

32/1980

## FAMILY COURT OF AUSTRALIA — FULL COURT at SYDNEY

***HELLIAR and HELLIAR***

Evatt CJ, Ellis SJ and Nobbs J

7 February 1980

(1979) 41 FLR 231; 28 ALR 604; 5 Fam LR 756; [1980] FLR 75,073 (¶90-007)

**FAMILY LAW - APPLICATION THAT HUSBAND BE DEALT WITH FOR CONTEMPT OF COURT FOR DISOBEYING COURT ORDERS - ORDER FOR PAYMENT OF MONEY DISOBEYED - WHETHER CONTEMPT POWER SHOULD BE USED TO ENFORCE SUCH AN ORDER.**

The wife appealed against the dismissal of an application that the husband be dealt with for contempt for disobeying court orders made in the wife's favour concerning the sale of the matrimonial home. There was some dispute as to the exact amount payable but the husband had neglected to pay even the amount which was not in dispute. The trial judge found that the husband had sufficient funds available to meet the court order.

Three points are of interest to the Magistrates' Court.

1. Are Contempt Proceedings appropriate where the issue is the non-payment of money?

Pawley J considered the decisions opposed to the proposition, e.g. *Vergis* 1977 and *Douglas* 1978 and the decisions in favour of it e.g. *Delly* 1977 and *McCulloch* 1978. He also considered the decision of the Full Court in *Sahari's case* (1976) FLC 90-086. The Full Court in the present case agreed with Pawley's conclusion that, notwithstanding section 107 of the *Family Law Act* which prohibits imprisonment for non-payment of moneys, section 108 gives the Family Court power to punish by way of contempt proceedings for the wilful disobedience of an order to pay money. The Full Court added the qualification:

"that the spirit and philosophy of the *Family Law Act*, as evidenced by ss70, 114 and 107, as well as by many provisions aimed at encouraging conciliation, discourage resort to the contempt power where it is appropriate to use other remedies first (*Sahari* (1976) FLC 90-086, at 75,407) 'Legal practitioners, who have their own duties under the Act, should be loathe to advise the invoking 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.' It is not necessary for this Court to define the circumstances in which it would be appropriate to use the contempt power in cases of failure to pay maintenance or other moneys due. Each case has different circumstances. The principle is simply that wherever possible other remedies should be used first."

2. The "Wilful" element.

Pawley J had not been satisfied that the husband's failure to pay constituted a wilful disobedience and he therefore dismissed the application. The wife had argued that it was not an essential part of her case to establish a guilty intent on the part of her husband. On consideration of the cases the Full Court held that the word "wilful" did not involve obstinacy but merely the refusal of the defendant to do those things which he had been ordered to do. Given the facts that the husband had made no attempt to pay any of the money ordered and that the trial judge had found that he had sufficient funds to have done so, the Full Court held that the failure to pay could as a matter of law, be regarded as wilful.

3. Alternatives to Contempt Proceedings.

The husband submitted that the wife should have taken alternative proceedings, e.g. by way of oral examination or sequestration. To support this he relied upon the *dicta* in *Sahari's case*. The Full Court said:

"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 r133 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."

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