אמר מר זוטרא אי טעין ואמר כולי –

מר זוטרא said; if he claims and says, etc.

Overview

The גמרא discusses how it is possible to find עדים that the מחזיק was in possession of his house for three consecutive years day and night. אביי answered that the neighbors know. רבא answered that the עדים are the tenants who lived there for the past three years (but did not pay the rent as of yet). מר זוטרא assumes that עדים who testify that the מחזיק lived in this house for three years, are acceptable, even if they do not say we know he was there all the days and nights. However if the מערער claims that he knows for sure that the מחזיק was not there on certain nights, then the מחזיק is obligated to produce witnesses that he lived there ג"ש ביום ובלילה. The גמרא concludes that מר זוטרא admits that if the מערער was a peddler, then בי"ד will demand that the עדים for the מחזיק testify specifically that he lived there ג"ש ביום ובלילה. This is the interpretation and text of the גמרא according to the רשב"ם. Our תוספות will briefly discuss the opinion of the רשב"ם, and then offer two alternate interpretations of the גמרא.

תוספות asks:

הקשה רבינו יצחק בר מרדכי לפירוש הקונטרס[1] כי לא טעין נמי אמאי לא נשאל מהן –

The ריב"ם has a difficulty, according to the interpretation of (רש"י) [רשב"ם] who maintains that (unless the מערער specifically demands it) all that the עדים are required to testify is that the מחזיק lived here for three years, without being specific whether it was ג"ש ביום ובלילה or not; **even if** the מערער **did not claim** that the מחזיק should produce witnesses that he lived in the house three complete years day and night, **why should we** (בי"ד) **not ask** the עדים whether the מחזיק was there ג"ש ביום ובלילה. The reason we should ask, is –

כי שמא אינן יודעין על הלילות –

Because perhaps the עדים do not know concerning the nights, whether the מחזיק indeed was there.[2] Probing these עדים will assure -

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[1] The פירוש הקונטרס generally refers to רש"י. We do not have פירש"י on this גמרא. Here are some options to choose from. A. תוספות (as well as the רשב"ם) perhaps had a previous version of רש"י on ב"ב, B. תוספות refers to פי' רשב"ם as the פירוש הקונטרס since it filled that void. C. The רשב"ם perhaps also distributed his פירוש in קונטרסים as רש"י did. See רשב"ם ד"ה אמר.

[2] We are not concerned that perhaps the עדים know that the מזיק was not there during the nights. If that were the case, they would not, in good conscience, testify that the מחזיק made a proper חזקה.

שלא נוציא על פיהן שלא כדין –

that we do not unjustifiably remove the מערער from his property, based **on their testimony.**

דבכל עדיות אנו דורשין יפה וכאן נמי אמאי לא נחקור אותן מספק –

for by all testimony we inquire properly to assure that the verdict is based on proper testimony **and here also, why do we not investigate them on account of the doubt** that we have, namely that they are not aware concerning the nights.[3]

תוספות answers:

ולאו פירכא היא דכיון שהעידו על הימים אפילו יאמרו אין אנו יודעים על הלילות –

However this is not a valid **challenge, for since they testified concerning the days;** that the מחזיק was there during the days, **even if the** עדים **were to say** (originally, or) subsequently after we question them, **'we do not know concerning the nights';** whether the מחזיק was there or not, nevertheless –

מסתמא כיון שדר בימים דר נמי בלילות אם לא שטוען המערער שבודאי לא דר –

It is presumed that since he dwelled in the house during the days, **he dwelt there also in the nights.** Therefore there is no point in questioning the עדים[4] **unless the** מערער **claims that** the מחזיק **certainly did not dwell** in the house during the nights.[5] In that case we will require that the מחזיק produce עדים who will testify specifically that the מחזיק was there by nights as well.

The opinion of the רשב"ם may be summarized as follows: According to רבא it is always necessary to have עדים who can testify that the מערער was there ג"ש ביום ובלילה (regardless of what the מערער claims). מר זוטרא maintains that if the מערער claims that the מחזיק was not there certain nights then מר זוטרא would agree with רבא; that עדות ג"ש ביום ובלילה is required. However If the מערער makes no specific claims, then a general testimony that the מחזיק lived there ג"ש is sufficient. There is a difference of opinions as to the ruling of אביי. Some maintain that אביי disagrees with רבא and מר זוטרא; that according to אביי the neighbors are always satisfactory witnesses (regardless of what the מערער claims); while others maintain that if the מערער contends that he knows for sure that the מחזיק was not there certain nights, then שיבבי are not accepted and we need עדים (tenants) who can testify that the מחזיק was there ג"ש ביום ובלילה (similar to the

[3] The ריב"ם assumes that the reason the רשב"ם maintains that a general testimony is sufficient, is because we assume that when the עדים state that the מחזיק lived here three years, they meant to say that he lived here ג"ש ביום ובלילה. Therefore the ריב"ם asks why we should not verify exactly what the עדים meant.

[4] תוספות maintains that the reason a general testimony is sufficient is (not because we assume that the עדים mean that the מחזיק lived here ג"ש ביום ובלילה, but rather) because we assume that if he was there generally, it can be assumed that he was there ג"ש ביום ובלילה.

[5] When the מערער claims that he knows for sure that the מחזיק was not there all the nights, then we cannot rely on the assumption, that since he was generally there, he most probably was there all the nights as well.

opinion of מר זוטרא). According to this latter opinion it is also a matter of contention whether מר זוטרא requires שיבבי as אביי does, or any עדים are sufficient.

תוספות offers a different interpretation of s'מר זוטרא statement:

ורבינו חננאל פירש דמר זוטרא קאי אפירכא דרב יימר דפריך נוגעין בעדותן הן –

And the ר"ח explained that זוטרא מר is **referring** back **to the challenge that רב יימר** posed to רב אשי concerning s'רבא statement. רב יימר challenged s'רבא answer, claiming that the tenants who testify, **their testimony is biased**!

וקאמר מר זוטרא אי טעין ואמר המחזיק –

So מר זוטרא responded to this challenge of רב יימר, saying **if the מחזיק claims and says** in response to the challenge that he should produce עדים that he lived there ג"ש ביום ובלילה; the מחזיק may respond, that –

לייתו תרי סהדי דדרו[6] ביה שלש שנים ביום ובלילה והבו לי אגרא ונפקו ואזלו להו –

Let two witnesses come, i.e. tenants **who lived there three years day and night and they paid me the rent** for the three years **and they left** my house **and went away -**

והנהו דדיירי ביה אחריני נינהו טענתו טענה[7] –

and those tenants **that live** in my house now **they are other tenants;** not the tenants that will testify, **his claim is a** valid **claim**; and these former tenants will be accepted as valid עדים –

תוספות will now explain why in this case there is no concern of נוגעין בעדותן. A synopsis of תוספות explanation follows:

In the previous case of רבא where the עדים are the current tenants there is a נגיעה בעדות. The tenants are aware that the ownership of the house is being contested. They already paid rent to the מחזיק. If the מערער wins the case and retrieves the house they will have to repay the rent to the מערער. The מערער is aware that they are living in this house. It is in the interest of the tenants that the מחזיק retain the house. Therefore their testimony is biased and not acceptable. In this proposed case by מר זוטרא, the tenants who will testify have vacated; the מערער is not aware that they lived there previously. To these tenants it makes no difference who wins the case. Even if the מערער wins he will not bother them for the rent; he does not even know them to be tenants. That is why they are not נוגע בעדות.

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[6] This is different than the גירסא of the רשב"ם and our גמרות where the text reads דדר instead of דדרו. According to the רשב"ם the עדים testify that the מחזיק lived there – דדר. However according to the ר"ח the עדים themselves lived there – דדרו.

[7] See later in this תוספות why the expression טענתו טענה is used instead of עדותן עדות, which seems more appropriate. See footnote # 18. See "Thinking it over # 3.

תוספות continues:

ולא נוגעין בעדותן הן[8] דלא דיירי בה השתא דמצי למימר להו הבו לי אגר ביתא –

and the former tenants **are not biased in their testimony, for** these former tenants **are not living now in** the house, so **that** the מערער **should be capable of saying to them give me the rent for the house** (which was the reason רב יימר challenged רבא that the עדים are נוגע בעדות). In this case it is not so. The עדים have nothing to fear from the מערער. The reason they need not fear the מערער even after they testify and the מערער becomes aware that they lived in the house for the past three years, is since it was -

אלא אינהו אמרו דיירנא ואינהו אמרו פרענו –

only they who admitted and **said we lived here** for three years ביום ובלילה (the מערער did not know about it) **and it is they who say we paid** the rent to the מחזיק (making him the מוחזק and therefore freeing themselves from any obligation to the מערער)[9]

תוספות explains that it is considered הפה שאסר, because they were in a compromising situation only on their own accord, through their own testimony –

והפה שאסר הוא הפה שהתיר[10] דאי בעו אמרי לא דיירנא ביה –

For the same mouth that bound them to the מערער (by saying we lived in the house that you claim as yours)**; that is the same mouth that frees them** from the מערער,[11] **for if they wished** they could have **said we never lived in that** house –

תוספות responds to an anticipated question:

וליכא למימר דדילמא מכחיש להו שהוא לא היה יודע כלל שהיו דרים באותו בית –

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[8] The הגהות הב"ח amends this to read, לא הן **<u>דהא</u>**

[9] It would seem that the ר"ח is of the opinion that a חזקה of a rental property requires two conditions; a) that the renters lived there ג"ש ביום ובלילה (so the מערער cannot claim that it was not a proper חזקה) and b) that the מחזיק receives the rent; for only through receiving the rent, does the מחזיק become the מוחזק. See 'Thinking it over' # 1. [See נח"מ who changes the גירסא to <u>דיירנא ג"ש</u> ואינהו אמרי אינהו וכו'.]

[10] A classic case of הפה שאסר הוא הפה שהתיר is a woman who comes to בי"ד and states; "I was once married, and now I am single". When בי"ד does not know the (past) status of a woman and she claims she is single, the woman is believed. If בי"ד knows that the woman was once married, then the woman must bring proof that she is now single. If the only way we know that she was once married is through her admission, then we say הפה שאסר the woman who said she was once married (and thus forbidden to marry) – הוא הפה שהתיר is the same woman who claims that she is now single (and permitted to marry). The woman is believed. We cannot prevent her from remarrying, since the only reason to prevent her from marrying is her exclusive testimony that she was once married, however she simultaneously proclaims that she is now single.

[11] When the עדים state דיירנא ביה, they place themselves at risk; for the מערער can then demand the rent from them (since merely living there three years does not accomplish a חזקה for the מחזיק – see previous footnote # 9).
However since they conclude simultaneously that we paid the three year rent to the מחזיק (making him a מוחזק), that removes any threat from the מערער. The concept of הפה שאסר וכו' is that the testimony is not viewed as two separate statements: a. we lived there, so you have a claim against us; and b. but we paid the מחזיק, so we do not owe you; for then they would be נוגע בעדות for they are testifying that they paid the מחזיק in order to make him a מוחזק. Rather it is considered as one statement; 'the house belongs to the מחזיק' (because we lived there and paid him the rent);

And we cannot say that perhaps the מערער **would contradict them** if they would have said that we never lived there, therefore they had to come and testify to protect themselves. This is not so; **because** the מערער **did not know altogether that they lived in that house.**

According to this interpretation of the ר"ח, there will also be a change in the גירסא in the following גמרא.

ובסמוך לא גרסינן מודה מר זוטרא אלא ומודה רבא דבעינן[12] שלש שנין ביממא ובליליא –

And in the following גמרא **the text does not read; 'מר זוטרא admits', but rather** the text reads; **'and רבא admits';** for it was רבא **who required** that there be witnesses who can testify that the מחזיק was there **three years by day and by night**, nevertheless רבא will admit that –

אם הנך עדים[13] רוכלים המחזרים בעיירות –

If these witnesses, who testify that they were tenants for three years **[they] are peddlers who travel to various cities** to peddle their merchandise; then רבא admits that -

אף על גב דלא אמרו דדרו ביה שלש שנין ביממא ובליליא –

even though they did not say that they lived there three years day and night –

אלא אמרי בידינו היה זה הבית שלש שנים רצופות –

but rather they say that this house was in our possession three consecutive years; they were the tenants all the time, then –

אף על גב שימים רבים הם מחזרים בעיירות ולא היו[14] בזה הבית עדותן עדות[15] –

Even though that for many day they are visiting other **cities and they were not [sleeping over] in this house** during those times, nevertheless **their testimony is a** valid **testimony**; and it is considered that the מחזיק made a proper חזקה.

The reason the ר"ח changes the גירסא from ומודה מר זוטרא (as it is in our גמרות, which is the גירסא of the רשב"ם) to ומודה רבא is as follows: According to the רשב"ם, מר זוטרא stated that (only) the מערער can demand עדות ג"ש ביום ובלילה; however בי"ד does not demand such עדות. Therefore the גמרא continues that מר זוטרא admits that if the מערער is a רוכל, then even if the מערער does not demand עדות ג"ש וכו', nevertheless בי"ד will demand עדות ג"ש ביום ובלילה.

However according to the ר"ח, מר זוטרא is merely interpreting s'רבא answer that it is possible to

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[12] Others amend this to דבעי.

[13] The הגהות הב"ח amends this to read רוכלים **הם** עדים.

[14] The הגהות הב"ח amends this to read, בזה היו **לנים**.

[15] This does not necessarily mean that the ר"ח changes the גירסא to read עדותן עדות. The גירסא can still be דאע"ג דלא טען טענינין ליה. The meaning would be that if the מחזיק is hesitant to bring these tenants as עדים, because he mistakenly assumes that they are not valid, then בי"ד will encourage him to bring them as עדים. See footnote # 20.

find tenants to testify ג"ש ביום ובלילה and not be נוגע בעדות. It was however רבא who insisted that we must find עדים for ג"ש ביום ובלילה (as opposed to אביי, who maintains that neighbors are sufficient). Therefore it follows that it is רבא who is מודה that there are circumstances – by רוכלין – where עדות of חזקת ג"ש ביום ובלילה is not strictly required.

The opinion of the ר"ח may be summarized as follows: מר זוטרא is explaining רבא. That it is possible to have the tenants as עדים (even if they already paid the rent) provided that the עדים tenants do not presently live there and the מערער is not aware of their previous tenancy. In addition; רבא agrees that the acceptability of tenant עדים applies even if the tenants do not live in the house continually but leave town to peddle wares elsewhere.

תוספות offers yet a different interpretation of the סוגיא:

ורבינו תם גרס דדיירנא ביה שלש שנין –

And the ר"ת maintains that **the text reads** (not דדר as the רשב"ם would have it and not דדרו as the ר"ח maintains, but rather) **that I** (the מחזיק) **lived there three years.**

ופירש דאביי ורבא תרוייהו סבירא להו דאין צריך להביא עדים על הימים ועל הלילות –

And the ר"ת **explained that אביי ורבא both maintain that it is not necessary to bring witnesses** to testify **concerning the days and the nights.** אביי said so clearly; for אביי maintained that the neighbors are sufficient to testify concerning the ג"ש. Even רבא who is seemingly saying that (only) the tenants can testify for the ג"ש ימים ולילות, nevertheless רבא does not maintain that it is required to have עדים for ג"ש ימים ולילות –

ורבא לא אמר ביממא ובליליא אלא להוציא המקשה מסברתו ולא לפלוגי אאביי אתא –

for רבא **did not state** that the tenants can testify **for the days and the nights** to imply that it must be this way, but rather **only** for the purpose of **disabusing the questioner from his conviction** that it is impossible to find witnesses who can testify concerning the entire three years by day and by night. רבא pointed out that it is possible to find such witnesses, i.e. tenants. However רבא **had no intention of arguing with אביי**, who states that neighbors are sufficient witnesses, even though they cannot testify with certainty that the מחזיק was there ג"ש ביום ובלילה. רבא agrees with אביי.

מר זוטרא is explaining the opinions of אביי ורבא:

וקאמר מר זוטרא אם אמר העידוני סתם[16] שדרתי ג' שנים בחזקת ימים ולילות –

And מר זוטרא said that אביי ורבא also agree that **if** the מחזיק **said** to witnesses, **testify on my behalf that I generally lived** here **three years, presumably days and nights,** so **–**

אף על פי שלא ראו ממש כל הימים והלילות אלא שבחזקת כן מחזקין אותו –

[16] Perhaps מר זוטרא claims that even שיבבי are not required; any עדים can testify to this effect.

even though the witnesses **did not actually see** that he lived there **all the days and all the nights** of this three year period **but rather they assume this presumption -**

שכל שעה שהיו נכנסים פעמים ביום ופעמים בלילה היו רואין אותו בביתו טענתיה טענה[17] –

because whenever they would enter the house **sometimes during the day and sometimes during the night the** עדים **would see** the מחזיק **in his house.** מר זוטרא maintains that **the claim** of the מחזיק that these witnesses should testify **is a** valid **claim,** and we accept these witnesses.

תוספות anticipates a difficulty with the ר"ת's explanation:

והוה ליה למימר עדותן עדות –

And מר זוטרא **should have worded** his ruling by saying **that their testimony is a** valid **testimony** instead of what מר זוטרא actually said that טענתיה טענה. Saying עדותן עדות would make it clear that a general testimony is also sufficient.

תוספות responds that it is not that difficult; even though it should have been worded עדות עדותן

אלא אגב דנקיטברישא דמילתיה אי טעין אומר נמי טענתיה טענה[18] –

However, on account that in the beginning of s'מר זוטרא **statement he used** the term **'if the** מחזיק **would *claim*'; therefore since he started with that term <u>he also</u> said** in the conclusion of his statement that **'his claim is** a valid **claim'.** The real intention of מר זוטרא, however, is that it is a valid testimony.

תוספות now concludes with the interpretation of the ר"ת concerning ומודה וכו' :

ומודה רבא והוא הדין מר זוטרא ואביי[19] ברוכלין המחזרין בעיירות –

And רבא **admits [and similarly מר זוטרא and אביי** whose names are not mentioned here together with ומודה רבא; they also agree] **concerning peddlers who circulate in** various **cities** peddling their wares, and are coming to testify on behalf of the מחזיק, that –

אף על גב דלא טען טענינן ליה[20] דאין צריכים להעיד שראו ממש –

even though the מחזיק himself **did not claim** that he wants them to testify, since he knows for sure that they cannot testify concerning the entire three years

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[17] It seems that only if the מחזיק claims that these עדים should be accepted, does בי"ד accept them. However initially בי"ד would not encourage these עדים to come and testify.

[18] See footnote # 7.

[19] The reason we mention only רבא, even though אביי ומר זוטרא also agree that we are lenient with עדים who are רוכלין, is because רבא stated the most stringent requirements for these עדים (and even though רבא does not actually require that stringency, nevertheless he verbalized it). The גמרא is saying that even רבא who is supposedly the most stringent is (also) lenient concerning the רוכלין.

[20] See footnote # 15.

(in which case בי"ד would not ordinarily encourage them to testify), **nevertheless we (בי"ד) will argue on his behalf that they should testify because it is not necessary that the** רוכלים **actually saw** the מחזיק in the house for the full three years**.** The reason בי"ד does not require them to testify for the full three years is –

שהרי הם מחזרין בעיירות ואין יכולין להעיד על הראיה[21] –

For these witnesses **are travelling in** various **cities and they cannot testify about seeing** the מחזיק in the house for three full years -

אלא יעידו שבחזקתו היה זה הבית שלש שנים ימים ולילות:

However, they may testify that this house was in the possession of the מחזיק, generally for **three years, days and nights.**

Summary

A. אמר מר זוטרא ואי טעין

a. רשב"ם - if the מערער claims that the מחזיק was not there at nights we require עדות for ג"ש ביום ובלילה.

b. ר"ח - (מר זוטרא is explaining רבא) If the מחזיק says I have tenants who left, they may testify, for they have no נגיעה בעדות.

c. ר"ת - (מר זוטרא is explaining אביי ורבא) The מחזיק can bring עדים that they always saw him whenever they came to his house (no ג"ש ביום ובלילה is required).

B. ומודה [מר זוטרא] [רבא]

a. רשב"ם - מר זוטרא agrees that if the מערער is a רוכל we require עדות ג"ש ביום ובלילה

b. ר"ח - רבא agrees that if the tenants are רוכלין they are proper עדים.

c. ר"ת - רבא (and אביי ומר זוטרא) agree[s] that רוכלין are encouraged to testify as tenants.

Thinking it over

1. If we were to assume that the ר"ח maintains that a חזקה of שכירות requires that the מחזיק receive the rent;[22] how can we explain that which רבא stated previously that we are discussing a case where the tenants did not pay the rent yet?

2. According to the ר"ח, that רבא agrees that רוכלין tenants can be proper עדים,

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[21] ר"ת maintains that we never strictly require עדים that can testify that the מחזיק was there ג"ש ביום ובלילה. It is sufficient to have עדים that testify that the מחזיק was there whenever they came. However, that is only if the מחזיק demands that we accept such עדים; בי"ד does not encourage it. If, however, the עדים are רוכלין then בי"ד will encourage (the מחזיק to bring) them to testify.

[22] See footnote # 9.

what would be the ruling if the מחזיק himself is a רוכל, would it be a proper חזקה even though he is not there ג"ש ביום ובלילה?[23]

3. Why does תוספות ask that it should have said עדותן עדות (instead of טענתו טענה) on the ר"ת only and not on the ר"ח?[24]

4. According to the ר"ח if רוכלין are permitted to testify, even though they were not there ג"ש ביום ובלילה, why in all other cases is it required that they should testify ג"ש ביום ובלילה?

[23] See רא"ש.

[24] See footnote # 7.