Here too; by a buyer — הכא נמי בלוקח -

Overview

The גמרא explained that the משנה which stated ואם אילן קדם לא יקוץ is in a case of a buyer (לוקח); for otherwise how could he be סומך (to the בור). There is a three way dispute how to interpret 'בלוקח'.

פירש הקונטרס[1] שהאילן ביד מוכר -

רש"י explained that the tree is now **in the possession of the seller –**

תוספות disagrees:

ואין נראה לרבינו יצחק ברבי מרדכי דאם כן הוי ליה למימר במוכר[2] -

And the ריב"ם disagrees, for in that case (that the tree is by the seller), the גמרא **should have answered** that the tree is **by the seller** (and not by the buyer) -

אלא נראה לו לפרש שהאילן ביד לוקח[3] -

Rather the ריב"ם **prefers to explain that the tree is by the buyer –**

תוספות anticipates a difficulty:

ולשני הפירושים אלו אין להקשות מאי איריא שהאילן קדם אפילו קדם בור נמי -

And one cannot ask according to these two interpretations (of רש"י and the ריב"ם), **why does** the משנה **teach us** the ruling of לא יקוץ in a case **where the tree preceded** the pit, the rule of לא יקוץ **should also apply even if the pit preceded** the tree; תוספות gives an example -

כגון שאדם אחד עשה הבור ואחר כך נטע האילן ומכר הבור לפירוש הקונטרס -

For instance where one person dug a pit in his property **and afterwards planted a tree** in his property, **and** then he either **sold the pit according to פרש"י** that the אילן remains ברשות המוכר -

או אילן לפירוש רבינו יצחק ברבי מרדכי לא יקוץ שהרי בהיתר עשאן -

Or he sold **the tree according to the ריב"ם פי';** in either case there is **no** requirement **to chop down** the tree (even though it will damage the pit which was dug before the planting of the tree) **since it was done permissibly.** Why was it therefore necessary for the משנה to state that we do not chop off the tree if it was planted before the

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[1] See רש"י ד"ה הכא who writes; אדם שנטע אילן בתוך שדהו ואח"כ מכר חצי שדהו לאיש אחר ובא הלוקח וחפר בור אין זה צריך לקוץ אילן שנטעו ברשותו. The tree is in the sellers field, where he had a right to plant it, so he need not chop it down when his neighbor (the buyer) digs a pit in his field. See 'Thinking it over'.

[2] We are continually discussing the אילן בעל, so it should have said that the אילן is still by the מוכר

[3] The case is basically the same as according to פרש"י, except that he sold the field and the tree, so if the seller decides to dig a pit in his field, we cannot chop down the tree of the buyer since it was planted ברשות..

pit, it will not be chopped off even if it was planted after the בור as long as it was planted בהיתר –

תוספות responds that in this example given, it is not considered בור קדם:

דבכהאי גוונא אילן קדם קרינא ביה שקדמה נטיעת האילן לערעור בעל הבור[4] -

For in such a case we consider it that **the tree preceded** the pit**, for the planting of the tree preceded the complaint of the בור owner -**

דערעור אינו בא אלא על ידי מכירת בור או מכירת האילן -

Since the ערעור did not take place previously (when it belonged to the same owner), **only later through the selling of pit** (לפירש"י) **or the selling of the tree** (לפי' ריב"ם) –

תוספות asks:

אבל לפירוש רבינו תם[5] שפירש בלוקח שלקח מאדם אחד את אילן וטוענין[6] ללוקח[7] -

However according to the explanation of the ר"ת, who explain that 'בלוקח' means **that** the בעל האילן **bought the tree from another person** and the reason why לא יקוץ **is because we** (the בי"ד) **argue on behalf of the לוקח -**

קשה לרבינו יצחק מאי איריא אילן קדם אפילו קדם בור נמי -

The ר"י has a difficulty with this פר"ת, for **why** does the משנה **teach** that if the **tree preceded** the בור, the rule is לא יקוץ, when according to the פר"ת **even if the בור preceded** the tree, the rule should **also** be לא יקוץ (since the seller had a right to maintain the tree and this right is transferred to the buyer)?!

תוספות has an additional difficulty on פר"ת:

ועוד כיון דהחזיק באילן ג' שנים איירי דבחזקת ג' שנים טוענין ללוקח[8] -

And furthermore since we are discussing a case **where** the seller **had a three year חזקה for this tree, for** it is only **by a חזקת ג' שנים that we argue on behalf of the buyer;** why is it necessary to establish the משנה by a לוקח -

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[4] בור קדם means that when he wants to plant the tree there is an ערעור from the בעל הבור (regardless whether he dug the pit it or not). However here since the owner is making both the בור and the אילן, there is no ערעור by the planting of the tree since it is the same owner. The ערעור takes place only after there are two owners, the בעל הבור and the בעל האילן but at that time the אילן was planted בהיתר; it was אילן קדם.

[5] The רש"ש amends this to read רבינו חננאל (instead of רבינו תם). See תוס' on the עמוד ב' ד"ה וסבר.

[6] We say that perhaps the seller of the tree (to the current owner) came to an arrangement with the בעל הבור to allow him to plant (or keep) the tree there (or some other claim that allows him to plant and maintain the tree). The seller transfers this right to the buyer, therefore לא יקוץ.

[7] There is a general rule that if a buyer (or an heir) gets into a dispute with a third party, בי"ד claims on behalf of the buyer (or heir) any claim which the seller (or the מוריש) could have claimed.

[8] This rule that טוענין ללקוח (or ליורש) is only if the seller had a חזקת ג' שנים in the property (the tree), for then we assume that it is his property, therefore we transfer his rights to the buyer. however if the seller did not have חזקת ג' שנים, we are not certain that it even belonged to the seller and therefore we are not טוענין ללוקח.

לוקמה נמי בלא לוקח ובחזקה שיש עמה טענה:

Let us establish it even without a לוקח, but with a חזקה of three years, where the בעל האילן **has a claim**[9] that he may keep his tree?![10]

Summary

בלוקח can mean either he sold the בור and retained the tree (רש"י), he sold the tree (ריב"ם), or he bought the tree from a third party (ר"ת; and טענינן ללוקח). The קדימה of the בור or אילן is determined by its status when there was an ערעור (complaint). According to the ר"ת it would seemingly make no difference what was קדים.

Thinking it over

According to whom is there a greater חידוש (by a לוקח) that לא יקוץ; according to רש"י or the ריב"ם?[11]

[9] The claim of the בעל האילן is the same as in footnote # 6. He will claim that he bought this right from the בעל הבור, or something similar. It will be valid for him as it was valid in the case of a seller.

[10] תוספות does not answer. See פני שלמה (brought also in נחלת משה) who answers these two questions.

[11] See סוכת דוד אות כא (עד"ז).