CHAPTER ONE

THE VISHAKHA JUDGEMENT

1. INTRODUCTION

India signed the CEDAW on 30th July 1980 and ratified it on 9th July 1993. However there was no discourse in India in terms of both legal recourse and enacting a special legislation till about late 1990s. Guidelines issued by the Supreme Court of India in 1997 with regards to the Bhateri gang rape case, were the first legal intervention with regards to sexual harassment at workplace in India. This particular ruling famous as the Vishakha judgment restored the debate that was lying dormant since the Apex court judgment (1995) in Rupan Deol Bajaj vs. KPS Gill case. Before Vishakha, the language of sexual harassment remained coded, invisible, and frivolous in India and the sexual dimension of harassment was disabling and unspoken Kapur (2009).

The Saheli report (1998) revealed that sexual harassment was often trivialised as eve teasing and hardly recognised as an issue in the Indian society. General tendency was to belittle it or ignore it. It became one of the central concerns of the women’s movement in India by early eighties Patel (2005). Perception of sexual harassment as eve teasing was then challenged. This is confirmed through a report by Forum Against Oppression of Women (1991). The report revealed that during the 1980s, militant action by the Forum against the sexual harassment received a lukewarm response from the trade unions and adverse publicity in the media. At that time, the issue did not receive importance and attention.

1.1 Background to the Vishakha Judgment

Till the Supreme Court acknowledged sexual harassment at workplace as infringement on a woman’s fundamental right of gender equality and the right to life and liberty it was treated as personal problem Radhika (1999). Mathur, (1992), Sood, (2006) and Vij, (2007) describe that the Vishakha judgment arose out of the gang rape of Bhanwari Devi. In 1985 Bhanwari Devi was selected and trained as Saathin (Woman Village Level Worker) under the Women Development Programme by the Government of Rajasthan. The project aimed at empowerment of women. In the course of seven years of work she took up issues related to land, water, public distribution system, literacy, health and payment of minimum wages during famine relief works. Bhanwari started facing alienation in the Bhateri village started specifically on the issue of stopping child marriage. In 1992, as part of the
state government campaign against child marriage i.e. anti child marriage fortnight before Akha Teej, Bhanwari Devi attempted to stop the marriage of a one-year-old girl happening in a Gujjar family. Men from the community retaliated and punished her by intimidating her with sexual harassment, threats, imposing a socio-economic boycott on her family which finally resulted in five men raping her in the presence of her husband. She faced numerous obstacles when she made attempts to seek justice. Police were reluctant to record her statement or carry out an investigation, and doctors at two government health facilities refused to conduct a proper medical examination. Subsequently, the men were acquitted by Sessions court. The court said, a man could not possibly have participated in a gang rape in the presence of his nephew, Bhanwari Devi could be lying that she was gang raped as her medical examination happened fifty two hours after the incident and that her husband could not possibly have watched passively as his wife was being gang raped because he had taken marriage vows which bound him to protect her.

The judgement led to campaign for justice for Bhanwari Devi by women’s groups in Rajasthan and Delhi. In 1992, under the collective name Vishakha a public interest petition was filed in the Supreme Court of India by women’s organisations and groups namely Vishakha, Mahila Purnvas Samou, Rajasthan Voluntary Health Association, Kali for Women, and Jagori against the State of Rajasthan, its Women and Child Welfare Department, its Department of Social Welfare, and the Union of India. The Bhrateri rape case was cited as an instance was a matter of sexual harassment in the context of work and it was said, in the absence of legislation on sexual harassment at workplace, women were left vulnerable and their rights unprotected. It was said that the court should give directions in this matter. It was premised on the fact that although Bhanwari Devi was exposed to of exhibitionism and sexual harassment for months before the gang rape took place, which she reported to the local authorities, the State made no attempts to protect her. It was argued that the Bhanwari Devi’s case brought to light utter disregard and failure by the state government as an employer to recognise sexual harassment experienced by women while performing duties in benefit and behalf of them. Jaising (2004) states that primary question in the Vishakha case was whether the State i.e. employer was responsible to protect its employees and workers. The writ petition therefore aimed at enforce fundamental rights of working women, to assist in finding suitable methods for realisation of gender equality, prevent sexual harassment and fill vacuum in existing legislation.
1.2 The Vishakha Judgment

In response to the public interest litigation, the Supreme Court of India delivered the judgment on 13th August 1997 in which it set out legally binding guidelines for employers to prevent and redress sexual harassment at the workplace. These guidelines are known as the Vishakha Guidelines. In the judgment the Apex court acknowledged the existence of sexual harassment at workplace, violation of the constitutionally guaranteed fundamental rights of sexual harassment and the need for legal recourse for the same. Most important aspect of the judgment was that it recognised the structural and systemic nature of sexual harassment at workplace.

Vishakha judgment defined sexual harassment as unwelcome sexually determined behaviour (whether directly or by implication) and interpreted sexual harassment as that behaviour with sexual overtones imposed on women. It was clear that sexual harassment was determined not by the perpetrator but by the women who faced it and thus it was about subjective perception. Onus for protection against sexual harassment at the workplace was placed on the employer. It was clearly stated that it was the duty of the employer to take all the necessary steps to prevent and deter sexual harassment at the workplace and, in the event that the harassment occurs, to make provisions to resolve, settle or prosecute the violation. It is important to note that by entrusting employers with the responsibility of protecting against sexual harassment, Vishakha emphasised the importance of prevention in addressing issues of sexual harassment. Rather than creating the provisions to prosecute a crime that has already been committed, Vishakha sought to stop that crime before it happened, by insisting on a safe working environment and promoting awareness on the issue of sexual harassment.

One most important mandate was establishment of a complaints committee by the employer to address complaints of sexual harassment. That committee was to be headed by a woman, with fifty percent of committee members as women. Most importantly the complaints committee was to involve a third party member knowledgeable on sexual harassment such as an NGO representative to ensure the influence of senior employees has no bearing on decisions made by the committee. It was said by the Court that the committee was to act in an efficient and timely manner, maintain confidentiality of all matters presented before it, and deliver an annual report of activities to the government. The Court directed that the guidelines would act as binding law until Parliament enacted legislation to replace them.

Sood (2006) said the Vishakha judgment filled a gap in domestic laws related to violence against women in India and upheld constitutional rights of women by directly applying the provisions of CEDAW to enact guidelines
against sexual harassment in the workplace. The judgement saw integration of the Indian Constitution and CEDAW. It recognised that sexual harassment violated the constitutional guarantee of gender equality, women’s fundamental rights to life with dignity, to personal liberty, and to carry on any occupation. Along with the fundamental rights, Directive Principles from the Indian Constitution regarding securing just and humane conditions of work and maternity relief, and the fundamental duty imposed on all Indian citizens to renounce practices derogatory to the dignity of women were mentioned by the Court.

In the absence of a national legislation, problem of sexual harassment at workplace was effectively expressed and situated in the language and framework of Constitution of India (1950) and international law. In other words, Constitution of India and international obligations became the basis for sexual harassment law in India. The Court drew attention to Articles 14, 15, 19, and 21 of the Constitution that were violated in cases of sexual harassment. Article 14 was interpreted from the point of view of gender equality which meant that women have a right to work with dignity and their rights are to be protected from sexual harassment. Using Article 15 sexual harassment was seen as discrimination based on sex. Article 19 (1) (g) which guarantees equal opportunity to all citizens to participate in the workforce was seen to be violated taking into consideration the climate of male domination that often exists in places of employment and women are discouraged to do paid work through sexual harassment. According to Article 21, all persons are entitled to life and personal liberty at all times and in all circumstances. When read along with Article 19(1) (g), which entitles all persons to equal opportunity at the workplace, it stands that no persons shall be deprived of life or liberty at the workplace. Article 42 in the Constitution which is about providing just and humane conditions of work laid foundation for future measures to make explicit legal provisions against sexual harassment at the workplace.

The Supreme Court emphasised legal obligations on part of India to uphold women’s rights pursuant to its ratification of CEDAW, the official commitments it made at the UN Beijing Conference and the constitutional provisions directing the State to enforce the treaties it has signed. Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) was the primary one. CEDAW was adopted by the UN General Assembly in 1979 and defines discrimination against women as any distinction, exclusion or restriction made on the basis of sex and sets up an agenda for action by the member states to end such discrimination through a series of measures including enacting legislations prohibiting all discrimination against women. General Recommendation Number 19 of CEDAW defines sexual harassment and explicitly talks about sexual harassment at workplace saying that equality in employment can be seriously impaired when women are subjected to gender specific violence in the form of sexual harassment at the workplace.
Though the international obligations were legally binding and obligatory, these treaties simply set out guidelines, requiring that member states implement laws that adhere to those guidelines. The guidelines are not laws rather they are requirements to pass laws. There was no law in India on sexual harassment at workplace in India despite ratification of the treaties. Hence, women were not protected directly by the treaties, but the Supreme Court could make rulings based on those treaties. Secondly though the articles in the Indian Constitution in spirit combine to protect victims of sexual harassment they do not address workplace sexual harassment explicitly.

Despite having signed the treaty in 1979, the government had not implemented many of the requirements. However, upon its ratification in 1993, the Convention changed from a mere guideline to a legally binding document. The Court explained the concept of gender equality as protection from sexual harassment and right to work with dignity adding that it was a universally recognized basic human right. It was stated that international conventions and norms were therefore of great significance in the formulation of the guidelines to achieve this purpose. Thus, the international obligations became a catalyst for the Supreme Court was able to draw on both CEDAW and the Constitution as part of the legal framework it used as the basis for the Vishakha judgment.

2. Reflections on the Vishakha Judgment

Naina Kapur stated that Vishakha being a public interest litigation that arose from Bhanwari Devi’s personal experience was targeted towards empowering working women (Sood, 2006). The public interest petition used her story as a concrete illustration of systemic rights violations, and then demonstrated a pattern of abuse by providing examples of five other women who experienced sexual assault while doing public health or social work. In the words of Akhila Sivadas who was quoted by Sood (2006), the Vishakha judgement charted out a path, created multiple stakes, and never left the public domain. Somebody or the other is always using it. It has snowballed into different kinds of ownerships. The original creators may have moved on, but they have left a very powerful legacy.

Sexual harassment at workplace as an issue was approached from the point of view of systematic discrimination. It was highlighted that societal attitudes needed to change. Importantly the Court ruled that the issue of sexual harassment at the workplace is a human rights issue not merely an issue falling in the framework of criminal law. The fact that the Supreme Court chose to cite the Human Rights Act, 1993 as a basis for the Vishakha judgment holds significance for the issue of sexual harassment. Within the understanding of human rights it was held as an
issue to be dealt with at the workplace rather than in courts. Focus was shifted from convicting the perpetrator to protecting rights of women in relation to work.

It can be said that the Vishakha judgment filled a void because for the first time the Apex Court upheld constitutional rights of women by directly applying the provisions of CEDAW to enact guidelines related to sexual harassment in the workplace. The judgment played a key role in demonstrating compliance by India to the CEDAW. India signed the CEDAW on 30th July 1980 and ratified it on 9th July 1993. In its first three reports to the CEDAW committee on the measures taken to effect the provisions of CEDAW i.e. initial report (1999), second and third reports (2005) the Government of India referred and resorted to the key judgments by the Supreme Court of India to demonstrate compliance to the CEDAW of which Vishakha judgment was prominent. GOI informed the CEDAW committee that the Indian judiciary played a proactive role and paved the way to use principles of the treaty in many judgments. It was brought to the notice of the international community that Supreme Court of India adopted the definition of sexual harassment from the General Recommendation number 19 while laying down guidelines for employers with respect to sexual harassment.

In this light, the Vishakha guidelines embodied landmark legislation. It was revolutionary way of conceptualising sexual harassment at the workplace. Sood (2006) quoted Justice Verma who expressed the Vishakha judgment represented a quantum leap forward not only for gender justice, but also for the development of Indian jurisprudence on international law. He said the international law could be used for the purpose of expanding the scope of existing constitutional guarantees, and also for filling the gaps wherever gaps existed for the purpose of enlargements of human rights. Vishakha was a landmark case as it laid down a new path because it was not intended merely to deal with sexual harassment since it opened new vistas in the field of international law becoming part of national law. Through its integrated use of CEDAW, Vishakha established a strong precedent for the direct application of international conventions in future cases. According to Justice Verma whether a country ratified a convention or otherwise, if there was a constitutional guarantee akin to that, it could be read into that provision. Sood stated that his comment explained the Court’s comfort in relying upon CEDAW even though the Indian government ratified the treaty one year after the Vishakha petition was filed but four years before the final judgment was issued.

Sood (2006) brought out that the Vishakha judgment represented a quantum leap forward not only for gender justice, but also for the development of Indian jurisprudence on international law. It compelled the Indian government to acknowledge the issue as a form of violence against women. International law was used for the purpose of expanding the scope of existing constitutional guarantees, and also for filling the gaps wherever gaps
existed for the purpose of enlargements of human rights. It was indeed a landmark case as it laid down a new path. It was not intended merely to deal with sexual harassment since it opened new vistas in the field of international law becoming part of national law.

Through its integrated use of CEDAW, Vishakha established a strong precedent for the direct application of international conventions in future cases. Sood (2006) further explained that Vishakha being a public interest litigation that arose from personal experience of a woman worker was targeted towards empowering working women. The public interest petition used her life experience as a concrete illustration of systemic rights violations, and then demonstrated a pattern of abuse by providing examples of five other women who experienced sexual assault while doing public health or social work. The Vishakha judgement was instrumental in carving out a path which created multiple stakes for various groups and it continued to remain in the public domain. It was seen that subsequently it was used in all the other judgments on the issues of violation of human rights at work thus leaving a powerful legacy. The judgment upheld the idea that concept of equality was much more than treating all persons in the same way. It pronounced that equality between men and women in the true sense of the term could be realised by making concentrated efforts towards rectification of already existing power imbalances in the society. This broader view of equality is the core principle and the goal in the struggle for recognition and acceptance of the human rights of women.

Chapter two looks at framework for analysing the issue from legal and sociological point of view.