

Western Samoa

Chu Ling v. Bank of Western Samoa

Supreme Court

Hattaway J.

4 September 1987

Property law - mortgage - mortgagee's power of sale - prohibition against power of sale against Samoan mortgagor without leave of Supreme Court - Section 367, Samoa Act 1921 (N.Z.).

10 *Constitutional law - Article 15 Constitution of Western Samoa - equal protection - discrimination against non-Samoans in case of default - possible discrimination against Samoans in application for loan.*

The defendant bank sought to exercise a power of sale against the plaintiff, the allegedly defaulting mortgagor. The plaintiff claimed the protection of section 367 of the Samoa Act 1921 (N.Z.) which provides as follows: "No security given by a Samoan over any property shall be enforceable, whether by the exercise of a power of sale or otherwise, without the leave of the Supreme Court". It was common ground that no such leave had been obtained. Defendant argued that section 367 had
20 been repealed by implication. Plaintiff sought an injunction against the defendant bank exercising its power of sale unless and until the requisite leave had been given.

HELD: The injunction would not be issued.

- (1) No implied repeal of section 367 was effected by the Property Law Act 1952 (N.Z.) or the Chattels Transfer Act 1965 (W.S.).
- (2) Section 367 is inconsistent with Article 15 of the Constitution, which establishes "equal protection under the law". By the supremacy clause of Article 2 of the Constitution, statutes inconsistent with the Constitution are
30 void. Section 367, being inconsistent, is therefore void and it follows that there is no requirement for the bank to seek leave prior to sale.

OBSERVATION: Many New Zealand Acts continued in force in Western Samoa after the adoption of the Constitution in 1960: see Article 114 of the Constitution of Western Samoa and section 5 of the Western Samoa Act 1961 (N.Z.) as amended in 1977.

The "Equal Protection Clause" was extensively discussed in the so-called "matai suffrage" case, *Attorney-General v. Saipa'ia Olomalu* (1982) usefully reported in (1984) 14 V.U.W.L.R. 275.

40 **Legislation referred to in judgment:**

Chattels Transfer Act 1965 (W.S.)

Constitution, Articles 2 and 15.

Property Law Act 1908 (N.Z.)

Property Law Act 1952 (N.Z.)

Samoa Act 1921, section 367 (N.Z.)

Samoan Status Act 1963, section 3 (W.S.)

K. Enari for the plaintiff

R. Drake for the defendant

50 **HATTAWAY J.**

Judgment:

This matter arises from consideration of an application for an interim injunction by His Honour Mr Justice Bathgate earlier this year when he directed that this matter be referred to the Court for consideration of the effect of section 367 of the Samoa Act as far as the enforcement of the rights of the mortgagee are concerned. Section 367 of the Samoa Act 1921 provides: "No security given by a Samoan over any property shall be enforceable, whether by the exercise of a power of sale or otherwise, without the leave of the Supreme Court." The Samoan Status Act 1963 defines a Samoan in section 3 to mean a person who is a citizen of Western Samoa; and has any Samoan blood. As I understand it in this present case the defendant bank has taken steps to exercise its power of sale and an application for injunction was made, and it was arising from that that the Judge's attention was directed to section 367 of the Samoa Act.

Counsel for the plaintiff, Mr Enari, has argued that the section is quite clear that this is another stage which a mortgagee must undertake in order to enforce his rights under the terms of the Property Law Act and that in this case as the bank has not complied with the provisions of section 367, it is not able to proceed with the enforcement of its power of sale.

For the defendant bank Mrs Drake argued that section 367 is no longer in force. She firstly argued that there is an implied repeal by virtue of the Property Law Act 1952 enacted in New Zealand and which is applicable in this country. She has also argued that there is an implied repeal by the Chattels Transfer Act 1965 of Western Samoa. The Property Law Act which was enacted in New Zealand in 1952 amended the Property Law Act 1908 in which the same power of sale was expressed. In any case I am not persuaded by the argument that there was an implied repeal by virtue of such legislation. The second part of the argument submitted by counsel for the bank is that by Articles 2 and 15 of the Constitution the provisions of section 367 of the Samoa Act are invalid. Article 2 of the Constitution of the Independent State of Western Samoa provides:

- (1) This Constitution shall be the supreme law of Western Samoa.
- (2) Any existing law and any law passed after the date of coming into force of this Constitution which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.

The argument by the defendant bank's counsel was that if the provisions of the Samoa Act 1921 in particular section 367 are inconsistent with the Constitution then it is void. She then turns to Article 15 of the Constitution which provides:

- (1) All persons are equal before the law and entitled to equal protection under the law.
- (2) Except as expressly authorized under the provisions of this Constitution, no law and no executive or administrative action of the State shall, either expressly or in its practical application subject any person or persons to any

disability or restriction or confer on any person or persons any privilege or advantage on grounds only of descent, sex, language, religion, political or other opinion, social origin, place of birth, family status, or any of them.

100 The section goes on to say at subsection 4 that the State shall direct its policy towards the progressive removal of any disability or restriction which has been imposed on any of the grounds referred to in clause (2).

The defendant bank argues that the restriction on the alienation of land by Western Samoans had already been removed by statute and that if section 367 is enforceable then it confers upon a Samoan who obtains a mortgage an advantage based on the fact that he is a Samoan by descent or his place of birth. Section 367, counsel argues, is at variance with the provisions of Article 15 subsection 1 which provides for equality under the law. A Samoan mortgagor could be given an advantage after he had made default under his mortgage by requiring the mortgagee to obtain leave to sell and conversely a Samoan could be at a disadvantage in seeking
110 a loan from a bank or from other lenders against any security, and the lender, being aware of the restriction under section 367, may prefer not to lend to them, so that on the one hand banks which lends on such security may be at a disadvantage when it comes to enforcing the power of sale until leave of the Court is obtained whilst on the other hand when applying for a loan a Samoan may be placed at a disadvantage for precisely the same reason.

Accordingly I have come to the conclusion that section 367 is void by virtue of the provisions of the Constitution in that it is at variance with the provisions of the Constitution. The Constitution is expressed to be the Supreme law in this country and that as all persons are equal before the law by virtue of Article 15 it follows that
120 the provisions of section 367, Samoa Act 1921 is void and I find that accordingly there is no necessity for the bank to apply to the Court for leave to exercise its power of sale.

Reported by: T.M.