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## FAMILY COURT OF AUSTRALIA

*In the Marriage of HELLIAR*

Evatt CJ, Ellis and Nobbs JJ

5-7 February 1980

(1979) 41 FLR 231; 28 ALR 604; 5 Fam LR 756; [1980] FLC 75,013 (¶90-007)

**FAMILY LAW – ORDER TO PAY MONEY – FAILURE TO PAY – CONTEMPT – "WILFUL DISOBEDIENCE" – STANDARD OF PROOF – STRICT COMPLIANCE WITH PROCEDURAL REQUIREMENTS: FAMILY LAW ACT 1975 (CTH) ss107, 108; FAMILY LAW REGULATIONS, RR133, 134.**

Appeal from an order of Pawley J dismissing the wife's application that the husband show cause why he should not be dealt with for contempt by his wilful disobedience of the order of the court which had made a substantial property settlement.

**HELD: Appeal allowed.**

**(1) Subject to the principle that however possible other remedies should be used first of all, the Family Court has power to punish, by way of contempt proceedings, the wilful disobedience of an order to pay money.**

*In the Marriage of Sahari* (1976) 25 FLR 475; (1976) FLC ¶90-086, approved.

*In the Marriage of Delly* (1976) 26 FLR 439; (1977) FLC ¶90-215;

*In the Marriage of McCulloch; Ex parte Males* (1978) 32 FLR 175; (1978) FLC ¶90-426, referred to.

*In the Marriage of Vergis* (1977) 29 FLR 227, (1977) FLC ¶90-275;

*In the Marriage of Douglas* (1978) 31 FLR 374 (1978) FLC 90-427, not followed.

**(2) The fact that there might be said to have been a dispute as to part of the moneys owed to the wife did not mean that the refusal of the husband to pay any part of the total sum was not "wilful disobedience".**

*Attorney-General v Walthamstow Urban District Council* (1895) 11 TLR 533;

*R v Griffiths; Ex parte Attorney-General* (1957) 2 QB 192;

*R v Odhams Press Ltd; Ex parte Attorney-General* (1957) 1 QB 73; [1956] 3 All ER 494; [1956] 3 WLR 796, referred to.

**(3) In a case where alternative remedies such as an oral examination or sequestration were likely to have been of little use, the wife was justified in seeking to have the court invoke its contempt powers.**

**(4) In contempt matters, procedural requirements must be complied with strictly. The court should have determined, at the outset, the precise sum due to the wife. Until such sum was clearly defined the charge of contempt could not properly be put to the husband.**

**THE COURT:** His Honour considered ss37, 107 and 108, and the contempt powers of the High Court. He concluded that the words "Notwithstanding any other provision of law" in s108(1) apply to s107, and that the Family Court has power to punish by way of contempt proceedings for the wilful disobedience of an order to pay money. With this conclusion of his Honour we respectfully agree, though subject to an important qualification. That qualification is that the spirit and philosophy of the *Family Law Act*, as evidenced by ss70, 114 and 107, as well as by the many provisions aimed at encouraging conciliation, discourage resort to the contempt power where it is appropriate to use other remedies first (*Sahari's case*): "Legal practitioners, who have their own duties under the Act, should be loathe to advise the invoicing of the contempt power until all other avenues of compliance or agreement have been reasonably considered and explored." Nevertheless cases will remain where invocation of the contempt power is the only appropriate course. Where such a course is necessary the relevant procedures must be strictly complied with.

Mr Coleman for the respondent husband sought to persuade the court that the charge of contempt could not be properly made out unless a fund could be pointed to from which the

husband could pay. However, we consider it sufficient to support his Honour's finding that it be shown that the husband had had funds in his possession of which he could give no satisfactory account. Mr Coleman raised substantial arguments on the procedure followed in the present case which need consideration. First, he submitted that the contempt power was being used in this case in a manner which had never been envisaged, to enforce the order for payment of money. In his submission the alternative procedures available including a summons for oral examination (reg 133) and sequestration (reg 134) should have been tried first. In this submission he relied on *Sahari's case*.

We agree that in most cases it is inappropriate to have resort to the contempt power as the primary means of enforcing an order for the payment of money. There are, however, exceptional cases where such action is justified. Where such cases arise it is for the applicant to satisfy the court either in the supporting affidavit or otherwise that it is proper to resort to the contempt power. In the present case use of the contempt power was justified because of the unsatisfactory behaviour of the husband and his complete failure to make any attempt to comply with the order of the court.

His Honour was unable to accept the husband's evidence as to his financial affairs; any procedure under reg 133 was unlikely to produce results. As it was difficult to detect assets in the husband's possession, the sequestration provisions may have been of little use. In these circumstances, though, we would not normally encourage resort to the contempt power, we consider it was appropriate in the situation which presented to the wife. The next point argued by Mr Coleman was that the charge of contempt was not properly made out because the amount owing had never been specified. In his submission it is not appropriate to commence contempt proceedings until a clear obligation had been established. It seems to this Court that there is some merit in this point.

Following the decision in *Sahari's case* this Court takes the view that procedural requirements should be strictly complied with in contempt matters, for the protection of the respondent in what is a quasi-criminal matter. In our view, until the sum was determined in this manner the charge could not be properly put to the husband. The proceeding could not, as a result, lead to a proper finding of contempt against the husband. In these circumstances it appears to us that the appropriate course of action is to remit the wife's application for further hearing. To this extent we allow the appeal and set aside his Honour's order dismissing the wife's application.

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