

CHU LING (JOHN) v BANK OF WESTERN SAMOA (No. 1)

Supreme Court Apia
Hattaway J
4 September 1987

PROPERTY LAW - mortgagee sale - interim injunction - whether the bank has to apply to the Supreme Court for leave to exercise its powers of sale under S367 Samoa Act 1921 - whether S367 Samoa Act 1921 valid.

CONSTITUTIONAL LAW - Constitution of Western Samoa 1961 - inconsistent legislation - whether S367 Samoa Act 1921 is inconsistent with the Constitution of Western Samoa under Article 15 (1), (2).

The Defendant was taking steps to exercise its powers of sale when an application for injunction was made and the matter was referred for consideration of S367 Samoa Act 1921.

HELD: S367 Samoan Act 1921 is void by virtue of the provisions of the Constitution. All persons are equal before the law by virtue of Article 15 of the Constitution. S367 confers upon a Samoan who obtains a mortgage an advantage or conversely a disadvantage in trying to obtain a mortgage, based on the fact of being Samoan by descent or place of birth. It follows S367 is void pursuant to Article 2 of the Constitution.

LEGISLATION:

- Samoa Act 1921; S 367
- Samoan Status Act 1963; S 3
- Property Law Act 1952 (N.Z.)
- Property Law Act 1908 (N.Z.)
- Chattels Transfer Act 1965
- Constitution of Independent State of Western Samoa
Articles 2 and 15

Enari for Plaintiff
R Drake for Defendant

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 is 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 authorised 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."

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 Samoan 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 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 lend 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 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.