plaintiff should be paid to the defendant " or other persons entitled to receive the same."

We direct that the decree be accordingly modified. In other respects, we affirm the decision of the lower appellate Court, and as the appellant has substantially failed in her appeal, we dismiss it, save as aforesaid, with costs.

Decree modified.

MISCELLANEOUS CIVIL.

Before Mr. Justice Banerji and Mr. Justice Richards.

IN THE MATTER OF THE PETITION OF KHALIL AHMAD AND ANOTHER.*

Muhammadan law—Gift—Usufruct—Ariat.

Held upon application for review of judgment in the case of *Mumtaz-un-nissa* v. *Tufail Ahmad* (1) that what was decided in that case was that the transfer there in question was not an absolute gift, so that any limitation or condition limiting it would be void under the Muhammadan law, but that, taking the transaction as a whole, it was a grant of the usufruct of the property to Musammat Habib-un-nissa for her life. It was not intended to be laid down that the transfer being an *ariat* was invalid.

THE facts of this case appear sufficiently from the judgment under review, reported in I. L. R., 28 All. 264 and Weekly Notes, 1905, p. 269, and also from the order on the present application for review.

Mr. *R. Malcomson* for the applicant.

BANERJI, J.—This is an application for a review of the judgment passed by us in this case on 16th November 1905. In that judgment, which is reported in I. L. R., 28 All., 264, the following passage occurs :—" It is manifest that the intention was to transfer to the lady the right to enjoy the usufruct of the property for her life. This under the Muhammadan law would be what is known as an *ariat*, and therefore invalid." It is said that we were wrong in saying in our judgment that an *ariat* is invalid and we are asked to expunge the word " invalid" and substitute for it the word " valid." Strictly speaking, this application for review of judgment is not maintainable under section 623 of the Code of Civil Procedure, as the applicant was not aggrieved by the decree or order passed in the case, but as the expression

* Application for review of judgment in F. A. f. O. No. 80 of 1905, decided on the 16th of November, 1905.

(1) I. L. R., 28 All., 264 ; Weekly Notes, 1905, p. 269.

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"therefore invalid" may lead persons to think that in our opinion a grant known as an *ariat* in Muhammadan law is invalid, we think the matter should be considered by us. Speaking for myself I think the word "invalid" erroneously crept into the judgment. What we meant to hold, and did hold, was that the transfer was not an absolute gift so that any limitation or condition limiting it would be void under the Muhammadan law, but that taking the transaction as a whole it was a grant of the usufruct of the property to Musammat Habib-un-nissa for her life. This is what is known in Muhammadan law as an *ariat* (*vide* Ameer Ali's Muhammadan Law, p. 79). An *ariat* is not invalid according to Muhammadan Law, and we did not mean to hold that the transfer in the present case being an *ariat* was invalid. All that we intended to decide was that it was not an absolute gift, but was what is known to Muhammadan law as an *ariat*. In order to remove all misconception I think the words "therefore invalid" should be expunged from the judgment and I would order accordingly.

RICHARDS, J.—I also think that an inaccurate expression has crept into the judgment. The suit was brought to recover possession of certain property. The plaintiffs claimed as heirs of Niaz Ali. The defendant defended the suit as transferee of Musammat Habib-un-nissa, wife of Niaz Ali. Niaz Ali had made an application in the Revenue Court for mutation of names in favour of Musammat Habib-un-nissa. The defendant claimed that the result of that application in the Revenue Court was to confer an absolute estate on Musammat Habib-un-nissa, at least this was the only contention in the appeal before us. We had therefore to decide only the question whether Musammat Habib-un-nissa had acquired an absolute estate. We decided that the transaction amounted to no more than a grant of an *ariat* to Musammat Habib-un-nissa, and that accordingly the defendant could not rely on a transfer from Musammat Habib-un-nissa as a complete transfer of the entire estate in the property. We intended to decide that question and no other, and if the judgment is corrected in the way pointed out by my learned brother it will be free from all ambiguity. I therefore concur in the order passed by him.

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BY THE COURT.—We allow the application so far that we direct that the words, "and therefore invalid" be expunged from the judgment. Having regard to the circumstances of the case we make no order as to costs.

FULL BENCH.

Before Sir John Stanley, Knight, Chief Justice, Mr. Justice Sir William Burkitt and Mr. Justice Aikman.

RAM BILAS AND ANOTHER (PLAINTIFFS) *v.* LAL BAHADUR AND OTHERS (DEFENDANTS). *

Custom—Finding in favour of existence of custom based upon insufficient evidence—Second appeal—Practice.

Held that where a question arises as to the existence or non-existence of a particular custom, and the lower appellate Court has acted upon illegal evidence or on evidence legally insufficient to establish an alleged custom, the question is one of law, and the High Court is entitled in second appeal to consider whether the finding is based upon sufficient evidence. *Hashim Ali* v. *Abdul Rahman* (1) approved. *Raj Narain Mittar* v. *Budh Sen* (2) referred to.

IN this case the defendants respondents Nos. 2 and 3 sold to the defendant No. 1 their house in mauza Bilsanda, together with its site. The plaintiffs, zamindars of Bilsanda, sued for recovery of possession of the site and for the ejectment of the defendant vendee. The vendee pleaded that Bilsanda was not an ordinary agricultural village, but a town, that the custom of sales and other transfers without the consent of the zamindars prevails in the abadi and therefore the plaintiffs had no title to eject him. The Court of first instance decreed the plaintiffs' claim, finding that the custom alleged was not established, and that the defendants vendors held the house in question as ordinary agricultural tenants and were not entitled to sell more than the materials of it. The vendee appealed. The lower appellate court (additional Judge of Bareilly) reversed the decree of the first Court and dismissed the plaintiffs' suit upon the main ground that Bilsanda was not a village, but a town, to which the ordinary law as to tenants' houses in the abadi was inapplicable. The plaintiffs

* Appeal No. 83 of 1907 under section 10 of the Letters Patent from a judgment of Griffin, J, dated the 19th June, 1907.

(1) (1906) I. L. R., 28 All., 698. (2) (1904) I. L. R., 27 All. 338.