We distance the fish nets, etc. – מרחיקין מצודת הדג כולי

Overview

The גמרא cites a ברייתא which states that one must distance his trap to catch fish from an existing trap, the distance that a fish can travel (which is a פרסה). This proves that one cannot encroach on his fellow's livelihood. תוספות discusses this ruling.

תוספות anticipates a difficulty:

אף על גב דרבינו תם מפרש דבדבר של הפקר אפילו רשע לא מיקרי[1] -

Even though that the ר''ת explained that by an item of הפקר, one is not even called a רשע if he encroaches on his friend's intent to acquire the הפקר item. The ר"ת proves this -

כדתנן (פאה פרק ד משנה ג) גבי פאה פירס טליתו עליה[2] מעבירין אותו ממנה -

As the משנה taught regarding פאה, 'if a poor person **spread out his טלית over** the פאה (with the intent of acquiring it for himself), the rule is **we remove him from** this פאה and we allow the other poor people (also) to collect the פאה –

Another proof to the view of the ר"ת:

וכן תנן בפרק קמא דבבא מציעא (דף י,א) ראה את המציאה ונפל עליה ובא אחר והחזיק בה -

And similarly the משנה taught in the first פרק of ב''מ מסכת**, 'he saw a מציאה and fell on it** (but did not pick it up) **and another** person **came and took possession of it,** the rule is **-**

זה שהחזיק בה זכה -

The one who took possession acquires it', and we do not consider him to be a רשע even though his friend wanted it and made his intention clear by falling on the מציאה -

ולא מיקרי רשע אלא בעני המהפך בחררה ובא אחר ונטלה -

And one is not called a רשע in these cases of הפקר, **only by** a case of **עני המהפך בחררה and another came and took it** away from the עני, in that case he is called a רשע -

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[1] There is a rule that by an עני המהפך בחררה (a poor person circling around a cookie) and someone took it away from him, that person is called a רשע (even though that legally he may keep the object). The ר"ת explains that this rule applies only if the עני wants to buy something and another buys it ahead of him; in that case he is called a רשע, since he could have bought the same item elsewhere. However if it is a מציאה (something which is הפקר) anyone can go ahead and be זוכה from הפקר even though another may be planning to acquire it, In this case we cannot say to him, 'why are you taking this, go find another מציאה', since מציאות are not [easily] found. Here too by the fish, the fish is הפקר, so why do we need to distance one's net from another's net, since by הפקר (according to the ר"ת) there is no rule of עני המהפך בחררה.

[2] By merely spreading a טלית over the פאה he does not acquire it (there was no מעשה קנין); the question, however is why we remove him and let the others collect the פאה, this person (who spread his טלית) is seemingly an עני המהפך בחררה, so if others take it they should be considered a רשע. This proves (the ruling of the ר"ת) that by הפקר (like פאה, which is הפקר לעניים) the concept of עני המהפך בחררה does not apply.

משום שאם לא ישתכר במקום זה ימצא להשתכר במקום אחר -

Because we say to him **that if he will not profit in this place, he will find another place from where to profit –**

תוספות now answers his initial question:[3]

והך דשמעתא לא קשיא דאף על גב דהוי דבר של הפקר -

And there is no difficulty from this ruling here, even though the fish **is an item of הפקר,** and by הפקר there is no rule of עני המהפך בחררה, it is free for anyone -

מכל מקום בכמה מקומות ימצא שיוכל לפרוס מצודתו[4] ועוד[5] דהכא אומנותו בכך -

Nevertheless, he can find many other places where he can spread his net, and additionally that here this is his trade and livelihood of the initial fisherman **–**

תוספות continues with a question:[6]

והא דאמרינן בפרק חזקת הבתים (לקמן דף נד,ב) נכסי כנענים הרי הן כמדבר -

And this which רב יהודה אמר שמואל **states in פרק חזקת הבתים; 'the properties of gentiles,** which are being sold to Jews, **are like a wilderness;** meaning they are הפקר, so that -

כל המחזיק בהן זכה בהן מאי טעמא -

Whoever takes possession of them acquires them'; the גמרא explains, **that the reason is -**

כנעני מכי מטא זוזי לידיה איסתלק ליה[7] וישראל לא קני עד דמטי שטרא לידיה -

As soon as the gentile receives the money in his hand, he is removed from the property, **and the ישראל** who is purchasing the land **does not acquire it until he receives a deed in his hand -**

ופירש רבינו שמואל בן מאיר התם[8] דישראל המחזיק רשע מיהא מיקרי[9] -

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[3] See footnote # 1.

[4] This is not like regular הפקר (like מציאה) where we cannot say to him, 'find your מציאה elsewhere'; however here by fishing there are many places where one can fish, so therefore if one is already fishing in this area, anyone else should find other fishing grounds, or be considered a רשע.

[5] תוספות is differentiating (in this second answer) between the ruling of עני המהפך בחררה (which does not apply to הפקר), and the ruling of 'פסקת לחיותי', which can apply even to הפקר.

[6] See later by footnote # 11.

[7] The mode of acquisition and sale by a נכרי is through money (כסף), therefore as soon as the נכרי received the money for his field, he relinquishes his ownership of the field. However the ישראל who is purchasing the field from the נכרי, does not acquire the field until the נכרי writes him a שטר (a deed) granting him the field. In the interim (after the נכרי received the money and before the ישראל received the שטר) the field is ownerless; it no longer belongs to the נכרי since he forfeited his ownership of the field as soon as he was paid, while the ישראל does not assume ownership until he has his שטר, therefore the field is הפקר and כל המחזיק בו זכה בו.

[8] בד"ה הרי. The רשב"ם there maintains that the מחזיק is not even required to repay the original buyer for the loss of his money

[9] The purchaser was an עני המהפך בחררה and this other ישראל snatched it away from him.

And the רשב"ם explained there that the other **ישראל** (not the purchaser) **who takes possession** of the property, **is nevertheless called a רשע -**

ולפירוש רבינו תם אפילו רשע לא הוי כיון שלא ימצא במקום אחר[10] -

However according to the פירוש ר"ת the מחזיק **is not even considered a רשע, since he cannot find** a הפקר property **elsewhere -**

וקשה[11] לרבינו שמשון בן אברהם מהא דאמר באיזהו נשך (בבא מציעא דף עג,ב) -

So based on the aforementioned, **the רשב"א has a difficulty** with the פר"ת **from this** which the גמרא **states in** פרק **איזהו נשך -**

רב מרי בר רחל משכן ליה ההוא נכרי ביתא אזל רבא וזבניה -

A certain gentile transferred **his house to רב מרי בר רחל as a security (משכון)** for a loan; **רבא went and bought this** house from the נכרי, while רמב"ר was still living in the house -

נטר תריסר ירחי שתא שקל אגר ביתא אמטייה לרבא[12] -

רמב"ר **waited twelve months** and then **took** with him **the rent for the house and bought it to רבא -**

אמר ליה האי דלא מטאי לה למר אגר ביתא עד השתא דאמר מר סתם משכנתא שתא -

רמב"ר **said to** רבא, **'the reason that I did not bring you rent until now** (for the past twelve months) **is because the master said that an unqualified משכון is for one year -**

ולא מצי נכרי לסלוקי[13] -

And the נכרי cannot remove me for this whole year'. This concludes the גמרא.

והשתא כיון שקדמה חזקת רב מרי לחזקת רבא[14] -

But now since the חזקה of ר"מ preceded the חזקה of רבא -

אם כן זכה בה רב מרי דנכסי הכנעני הרי הן כמדבר -

Therefore ר"מ acquired the house, **since** we said[15] **that the properties of a נכרי** who is selling to a ישראל **are** הפקר **like a מדבר.** The question therefore is why did רמב"ר need to pay rent to רבא, since the house now belonged to רמב"ר.

ואי מקרי רשע[16] אתי שפיר דלא היה רוצה לזכות בה -

So if he is called a רשע (as the רשב"ם stated), **it is understood** why ר"מ paid the

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[10] This field is הפקר, and by הפקר the rule of עני המהפך בחררה does not apply (see footnote # 1).

[11] This is the conclusion of the question mentioned by footnote # 6.

[12] The rent was for the following twelve months.

[13] When the נכרי gave רמב"ר the house for a משכון it is presumed that רמב"ר (the מלוה) can live there for a year (סתם משכנתא שתא), and the מלוה deducts the amount of rent due from the loan. Therefore even though רבא bought the house from the נכרי (but after the loan and the giving of the משכון), nevertheless רמב"ר already acquired the right to live in the house for a year, and the purchase of רבא cannot deprive him of this right.

[14] When רבא bought the house, ר"מ was already living in the house; meaning that he made a חזקה in the house before רבא. At the moment when the house became הפקר (while רבא was purchasing it) ר"מ was מחזיק in it (by living there).

[15] See footnote # 7.

[16] See footnote # 8 & 9.

rent, **since he did not want to acquire it** (for he did not want to be a רשע) -

אבל לפירוש רבינו תם דאפילו רשע לא מיקרי -

However according to the ר"ת that רמב"ר **would not even be called a רשע -**

אמאי לא זכה בה רב מרי כיון דהיתר גמור הוא -

Why did not ר"מ acquire it, since it is perfectly permissible?!

תוספות responds:

ושמא לפנים משורת הדין עבד -

And perhaps רמב"ר **acted beyond the requirement of the law;** he did not want to cause a loss for רבא, even though legally it is permitted.

תוספות offers an alternate explanation:

ולרבינו יצחק בן אברהם נראה דחזקת רב מרי לא היתה אלא בתורת משכון[17] -

And it appears to the ריב"א that ר"מ took possession only in regards to a משכון, but he had no intention of making a חזקה for ownership -

ורבא קנה ממנו בשטר וזכה בה ואחר כך נתן מעות[18]

And (additionally/alternately) **רבא bought** the house from the נכרי **with a שטר and** thereby **acquired it** first **and** only **afterwards did he give the money** to the נכרי.

[ועיין עוד תוספות קדושין נט,א דיבור המתחיל עני המהפך וכולי ותוספות בבא מציעא עג,ב: סוף דיבור המתחיל נטר]:

Summary

The ruling of עני המהפך בחררה does not apply to הפקר, except for cases like fishing (where there are other places to fish) or where one is encroaching on someone's livelihood. A חזקה for a משכון is not effective for an ownership חזקה.

Thinking it over

From תוספות it seems that רבא acquired the house with the receiving of the שטר.[19] However תוספות there in (ב"ב (נד,ב ד"ה עובד clearly states, שטר ודאי לא קנה בעובד כוכבים, so תוספות should have rather answered that רבא gave him the money at the same time that he received the שטר.[20]

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[17] Presumably a חזקה must be with intent to own the property, however רמב"ר had no such intention.

[18] In this scenario the house was never הפקר, since רבא acquired it first with a שטר before the נכרי removed himself from the house (which happened later when he received the money). See 'Thinking it over'.

[19] See footnote # 18.

[20] See משפט שלום (למהרש"ם) סי' קצא בהגה"ה אות ג'.