than one year. It is not necessary that he should have served a period of one year of sentence during the course of those five years. In our view the period of one year relates to the period of sentence and not to the period of sentence undergone during the period of five years. It is thus clear that the learned Single Judge came to a correct conclusion on both the contentions raised before him and reiterated before us. The answer to the second contention depends on the interpretation of section 6(i) of the Act which interpretation I have set out above and in view of that interpretation there is no force in the second submission of the learned counsel as well. The appellant was not eligible for being nominated for election as a member of the Panchayat Samiti in June, 1964, and having been elected, his seat became vacated under section 15 because of the disqualification incurred by him under section 6(i) of th Act.

(6) For the reasons given above, there is no merit in this appeal which is dismissed, but without any order as to costs.

MEHAR SINGH, C.J.—I agree.

N. K. S.

APPELLATE CIVIL

Before A. D. Koshal, J.

TIKAN,—*Appellant.*

versus

DHARAMVIR SINGH ETC.,—*Respondents.*

R.S.A. No. 106 of 1963.

May 1, 1970.

Punjab Pre-emption Act (1 of 1913)—Section 15(1)(a) fourthly—Agricultural land in possession of a tenant—Landlord creating usufructuary-mortgage in respect of the land—Tenant paying rent to the mortgagee without surrendering earlier or creating fresh tenancy—Land sold by the landlord—Such tenant—Whether has a right to pre-empt the sale.

Held, that in cases of usufructuary mortgages created over land in possession of tenants, the tenants, from the time the mortgage comes into being, attorn to the mortgagee. The mortgagee having become entitled

to possession, his position as against the tenant becomes that of an attorney of the mortgagor having authority to receive rents and profits accruing from the property. In such cases the tenant remains the tenant of the mortgagor even though he may also be described as the tenant of the mortgagee (who actually receives the rent from him). There is nothing in law which justifies the proposition that as soon as the tenant begins to pay rent to the mortgagee his tenancy under the mortgagor comes to an end and a new tenancy under the mortgagee begins. Unless the pre-existing tenancy under the mortgagor is either effectively terminated by the latter or is surrendered by the tenant himself before or after the creation of the mortgage, the tenant will continue to hold the same status under the mortgagor as he was holding before the creation of the mortgage. The tenant pays rent to the mortgagee not because there is a surrender of his earlier tenancy or that he has taken a fresh tenancy from the mortgagee but because of the unilateral act of the mortgagor over which the tenant has no control and which act would in any case have been operative against him in so far as it authorised the mortgagee to receive the rents and profits of the land. If the land is sold by the landlord, such a tenant continues to be tenant of the vendor and has a right to pre-empt the sale under sub-clause fourthly of section 15(1)(a) of the Punjab Pre-emption Act.

(Para 5)

Regular Second Appeal from the decree of the Court of Shri Har Narain Singh Gill, Senior Sub-Judge, with enhanced appellate powers, Gurgaon, dated the 17th September, 1962, affirming with costs that of Shri Raghbir Singh Gupta, Sub-Judge Ist Class, Palwal, dated the 4th December, 1961, dismissing the plaintiff's suit and leaving the parties to bear their own costs.

D. S. KEER AND MUNESHWAR PURI, ADVOCATES, for the appellant.

SUKINDER SARUP, ADVOCATE, for respondents Nos. 1 to 4.

JUDGMENT

A. D. KOSHAL, J.—The main question which requires determination in this appeal is whether a person holding agricultural land as a tenant under the owner thereof continues to have that status after a usufructuary mortgage is created by the owner in respect of the land in favour of a person to whom the tenant begins to attorn.

(2) The facts giving rise to this appeal are these. Shmt. Khemon, a resident of village Tigaon, Tahsil Ballabgarh, district Gurgaon, sold 23 Kanals 2 Marlas of agricultural land situated in that village to the defendants-respondents for Rs. 7,000 by means of a registered sale deed, dated the 21st of April, 1960. This land was held under usufructuary mortgage with one Sanwal Singh, the mortgage-money being Rs. 3,000, which was left in deposit with the

vendees for payment to the mortgagee. The plaintiff-appellant who, at the time of sale, was in possession of the land as a tenant under the mortgagee filed a suit to pre-empt the sale on the ground that at that time his status really was that of a tenant under the vendor. Exception was taken to the genuineness of the ostensible price and it was averred that the price actually fixed was only Rs. 4,000. The defendants' case was that the plaintiff had no right to pre-empt the sale. In the event of the suit being decreed, however, they asserted their right to be reimbursed for the expenses incurred in purchasing the stamps for the sale deed and having it registered.

(3) The trial Court found that the price of Rs. 7,000 was actually paid and fixed in good faith. No evidence having been led as to whether the vendor or the vendees had incurred the expenses incidental to the sale the claim of the defendants thereto was negatived. It was further held that although in respect of a part of the property the plaintiff was in possession thereof as a tenant of the vendor before the mortgage in question, which was created in 1957, he accepted the position of a tenant under the mortgagee thereafter and continued to hold that position right up to the date of the sale and that on that date he was a tenant under the mortgagee and not under the vendor. It was on these findings that the plaintiff was non-suited by the trial Court whose decree was upheld in appeal on the 17th of September, 1962, by Shri Har Narain Singh Gill, Senior Subordinate Judge, Gurgaon, who confirmed the findings of the trial Court on the only point argued before him, namely, that on the facts stated the plaintiff was entitled to be regarded as a tenant under the vendor on the date of the sale. It is against the appellate decree passed by Shri Gill, that the plaintiff has filed this Regular Second Appeal.

(4) From a perusal of the Khasra Girdawari Exhibit P. 1, the following facts are clearly made out :

(a) In the beginning of the agricultural year 1956-57, the plaintiff was in possession of Khasra Nos. 8/3, 9 and 14 forming part of the land in dispute and having a total area of 19 Kanals 18 Marlas as a tenant under Smt. Khemon, the vendor.

(b) After the mutation based on the mortgage was sanctioned, the plaintiff was described by the Revenue authorities as a

tenant under Sanwal Singh, mortgagee, on the same terms as to payment of rent.

(c) The plaintiff continued to hold the land as a tenant under the mortgagee right up to the time of the sale.

(5) These facts are not seriously controverted on behalf of the respondents whose learned counsel, however, contends, in accordance with the findings of the two Courts below, that on the date of the sale the plaintiff must be regarded as a tenant under the mortgagee and not as one under the vendor. This contention, in the circumstances of the case, I do not find to be well-based. It is to be noted, as pointed out above, that the plaintiff was holding the land as a tenant under Smt. Khemon before the mortgage was created. It is nobody's case that he surrendered his tenancy and accepted a fresh tenancy under the mortgagee. On the other hand his stand throughout has been (and there is absolutely nothing on the record to show that it was not well-founded) that after the mortgage was created he became a tenant under Sanwal Singh, *by reason of the mortgage*, which appears to be quite natural. In fact, what happens normally in cases of usufructuary mortgages created over land in the possession of tenants is that the tenants, from the time the mortgage comes into being, attorn to the mortgagee. And this is not a course adopted without reason. The mortgagee having become entitled to possession, his position as against the tenant becomes that of an attorney of the mortgagor having authority to receive rents and profits accruing from the property. In such cases the tenant remains the tenant of the mortgagor even though he may also be described as the tenant of the mortgagee (who actually receives the rent from him). There is nothing in law which justifies the proposition that as soon as the tenant begins to pay rent to the mortgagee his tenancy under the mortgagor comes to an end and a new tenancy under the mortgagee begins. Such a proposition cannot be accepted unless there is the further fact that the pre-existing tenancy under the mortgagor is either effectively terminated by the latter or is surrendered by the tenant himself before or after the creation of the mortgage. Till such a state of affairs is shown to exist the tenant will continue to hold the same status under the mortgagor as he was holding before the creation of the mortgage. In this connection I may refer with advantage to a recent Full Bench decision of this Court in *Jagan Nath Piare Lal* v. *Mittar Sain and others* (1), in which one of the five

(1) A.I.R. 1970 Pb. & Hr. 104.

propositions applicable to cases of mortgages of property, which is under a pre-existing tenancy, was laid down thus:

> "The mere execution of a rent-note by the tenant of the mortgagor in favour of the mortgagee, after the mortgage has been effected, does not create a fresh tenancy in favour of the mortgagee. But there is nothing to prevent the tenant to surrender his earlier tenancy and enter into a fresh contract of tenancy with the mortgagee; and in each case, it will have to be determined on evidence, whether a tenant of the mortgagor did surrender his tenancy and obtained a fresh tenancy from the mortgagee after the mortgage came into being."

(6) This proposition is fully applicable to the facts of the present case in which it is clearly made out that the plaintiff was paying rent to the mortgagee not because there was a surrender of his earlier tenancy by him or that he had taken a fresh tenancy from the mortgagee, but because of the unilateral act of the mortgagor over which he (the plaintiff) had no control and which act would in any case have been operative against him in so far as it authorised the mortgagee to receive the rents and profits of the property.

(7) From the above discussion it follows that at the time when the sale took place the plaintiff was as much a tenant under the vendor as under the mortgagee, their position collectively as against him being that of the landlord. He was, therefore, entitled to be given the benefit of sub-clause Fourthly of clause (a) of sub-section (1) of section 15 of the Punjab Pre-emption Act and to be regarded as a person having a right of pre-emption as against the defendants. The findings of the two Courts below to the contrary are held to be erroneous and are reversed.

(8) The only other point argued before me is in respect of the expenses incidental to the sale. While the defendants would undoubtedly be entitled to them if they can be shown to have incurred any, there is not an iota of evidence on the record to show that they did. The findings of the trial Court on that issue cannot, therefore, be taken exception to.

(9) The result is that the plaintiff's suit must succeed in relation to the land which he is shown to have held as a tenant immediately before the mortgage was created, that is, Khasra Nos. 8/3, 9 and 14

of Rectangle No. 9, having a total area of 19 Kanals 18 Marlas, on payment of a proportionate price, it having been admitted by one of the defendants on oath before me today that the entire land in suit is of a uniform quality and price. The total area sued for being 23 Kanals, 2 Marlas, such proportionate price shall be 398/462 and share of Rs. 7,000 and works out to Rs. 6,030. In partial acceptance of the appeal, therefore, it is directed that if the plaintiff deposits in the trial Court, the amount last mentioned on or before the 30th of June, 1970, his suit for possession of Khasra Nos. 8/3, 9 and 14 in Rectangle No. 9, situated in village Tigaon shall stand decreed, but remains dismissed for the rest, with no order as to costs throughout. If he fails to make the deposit as just above stipulated, the dismissal of the suit as a whole shall remain intact and the plaintiff shall be burdened with the costs of the proceedings in all the three Courts.

N. K. S.

CIVIL MISCELLANEOUS

Before S. S. Sandhawalia, J.

GURDEV SINGH,—*Petitioner.*

versus

THE UNION OF INDIA, ETC.,—*Respondents.*

C. W. No. 637 of 1970

May 1, 1970.

The Army Act (XLVI of 1950)—Section 3 (xviii)—Punjab .District Soldiers' Sailors' and Airmen's Board (State Service Class II) Rules (1968)—Rule 7—Term "Indian Commissioned Officer"—Whether includes "Emergency Commissioned Officer".

Held, that the words "Indian Commissioned Officer" are more or less a term of art relating to a specific type of commission granted to the officers in the regular Indian Army. This is in sharp distinction to the "Emergency Commissioned Officers" who are recruited only on a temporary basis. The Emergency Commissioned Officers have no permanent right to hold the commissions and may be discharged or released at the sweet will of the Government, and it is normally so done after the period of the expiry of the emergency unless they are absorbed in the regular Army by grant of permanent commissions. Whilst the Indian Commissioned Officers form the permanent core of the Indian Army, the Emergency Commissioned Officers are recruited only for a temporary period. An Indian Commissioned Officer