IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

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FAO-8413-2014(O&M)

Date of decision: 26.08.2025

Regional Director Employees' State Insurance Corporation & Anr.

...Appellant(s)

Vs.

M/s Venky's (India) Ltd.

...Respondent(s)

CORAM: HON'BLE MS. JUSTICE NIDHI GUPTA

Present:- Mr. Adarsh Malik, Advocate
for the appellants.

Mr. Sumeet Jain, Advocate
for the respondent.

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NIDHI GUPTA, J.

Present appeal has been filed laying challenge to the judgment dated 26.08.2013 passed by the Employees' Insurance Court whereby the application filed by the respondent establishment under Section 75 of the Employees' State Insurance Act, 1948 (hereinafter referred to as "the ESI Act") for adjudication of the orders dated 16.02.2009 passed by the appellant demanding a sum of Rs.2,74,256.00 as damages & Rs.3,62,412.00

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as interest and seeking directions to the appellant to refund the amount of Rs.6,16,565.00 paid by the establishment and also Rs.3,62,412.00 paid as interest under protest, has been partly allowed.

2. It is inter alia submitted by learned counsel for the appellants that it is undisputed fact on record that the respondent-employer had caused substantial delay in depositing the statutory contributions. Yet, the learned Employees' Insurance Court has returned a finding that there appears to be no mens rea on the part of the establishment for delay in payment of the amount of contribution for the period December 2000 to March 2005. The reasoning adopted by the learned El Court is that the establishment was not aware of its duty to pay contribution, which was brought to its notice during the surprise inspection visit in the year 2005. However, the learned Employees' Insurance Court has totally overlooked the document Exhibit D-3, dated 8.8.2005, whereby the establishment was specifically informed of the application of the provisions of the Act since 1.12.2000 and the said establishment was also conveyed the Code Number allotted to it for making compliance. The establishment subsequently also deposited the amount towards arrears of contribution for the period December 2000 to March 2005 on 26.6.2007. It is contended that after the establishment had been categorically made aware of the application of the statutory provisions, the non-deposit thereafter was wilful and intentional.

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Despite the said finding, the learned Employees' Insurance Court has exonerated the employer-respondent of its default. As such the impugned judgment suffers from perversity.

3. It is further submitted that it is well settled law that when the provisions of the ESI Act extend to an establishment for the first time and to which an employers' Code Number is yet not allotted, the employer is required to furnish to the appropriate Revisional Office not later than fifteen days after the ESI Act becomes applicable, a declaration or registration in writing in Form 01. Thus, it is the duty of the said establishment to act positively and as such, cannot hide behind the shield of ignorance of law, which is even otherwise not a valid legal defence. Even the said plea does not survive after 8.8.2005 (Exhibit P-1/D-3). The learned Employees' Insurance Court has failed to appreciate that damages had been imposed on the establishment only for the period after 29.8.2005 i.e. after allowing 21 days from 8.8.2005, the details of which were duly provided in the show cause notice itself Exhibit D-8 dated 19.5.2008. A perusal of the same would reveal that the due date of payment for the period commencing December 2000 has been taken as 29.8.2005 and not of the year 2000/ 2001. The establishment had delayed the payment of the statutory contributions for the period commencing from 1.12.2000 by 2399 days, but the Appropriate Authority had taken the default only from the date being 21 days after the

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employer Code Number had been allotted to the said establishment. Thus, no damages were levied for the period of 1733 days against 2399 days. It is further submitted that as per Section 85B of the ESI Act and Regulation 31-C of the Employees' State Insurance (General) Regulations, 1950 (hereinafter referred to as "the Regulations"), the appellants are well within their powers to impose damages upon the respondent establishment. It is submitted that in view of the above provisions of law, the impugned order could not have been passed. Learned counsel accordingly prays that present appeal be allowed and the impugned order be set aside.

4. Per contra, learned counsel for the respondent establishment vehemently opposes the submissions made on behalf of the appellants and submits that no cause was made out for imposition of damages by the appellants as it is the own admitted case of the appellants that it was only in August 2005 that the respondent was apprised of the liability. It is submitted that a perusal of the letter dated 08.08.2005 issued by the appellants shows that the assessment made against the respondent was only provisional in nature. It is submitted that the respondent was made aware of the Notification of November 2000 only during the inspection visit in 2007 by the Area Inspector of the appellants when the respondent was verbally informed that ESI Act is applicable to the respondent establishment with effect from December 2000 instead of 2005. It is submitted that accordingly, the

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establishment at its own had deposited the demand sum of Rs.6,16,565/- as arrears for the period December 2000 to March 2005 on 20.06.2007 even without any orders from the appellants in this regard as orally told by the Area Inspector merely to avoid prosecution and penalty. It is submitted that even interest on the said amount was duly deposited by the respondent. However, vide the impugned notice, the appellants had even raised demand for deposit of damages to the tune of Rs.2,74,256/-. Learned counsel contends that the said amount is not payable as first and foremost, the provision of Section 85B is not mandatory and is discretionary. In support of his contentions, learned counsel relies upon Division Bench judgment of this Court in **Employees State Insurance Corporation v. M/s Dhanda Engineers Private Limited Faridabad-II, (P&H) (DB) : Law Finder Doc ID # 67821;** and judgment of this Court in **Baba Banda Singh Bahadur Engineering College v. Regional Director, Regional Office, (Punjab And Haryana) : Law Finder Doc ID # 2636521.** Ld. counsel accordingly prays that present appeal be dismissed.

5. No other argument is made on behalf of the parties.

6. I have heard learned counsel for the parties and given my thoughtful consideration to their rival submissions.

7. As per the record, facts in chronological order are as follows: -

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09.11.2000: The Respondent is a duly incorporated company establishment dealing with hatchery at village Larsoli, Sonepat. On 9.11.2000 Notification is issued bringing village Larsauli under ESI Act w.e.f. December 2000.

02.06.2005: Survey is conducted by Appellant-Corporation.

08.08.2005: The appellant brought respondent-establishment under the purview of Employees' State Insurance Act, 1948 vide letter No.13/12267/67 dated 08.08.2005 covering establishment w.e.f. 01.04.2005 'provisionally'.

21.09.2005: On 21.09.2005, Establishment requested appellant to issue membership cards for its employees so that they may start availing the benefits as provided under various ESI Act. In the meantime, the Respondent complied with provisions of ESI Act from April 2005 and paid respective contribution on 06.01.2006, 11.05.2006 and 13.11.2006.

7.2.2007: In 2007, during inspection visit by Area Inspector of the appellant, it was verbally brought to the notice of the Establishment that ESI Act is applicable w.e.f. December 2000 instead of 2005 as per Notification of Government. On 7.2.2007 for the first time a demand is raised by the appellant corporation that Rs.6,16,565/- be paid by the respondent on account of ESI contribution for the period from 01.12.2000 to 31.03.2005.

20.06.2007: On 20.06.2007, Establishment duly deposited a sum of Rs.6,16,565/- as arrears of contribution for period of 1.12.2000 to 31.3.2005.

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19.05.2008: Subsequently, a Letter dated 19.5.2008 is issued by the Appellant demanding interest of Rs.3,62,412/- on delayed payment of arrears for period from December 2000 to December 2006.

19.05.2008: A Show cause notice is also issued by the Appellant for imposition of damages to the tune of Rs.2,74,258/-.

06.06.2008: On 06.06.2008, Establishment brought the factual position before appellant No.1 that the Establishment was not aware about coverage from December 2000 till visit of Local Area Inspector and requested interest and damages be not charged.

30.07.2008: On 30.07.2008, Establishment received 2 letters from the appellant asking them to deposit Rs.3,62,412/- as per C-18 (interest); Rs.2,74,258/- as per D-18 (damages) without any adjudication.

16.09.2008: Reply is submitted by Respondent stating factual position.

30.12. 2008: On 30.12.2008, after reading Amnesty Scheme as advertised in newspaper by the appellant, the Establishment again requested appellant not to charge interest and levy damages.

16.02.2009: On 16.02.2009, appellant imposed Rs.2,74,256/- as damages from December 2000 to December 2006 under Section 85B of ESI Act, 1948.

16.02.2009: On 16.02.2009, Deputy Director of appellant issued recovery letter to its Recovery Officer for recovering Rs.3,62,412/- as interest.

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19.2.2009: On 19.02.2009, Recovery Officer of appellant issued a Notice of Demand to Establishment directing to deposit a sum of Rs.3,62,462/- including Rs.50/- as cost within 15 days of issue of said Demand Notice.

26.02.2009: On 26.02.2009 Establishment requested appellant No.1 to supply the calculation sheets of Rs.2,74,256/- as well as of Rs.3,62,412/- but same was never supplied.

02.03.2009: Reminder by Respondent company for calculation sheet.

09.03.2009: Interest of Rs 3,62,412/- deposited by Respondent company.

24.03.2009: Recovery officer issued notice of demand damages.

24.04.2009: Application u/s 75 ESI Act filed by the Respondent before the Civil Judge Senior Division Sonepat challenging Demand of ESI contribution from the year 2000 to 2005 Rs. 616565/- (paid) and Demand of Interest Rs. 362412/- (paid) and Demand of damages Rs.274256/-.

26.08.2013: Vide the impugned order, the Trial Court upheld ESI contribution and interest and set aside demand for damages on the ground that:

- levy of damages is discretionary and not mandatory;
- on date of demand of damages i.e. 16.02.2009, all the arrears of contributions stood paid by respondent company;
- For delayed payment interest stands paid by respondent company;

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- only during inspection in 2007 it was pointed out that amount deposited by the respondent company is short and same was deposited by the respondent in reasonable time;
- No mens rea on part of respondent company.

8. The above facts speak for themselves. It has not been denied by learned counsel for the appellants that the respondent was informed of the applicability of the ESI Act on the respondent establishment for the first time only vide letter dated 08.08.2005; whereafter the respondent had been duly making payments without any demur or delay. It has also not been denied by the appellants that it is mentioned in the letter dated 8.8.2005 that the implementation of the ESI Act to the respondent, was provisional in nature. This is borne out from Clause 4 of the aforesaid letter which read as follows: -

> *"Sub: Implementation of the E.S.I Act, 1948-Registration of Employees' and Factories/Establishment under section 2(12)/1(5) of the E.S.I. Act, 1948 as amended.*
>
> *XXX*
>
> *4. On the basis of the particulars in respect of your Factory/Establishment submitted by you the report of the Inspection conducted by the Insurance Inspector/Local Office Manager of your Factory/Establishment on 2/6/05 your Factory/Establishment falls within the purview of Section 2(12)/1(5) of the Act, w.e.f. 1/4/05 (P). In case however, subsequent facts reveal that your factory/Establishment was*

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coverable from a date prior to the mentioned above, you shall make yourself liable to comply with the provisions of the Act, from such earlier date."

9. From the above, it is clear that vide above letter dated 8.8.2005, it was conveyed to the respondent that pursuant to the inspection conducted of the respondent establishment on 2.6.2005, it was found that the respondent fell within the purview of the ESI Act "*w.e.f. 1/4/05 (P)"* i.e. with effect from 1.4.2005 "(P)" meaning provisional. It is further stated therein that in case it is found that the respondent establishment was coverable from a date prior to 1.4.2005, then the respondent would be liable to comply with the provisions of the Act from the previous date. Admittedly, no communication was made to the respondent that it was covered from a date prior to 1.4.2005.

10. It is only during inspection by the Area Inspector in 2007 that the respondent was verbally informed that the Notification dated 09.11.2000 was applicable to the respondent from December 2000 instead of 2005. Subsequently, a demand notice dated 07.02.2007 (Ex.D5), was served upon the respondent raising a demand for Rs.6,16,565/- as arrears for the period from 01.12.2000 to 31.03.2005; which was immediately paid by the respondent in June 2007. However, on 19.05.2008, suddenly the appellant vide letter No.13/12267/Ins-IV-368 directed Establishment to deposit Rs.3,62,412/- as interest on arrears of contribution deposited late for period

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from December 2000 to December 2006. Admittedly, even the said amount has been paid by the respondent. In these facts and circumstances, the Show Cause Notice dated 19.05.2008 and the Demand Notice dated 30.07.2008 to deposit damages of Rs.2,74,256/-, is totally uncalled for.

11. It has been submitted by learned counsel for the appellants that in terms of Section 85B of the Act, and as per Regulation 31-C of the Regulations, the appellants have the power to recover damages in the manner specified therein. The said provisions read as follows: -

> ***"85B. Power to recover damages****.—(1) Where an employer fails to pay the amount due in respect of any contribution or any other amount payable under this Act, the Corporation may recover from the employer by way of penalty such damages not exceeding the amount of arrears as may be specified in the regulations:*
>
> *PROVIDED that before recovering such damages, the employer shall be given a reasonable opportunity of being heard :*
>
> *PROVIDED FURTHER that the Corporation may reduce or waive the damages recoverable under this section in relation to an establishment which is a sick industrial company in respect of which a scheme for rehabilitation has been sanctioned by the Board for Industrial and Financial Reconstruction established under section 4 of the Sick Industrial Companies (Special Provisions) Act, 1985, subject to such terms and conditions as may be specified in regulations.*

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(2) Any damages recoverable under sub-section (1) may be recovered as an arrear of land revenue or under sections 45C to 45-I.

***31C. Damages on contributions or any other amount due, but not paid in time**.—If an employer who fails to pay contribution within the periods specified under regulation 31, or any other amount payable under the Act, the corporation may recover damages, not exceeding the rates mentioned below, by way of penalty:*

Period of delay	*Maximum rate of damages in % per annum of the amount due*
(i) Less than 2 months	*5%*
(ii) 2 months and above but less than 4 months	*10%*
(iii) 4 months and above but less than 6 months	*15%*
(iv) 6 months and above	*25%*

PROVIDED that the Corporation, in relation to a factory or establishment which is declared as sick industrial company and in respect of which a rehabilitation scheme has been sanctioned by the Board for Industrial and Financial Reconstruction, may—

(a) in case of change of management including transfer of undertaking(s) to workers' co-operatives) or in case of merger or amalgamation of sick industrial company with a healthy company, completely waive the damages levied or leviable;

(b) in other cases, depending on its merits, waive up to 60 per cent damages levied or leviable;

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(c) in exceptional hard cases, waive either totally or partially the damages levied or leviable."

12. No doubt under the above provisions power has been assigned to the appellant to recover damages. However, a bare reading of the above Section 85B shows that the power to recover damages is discretionary and not mandatory. Moreover, the same cannot be done arbitrarily. In imposing damages, conduct of the respondent is also to be seen. It is clear from the above enumerated facts that the respondent has been making payments diligently as and when demands have been raised by the appellants. In this circumstance, no occasion was made out to impose damages upon the respondent vide the impugned order dated 16.02.2009 issued under Section 85B of the ESI Act.

13. Further, as per Section 85B of the Act, the impugned order is required to be a speaking order. However, perusal of order dated 16.02.2009 shows the same to be a cryptic and non-speaking order wherein no reasons have been given as to why damages are liable to be imposed upon the respondent. In such a situation it would be apposite to refer to the Division Bench judgment of this Court rendered in **M/s Dhanda Engineers (supra)** wherein it is held that:-

"25. Once it is so held, the issue of passing a speaking order would be a necessary corollary. It is axiomatic that in the exercise of quasi-judicial functions when opportunity has to be given to the parties to present their case, it is normally

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necessary to record a reasoned order. Principle apart the matter now appears to be settled by precedent as well. Under the similar provisions of the Section 14-B Employees' provident Funds and Miscellaneous Provisions Act, 1952 their Lordships in the ***Organo Chemical Industries and other's case (supra)*** *have held as follows :-*

"The conferral of power to award damages under Section 14-B is to ensure the success of the measure. It is dependent on existence of certain facts, there has to be an objective determination not subjective. the regional provident Fund Commissioner has not only to apply his mind to the requirements of Section 14-B but is cast with the duty of making a "speaking order", after conforming to the rules of natural justice."

26. On the second part of Question No. (2), it must, therefore be held that it is incumbent on the authority to not only consider the explanation of the employer, if duly rendered, but also to pass a speaking order for the imposition of damages.

27. However, it is axiomatic that the volume and the contents of the speaking order must inevitably depend on the nature of the particular case. The reasons expected to be recorded in a speaking order must inevitably depend on the nature and the exhaustiveness of the contentions raised in reply to the show cause notice. Obviously where the objections raised are themselves vague and devoid of necessary particulars, then even a finding that the plea is plainly untenable may be sufficient compliance of the requirement of a reasoned order. This has been so held by a Division Bench of the Allahabad High

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Court in ***The Regional Provident Fund Commissioner U.P. v. M/s Allahabad Canning Co. Bamrauli, 1978 LIC 998.*** *Following the same, the Division Bench in M/s. T.C.M. Wollen Mills's case (supra), has also opined as follows :-*

"As has already been noticed in the resume of facts despite a repeated number of opportunities given to the petitioners of personal hearing they choose not to avail most of them. Apparently it is plain that in such a situation unless the objections and the factual matters are pressed before the Commissioner he cannot imagine the same and pretend to adjudicate thereon."

The present case appears to be wholly covered by the aforesaid observations. It is manifest from the order of the Regional Director dated February 21, 1978 that the respondent-employer was duly served with a notice and granted a period of 15 days specifically mentioning the quantum of damages proposed to be imposed upon him and was directed to show cause within 15 days thereof. The respondent-employer, however, within the said period of 15 days made no representation written or oral in response to the said notice. The director, therefore, was left with little option but to find that in view of the absence of any response, the proposed damages may be levied against the respondent. It may be noticed, that it appears to be the common case, that the payments were made far beyond the prescribed time."

14. In the present case, the impugned order dated 16.2.2009 is cryptic non-speaking without affording consideration to the fact that

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payments have been made by the respondent promptly as and when demands have been raised by the appellant. In such a situation, there was no occasion for the appellants to impose damages upon the respondent. Clearly in passing the impugned order, the appellants have failed to take into consideration the conduct of the respondent.

15. Further, there can be no issue with the fact that the power under Section 85B of the Act is discretionary. Relevant extract of judgment in **Baba Banda Singh (supra)** is as under:-

> *"15. From the perusal of above quoted Section, it is evident that damages can be charged if there is failure on the part of employer to pay due amount of contribution. The Corporation is not bound to levy damages. It is discretion of the Corporation. Meaning thereby section 85B of ESI Act is not a mandatory provision whereas it is a discretionary provision. The damages are imposed by way of penalty. It is a settled proposition of law that penalty cannot be imposed unless and until there is an intentional lapse on the part of the employer. The authorities are bound to levy penalty if provision is mandatory. In case, provision is not mandatory, the authorities may or may not levy penalty section 85B of ESI Act provides that Corporation may recover by way of penalty such damages not exceeding the amount of arrears as may be specified in the regulations. The language of Section makes it clear that it is not a mandatory provision. The penalty cannot be imposed mechanically. It can be imposed if there is failure on the part of the employer to make contribution. Every delayed payment of*

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contribution cannot be considered as failure to invoke rigour section 85B of ESI Act."

Further, Regulation 31C only specifies the mode in which payments have to be made.

16. The relevant findings of the learned Civil Judge (Senior Division), Sonepat as contained in the impugned order are as under:-

"20. Now, at this juncture, the question arises for consideration whether the respondents were/are legally entitled to recover contribution for the period December, 2000 to March, 2005, interest for the period December 2000 to December, 2006 and damages for the said period on account of delayed payment of contribution. Admittedly, applicant establishment is situated at village Larsoli, District Sonepat and same was established in the year 1988. Vide Government notification dated 25.11.2000 Ex.D16 it was declared that provisions of ESI Act shall be applicable to 10 (ten) villages of District Sonepat Larsoli, which includes village Larsoli. Vide letter Ex. P1 dated 08.08.2005, applicant establishment was covered under ESI Act w.e.f. 01.04.2005 provisionally as during the preliminary inspection, complete record was not available and in the said letter it was clearly mentioned that if subsequently it revealed that establishment was coverable from the date prior to 01.04.2005, then establishment shall be liable to comply with the provisions of the Act from such earlier date. Thus, order regarding coverage of establishment conveyed to the applicant vide letter dated 08.08.2005 was not final order. According to Rule 10(b) ESI (General) Regulations, 1950, the employer in respect

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of a factory or an establishment to which the Act applies for the first time and to which Employee's Code number is not yet allotted, shall furnish to the appropriate Regional Office not later fifteen days after the Act becomes applicable as the case may be to the factory or establishment, a declaration or registration in writing in Form 10 (Employer's Registration Form). Thus, according to above said rule, it was incumbent upon the applicant establishment to submit the declaration/registration in writing to the Corporation within fifteen days after Haryana Government notification regarding the applicability of the ESI Act to the applicant establishment. Certainly, after Haryana Government notification regarding applicability of the ESI Act to the establishment situated at village Larsoli, applicant establishment was required to pay the statutory contribution to respondents Corporation from the year 2000 onwards. But it was not done so. Rather during inspection, when it was pointed out by Inspector of respondents Corporation that contribution w.e.f. December, 2000 to December, 2005 was lying due against applicant establishment then, applicant establishment deposited the amount of contribution on 26.06.2007. Since the said amount was deposited very late, therefore, in view of Section 39(5)(a) of the ESI Act, applicant establishment was liable to pay interest @ 12% per annum on the delayed payment and accordingly, respondents Corporation has rightly charged the interest on the late payment and the said amount has already been deposited by applicant establishment with respondents Corporation on 09.03.2009. According to Rule 31-C of

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Employee State Insurance (General) Regulations, 1950 an employer who fails to pay contributions within the periods specified under Regulation 31 Corporation may recover damages. A plain reading of this rule reveals that awarding of damages is not mandatory but only discretionary. In this case, damages were claimed by respondents vide order dated 16.02.2009. Admittedly, at the time of passing of said order, applicant establishment had already paid the arrears of contribution w.e.f. December, 2000 to March, 2005. Provisions for imposition of damages could not have been commenced when there was no arrears on the date of levy of damages. Further in this case, it is only during the inspection of the applicant establishment in the year 2007, it was pointed out that contribution deposited by the applicant establishment was short. Accordingly after inspection, said amount was deposited by the applicant establishment within reasonable time. For the delayed payment, interest has already been imposed upon the applicant establishment, which has also been deposited by applicant establishment. There appears no mensrea on the part of the applicant establishment for delay in payment of the amount of contribution for the period w.e.f. December, 2000 to March, 2005. Therefore, order of imposing of damages for the delay payment of contribution is not justified at all. In view of my above detailed discussion, this issue is partly answered in favour of the applicant and against the respondents."

17. The gist that emerges from the above discussion is that:

Discretionary Nature of Damages - The levy of damages under Section 85B

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ESI Act is discretionary and not mandatory; the trial court rightly exercised its discretion in setting aside the penalty.

Contribution and interest already paid- On the date of demand i.e. 16.02.2009, the respondent had already cleared all arrears of contributions and paid statutory interest, leaving no basis for imposing damages.

Bona Fide Compliance without Mens Rea - The shortfall was only noticed during the 2007 inspection and was promptly rectified within reasonable time; hence, in absence of mens rea or contumacious conduct, damages could not be justified.

Non-Speaking Order - The order dated 16.02.2009 imposing damages is non-speaking, passed without recording reasons or addressing the respondent's explanation.

Double penalty - Damages in the form of Interest had already been recovered from the respondent for the period December 2000 to December 2006. In view of the same, there was no question of imposing double penalty upon the respondent.

18. In view of the above, present appeal is **dismissed.**

19. Pending application(s) if any also stand(s) disposed of.

26.08.2025 **(Nidhi Gupta)**
Sunena **Judge**

Whether speaking/reasoned: Yes/No
Whether reportable: Yes/No

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