically admits "I left India two months late instead of immediately";

(b) On 19.02.2020, petitioner initially was given a reprieve of one month due to spread of COVID-19 in China; the same was extended for one more month on 30.03.2020; thereafter, she was issued multiple reminders *cum* the Exit Permits specifically warning her to "LEAVE INDIA ON FIRST AVAILABLE FLIGHT AFTER RESUMPTION OF INTERNATIONAL FLIGHT OPERATIONS FROM INDIA"; she herself has produced copies of all these permits.

(c) Petitioner had requested for the extension of her stay; no decision having been taken thereon, she was before this Court in W.P.No.8461/2021 which came to be disposed off by a Co-ordinate Bench of this Court vide judgment dated 24.03.2021 reserving liberty to her to make a representation within 15 days and that till a decision thereon was taken she was permitted to stay on the Indian soil; petitioner accordingly had made a

representation on 07.05.2021 wherein she had made some grievance against the Visa Authorities in not recalling the Leave India Notice.

(d) At paragraph 9 of her above representation this is what the petitioner has said:

*“9. I am aware that the Leave India Notice dated Oct.30, 2019 is the reason for the issuance of Exit Permit dated Feb.07, 2020 and for the Refusal of Extension of Exit Permit dated April 19, 2021. **Since the LIN has caused me so much grief and I have not been able to understand what I did wrong, I eagerly request a re-examination of the LIN, and an explanation for the issuance, or a cancellation, if there was indeed misunderstanding**”.*

The above text of the said representation is not happily worded, to say the least; a foreigner who has apparently overstayed the Visa period cannot ask for an explanation from the host country as to why she has been issued an Exit Notice; the very language offends the principle of Sovereignty of Nation State; it is not that the concession by way of extension of her stay was not bestowed on her; this she admits at paragraph 7 of the writ petition itself; that apart, India has shown appreciable leniency in granting automatic extension of visa period because of COVID-19 pandemic till 30.09.2021 by issuing Orders from time to time, as borne out by record.

(e) The vehement contention of learned counsel for the petitioner that India being a signatory to the International Covenant on Civil & Political Rights, 1966, does not permit expulsion of an alien from the territory of a host country except in accordance with law, is broadly true; Article 13 of the said Covenant reads as under:

“Article 13: *An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority”.*

As a well settled principle of international law, the process of deportation can only be carried out with due process of law; while the ICCPR does require a State to expel aliens in accordance with law, it refers to those foreigners who are in the host country ‘lawfully’; petitioner admittedly is overstaying the Visa & extended Visa.

(f) Petitioner is being asked to leave the country not all of a sudden as sought to be made out by the pleadings & submissions; her Visa period has expired long ago; despite issuance of Leave India Notices in series, she has been clinging on to Indian soil with one or the other

excuses; admittedly, she was shown some concession by a Co-ordinate Bench of this Court too; the question of passing specific order on the representation of petitioner would not arise since as a matter of policy extension was granted to all the foreigners upto 30.09.2021 which she herself has averred at paragraphs 13 & 14 of the petition.

4. As to what the jurists of International Law say about the rights of aliens in the host Nations:

(a) **Oppenheim's International Law**, volume 1, 8th Edition, page 675 says. "... no State can claim the right for its subjects to enter into, and reside on, the territory of a foreign State. The reception of aliens is a matter of discretion, and every State is by reason of its territorial supremacy competent to exclude aliens from the whole or any part, of its territory... if a State need not receive aliens at all, it can receive them only under certain conditions...", similarly, another acclaimed jurist **J.G.Starke** in his **Introduction to International Law**, 11th Edition at Pages 314-315 writes: "Most states claim in legal theory to exclude all aliens at will, affirming that such unqualified right is an essential attribute of sovereign government...The absence of any duty at international law to admit aliens is supported by an examination of state immigration laws, showing that

scarcely any states freely admit aliens... Most states, however place aliens under some kind of disability or some measure of restrictions of varying severity...”

The Apex Court in **UNION OF INDIA Vs. AGRICAS, LLP** 2020 SCC Online SC 675, has respectfully referred to the writings of **Oppenheim**; similarly, the Constitution Bench of the Apex Court has referred to the opinions of **J.G.Starke**, in several cases i.e., **UOI Vs. SUKUMAR SEN GUPTA**, 1990 (3) SCR 24 and in **SARBANANDA SONOWAL Vs. UOI**, AIR 2005 SC 2920.

(b) It can be broadly normed that the rights of aliens on a foreign soil are those which the host country grants and that no alien can lay a claim for more rights than are granted; our Constitution extends certain Fundamental Rights to non-citizens as well, *inter alia* under Articles 14, 20 & 21, is true; however, the degree & extent of their availment vary depending upon the circumstances, which the domestic law envisages; the significance of boundaries of nations justifies the classification of people as citizens and aliens; **SALMOND** in an article on ‘**CITIZENSHIP AND ALLEGIANCE**’ published more than a century ago in (1901) 17 LQR 270 wrote: “...Citizenship is a title to rights which are not available for

aliens. Citizens are members optimo jure, while aliens stand on a lower level in the scale of legal right...".

(c) A distinction is made in practically all countries between citizens & non-citizens and between domiciled & non-domiciled aliens, with reference to their rights & duties; how the aliens should be treated is essentially a policy matter left to the wisdom of the government of host country; several pragmatic factors and the lessons gained from experience enter the fray of foreign-policy-making and its implementation; in matters of this kind, courts lack expertise in assessing the worth & relevance of such factors and therefore as of necessity recognize a greater latitude in the Executive; the Executive i.e., the competent authorities have taken the decision to issue Leave India Notices and the judiciary being an organ of the State has to show due deference to such decisions of other organs; that is the essence of **doctrine of 'Separation of Powers'** which is recognized as a *basic feature* of our Constitution vide **INDIRA NEHRU GANDHI Vs. RAJ NARAIN**, 1976 (2) SCR 347.

5. The Apex Court and the rights of VISA overstaying foreigners:

In our country, the law relating to deportation of aliens has grown from *precedent to precedent*; in **HANS MULLER OF NURENBURG Vs. SUPERINTENDENT, PRESIDENCY JAIL AIR 1955 SC 367**, the Constitution Bench of the Apex Court observed at para 39: “*The Foreigners Act confers the power to expel foreigners from India. It vests the Central Government with absolute and unfettered discretion and, as there is no provision fettering this discretion in the Constitution, an unrestricted right to expel remains*”; later, in **LOUIS DE RAEDT Vs. UNION OF INDIA (1991) 3 SCR 149**, it is observed that *the foreigners also enjoy some fundamental right under the Constitution of this country, is also of not much help to them. The fundamental right of the foreigner is confined to Article 21 for life and liberty and does not include the right to reside and settle in this country, as mentioned in Article 19(1)(e), which is applicable only to the citizens of this country*; this well settled position of law has been reiterated by the Apex Court and High Courts in several cases.

6. The treatment of VISA overstaying foreigners in other jurisdictions:

(a) A Writ Court cannot turn a Nelson's Eye to the realities of the world; it hardly needs to be stated that in hosting the foreigners, the **principle of reciprocity** between the host country and the foreign country concerned and the **doctrine of Sovereignty of Nations**, assume significance in matters relating to expulsion of foreigners; several other factors that belong to the domain and expertise of the Executive do also figure; despite repeated questioning, learned counsel for the petitioner was not in a position to answer as to how overstaying Indians are treated in the country to which his client belongs; a basic search reveals that such persons are treated with hefty penalties & stringent punishments; in almost all countries, overstaying the Visa period *per se* is made an offence, although punishments & penalties vary in degrees; in India, Sec. 14 of the Foreigners Act, criminalizes the act of overstaying the VISA and the offence is punishable with an imprisonment upto 5 years and levy of unlimited fine; that being the position, there is absolutely no justification for the petitioner to stay on Indian soil any longer disobeying a series of Leave India Notices; such foreign nationals cannot be granted indulgence by the constitutional courts.

(b) The reliance of learned counsel for the petitioner on the decision of the Apex Court in **HASAN ALI RAIHANY Vs. UOI AND OTHERS**, (2006) 3 SCC 705 that she cannot be expelled without giving reasons, does not much come to her aid inasmuch as, it was a case of sudden deportation of a foreign national who was born, brought up, domiciled & educated in India; since long he was carrying on lawful business too; this fact matrix is miles away from that of petitioner's case; similarly, the Division Bench decision of Hon'ble Delhi High Court in **MOHD. JAVED & ANOTHER Vs. UOI & ANOTHER**, AIR 2019 DEL 170, too does not much come to the support of petitioner because of differential fact matrix; in the said case, the foreigner was abruptly asked to leave India absolutely without any justification when his Long Term Visa (LTV) period had not yet expired; it is pertinent to mention what Lord Halsbury more than a century ago had said in **QUINN Vs. LEATHEM**, 1901 AC 495 that a case is an authority for the proposition that it lays down in a given fact matrix and not for all that which logically follows from what has been so laid down.

7. **Some Observations & Suggestions:**

a) Nowadays Courts have been noticing a large chunk of cases involving overstaying of VISA and VISA violation by the foreigners; in quite a few cases, an impression is gathered that the aliens concerned want to somehow perpetuate their continuance in the Indian Territory and for this, several devious strategies are adopted (however, arguably petitioner's may not be one such case); one such means is to commit some bailable offence and to trigger the prosecution which would more often than not be dragged for long; added to this, the bail orders obtained by them are wrongly treated by the quarters that be as the VISA extensions, unmindful of the difference that galore between them; extension of VISA is one thing & enlargement on bail is another; bail bars the custody and ordinarily, it is granted by the courts, whereas VISA is granted by the authorities of the Union Govt., in its absolute discretion; therefore, in cases of VISA expiry, regardless of the bail order, the accused aliens have to be quarantined consistent with the observations of a Coordinate Bench of this Court in **CHRISTIAN CHIDIEERE CHUKWU Vs. THE STATE OF KARNATAKA**, ILR 2016 KAR 1232.

b) The above apart, it is desirable to incorporate appropriate conditions in the VISA documents so that the foreigners shall leave Indian territory soon after the expiry of the VISA period without brooking any delay; an assurance can be insisted upon from the concerned foreign countries for the cancellation of the travel documents of their citizens co-terminus with the expiry of their VISA so that their expulsion becomes easy consistent with the principles of Sovereignty & Reciprocity; an appropriate provision can also be made for discouraging their entry to India on subsequent occasions, as well; this apart, the penalties/fines for overstaying aliens should be reasonably enhanced commensurate with the seriousness of the issue; it is also desirable to request the concerned foreign States to recall their Nationals immediately on the expiry of their travel documents; precautionary measures may be many but the policy makers need to advert to them, keeping in view all relevant factors.

In the above circumstances, this writ petition being devoid of merits is liable to be dismissed and accordingly it is, costs having been made easy; however, the Competent Authorities in their discretion may conditionally permit the

petitioner to stay in India till the first flight to China is scheduled and not beyond that.

**Sd/-
JUDGE**

Bsv/Snb