

1875. It should be pointed out to the Session Judge that he  
 REG. . was wrong in holding that the committal, being by a com-  
 v. petent Magistrate, he was, under Section 197 of the Code of  
 TUKA'RA'M Criminal Procedure; bound to accept it. When the Session  
 RAG'HO. Judge found the order of committal to be contrary to law,  
 he should have reported the proceedings to the High Court,  
 under Section 296 of the Code, with a view to getting it  
 annulled.

*Order accordingly.*

[APPELLATE CIVIL JURISDICTION.]

*Special Appeal No. 400 of 1874.*

July 6. SHA'PURJI JAHA'NGIRJI.....(*Defendant*) *Appellant.*  
 THE SUPERINTENDENT OF } ... (*Plaintiff*) *Respondent.*  
 THE POONA CITY JAIL. }

*Limitation Act IX. of 1871, Schedule II., Clauses 63, 84, and 95—Suit on an  
 indemnity bond—Fraud—Cause of action.*

On the 27th July 1868 plaintiff received from defendant an indemnity bond, promising to indemnify plaintiff against the misbehaviour of a third person. On the 4th June 1870 the third person committed an act of embezzlement. In an action brought by plaintiff on the 28th June 1873 on the indemnity bond, the first Court held the claim barred under Clauses 63 and 84 of Schedule II., Act IX. of 1871. In appeal that decree was reversed, and the claim allowed under Clause 95 of the same schedule.

The High Court, on special appeal, *held* that Clauses 63 and 84, and not Clause 95, applied to the case; as the suit was one, not for relief on the ground of fraud, but for breach of a contract to indemnify against fraud.

**T**HIS was a special appeal from the decision of H. Crowe, Assistant Judge of Poona, reversing the decree of Mahádev Govind Bânade, 1st Class Subordinate Judge at the same place.

The special appeal was argued before WESTROPP, C.J., and LARPENT, J., on the 6th July 1875.

*Gándhibái Jhángirji Modi* for the appellant.

*Dhirájlál Mathurádás* (Government Pleader) for the respondent.

The facts of the case fully appear from the judgment of the Court delivered by

WESTROPP, C.J. :—This suit has been brought by the Superintendent of the Poona City Jail upon a bond, given by the defendant on the 27th July 1868, to indemnify, to the extent of Rs. 4,000, the plaintiff against any embezzlement or other misbehaviour of Dorábji Hormasji Chinay, the gaoler. The latter, on the 4th of June 1870, embezzled a fine of Rs. 1,000 paid to him by one of the prisoners in his custody, and was, on the 21st November 1871, convicted and sentenced in respect of that offence. The plaint was not filed in this suit until the 28th June 1873. The defendant has pleaded the Limitation Act IX. of 1871 as barring the suit, it not having been brought within three years after the occurrence of the act of embezzlement on the 4th June 1870.

1875.

SHA'PURJI  
JAHANGIRJI  
v.  
THE SUPER-  
INTENDENT  
OF THE POONA  
CITY JAIL.

The Subordinate Judge, Mr. Ránade, relying on Clauses 84 and 63 of Schedule II. of the Act, has held the plea to be good and the suit barred.

The Assistant Judge, relying on Clause 95 of the same schedule, has reversed the decree of the Subordinate Judge, and made a decree in favour of the plaintiff for Rs. 1,000, the amount claimed and costs.

The defendant has specially appealed to this Court against that decree.

We are unable to support the decree of the Assistant Judge.

Clause 95, on which he relied, provides that in suits "for relief on the ground of fraud" the three years' limit shall begin to run from the time "when the fraud becomes known to the party wronged". It is true that the fraud of the gaoler was the circumstance which entitled the plaintiff to call upon the defendant to indemnify him. But the cause of action is not the fraud itself, but the breach of the defendant's contract to indemnify the plaintiff. The suit, therefore, is one, not for relief on the ground of fraud, but for a breach of a contract to indemnify against fraud. And Section 19 of the Act, strengthens our view as to the question whether Clause 95, Schedule II., was intended to be appli-

1875. cable to such a case as the present. Section 19 provides that "when any person having a right to sue has, by means of fraud, been kept from the knowledge of such right or of the title" on which it is founded, and where any document necessary to establish such right has been fraudulently concealed, the time limited for commencing a suit, (a) *against the person guilty of the fraud or accessory thereto*, or (b) against any person claiming through him otherwise than in good faith and for a valuable consideration, shall be computed from the time when the fraud first became known to the person injuriously affected thereby, or, in the case of the concealed document, when he first had the means of producing it or compelling its production." Here there has not been any allegation that the defendant was in any wise accessory either to the fraud of Dorábji, the gaoler, or to the concealment of it. And there is not any provision in Section 19 prolonging the right of suit against an innocent guarantor.

SHA'PURJI  
JAHANGIRJI  
v.  
THE SUPER-  
INTENDENT  
OF THE POONA  
CITY JAIL.

The case seems to us to come within the Clauses 63 and 84 relied upon by Mr. Ránade. Clause 63 provides that in a suit "upon a promise to do anything at a specified time or upon the happening of a special contingency, the period of limitation (three years) shall begin to run at the time specified or at the contingency happening". Here the contingency, viz., the act of embezzlement, occurred on the 4th June 1870, *i.e.*, 3 years and 24 days before the plaint was filed. Clause 82 provides for the case of a suit by a surety against the principal debtor; Clause 83, for a suit by a surety against a co-surety; and Clause 84 provides for the case of a suit "upon any other contract to indemnify", and prescribes that the three years' limit shall commence to run "when the plaintiff is actually damnified". Here the plaintiff was actually damnified on the 4th June 1870 by the act of embezzlement, and, as already observed, the suit has not been brought within three years from that time.

We must reverse the decree of the Assistant Judge, and dismiss the claim with costs of suit and both appeals.