

אמאי קא סמכת אהאי שטרא האי שטרא חספא בעלמא הוא –

**On what are you relying, on this שטר; this שטר is merely a potsherd**

### **OVERVIEW**

In the case at hand, the מוחזק initially claimed that he has a שטר (which would have been מקויים). The מערער argued that it is a מזוייף שטר. In response the מחזיק admitted that it is a מזוייף שטר; however he lost his original valid שטר. רבה ruled that the מוחזק has a מיגו for he need not have admitted that it is a מזוייף שטר. However, רב יוסף disagreed and argued that the שטר which you are relying on is a מזוייף שטר. Seemingly רב יוסף is not responding to רבה's argument that the בעל השטר has a מיגו. This תוספות will offer three explanations why the מיגו is not effective.

תוספות asks:

תימה דליהמניה במיגו דאי בעי אמר שטרא מעליא הוא<sup>1</sup> –

**It is astounding! For the בעל השטר should be believed with a מיגו; for he could have claimed it is a valid שטר.** If the bearer of the שטר would not have admitted that it is indeed a false שטר, but would have rather maintained that it is a valid שטר, he would have been awarded the property. Therefore on account of this מיגו we should believe his claim that 'I bought it from you (and I lost the original valid שטר)'.

תוספות answers:

ותירץ רבינו יצחק ברבי מרדכי דלא אמרינן מיגו להוציא<sup>2</sup> ממון<sup>3</sup> –

**And the ריב"ם answered that we do not apply the rulings of a מיגו to extract monies [from its presumptive owner];**

ומה שהוא מוחזק בקרקע אינו כלום דקרקע בחזקת בעליה קיימא –

**(And) [For] the fact that the בעל השטר is in possession of the property is meaningless; the בעל השטר is not the מוחזק for land is presumed to be in the possession of its original owner -**

כיון שאין לו שטר ולא חזקה אלא בדברים בעלמא שאומר שטרא מעליא הוה לי ואירכס –

**Since he has neither a valid שטר nor a חזקה that support his contention, but rather merely the words which he says that I had a valid שטר and it was lost.** Words alone without a חזקה or a שטר do not entitle anyone to be considered a מוחזק in a property.

<sup>1</sup> מיגו is (seemingly) merely repeating רבה's argument; indicating that רב יוסף did not properly address the argument. רבה, וצ"ב however, does not explicitly state that רב יוסף is not responding to רבה's argument.

<sup>2</sup> The reason is that in order to extract money from the owner it is necessary to be certain that the monies are due. A מיגו cannot offer this degree of certainty; only two עדים can.

<sup>3</sup> The מחזקתו דמה שהוא הגהות הב"ח amends this to read ממון מחזקתו דמה שהוא הגהות הב"ח.

Therefore since the בעל השטר is not the מוחזק; but rather the מערער is the מוחזק in this case, for he is certainly the קמא, we cannot apply the מיגו principle here.<sup>4</sup>

anticipates the possible question that in any monetary argument someone is losing money; every מיגו should be considered a להוציא. מיגו תוספות will clarify when a מיגו is effective.

**ולא אמרינן מיגו אלא להחזיק ממון שיכול לפטור עצמו על ידי מיגו –**

**And we do not apply a מיגו only to maintain money that is in one's possession, which he can exempt himself from paying out monies to creditors through a מיגו.**

This example is discussing a case where one claims that the בעל המיגו owes him money. The בעל המיגו can be exempt from paying this claim through the מיגו; since the money claimed is in his unequivocal possession.

**אי נמי<sup>5</sup> אם יש לו שטר או חזקה וזה בא לפסול ראיתו אז זה יכול לקיימו על ידי מיגו –**

Or if you will, a מיגו is also effective if one has a שטר or a חזקה concerning property and this מערער comes to invalidate his proof; by claiming, for instance, that the third party seller never owned this property, then this מוחזק can substantiate his claim through a מיגו. תוספות offers an example –

**כמו קמי דידי זבנה מינך מיגו<sup>6</sup> דאי בעי אמר מינך זבינתיה ואכלתיה שני חזקה –**

As in the case where the מוחזק claims concerning his seller that 'he bought it from you in my presence' he is believed with a מיגו for he could have claimed 'I bought it from you and I consumed its produce for the three years'. In this case the ownership of the field is being contested;<sup>7</sup> nevertheless since he has a חזקה, the מיגו allows him to retain the field on the basis of the חזקה. However a מיגו does not have the power to enable someone to extract money or property that is in someone else's possession.

ריב"ם is not satisfied with this explanation of the תוספות.

**ואין נראה לרבינו יצחק מדלא מפרש טעמא הכי בהדיא<sup>8</sup> משמע דלאו משום הכי הוא –**

<sup>4</sup> may be of the opinion that since this is a מיגו דאי בעי שתיק, it is more effective than a regular מיגו and can be utilized even להוציא ממון. See תוספות ב"ב, א, ד"ה וזה. See footnote # 8.

<sup>5</sup> תוספות will offer another example where מיגו is effective even in a case where his presumptive ownership is not as verifiable as in the aforementioned case concerning his money

<sup>6</sup> It seems evident from this תוספות that the claim of קמי דידי מינך דזבנא is not believed on its own merits; only on account of the מיגו of זבינתא. See תוס' ל, א, ד"ה לאו (TIE footnote # 2).

<sup>7</sup> It is not that clear who is the מוחזק in this case; whether it is the מוחזק (who lived there for three years) or the מערער (who is the קמא). Nonetheless since the מערער is not a definite מוחזק, the מיגו is effective.

<sup>8</sup> Some commentaries maintain that according to the ריב"ם, the dispute between רב ורב יוסף is whether this is considered a מיגו להוציא or not. רב maintains that it is not a מיגו להוציא since the מוחזק initially presented a שטר which would have given him possession of the property. רב יוסף replied that we cannot consider him a מוחזק on account of a שטר מזוייף. This would seemingly answer the ר"י's objection. However the ר"י argues that if the basis of ר' יוסף's objection is that it is a מיגו להוציא, he should have stated that 'explicitly' (in addition to perhaps also explaining why it is considered a מיגו להוציא on account of the שטר מזוייף).

**However the ר"י is not satisfied** with this explanation that רב יוסף is discounting the מיגו since it is a להוציא, **since רב יוסף does not explicitly express this reason** of להוציא; but rather רב יוסף claims that **this indicates that it is not because of this** explanation of להוציא, that רב יוסף dismisses the מיגו.

– offers a different explanation תוספות

**ונראה לרבינו יצחק דטעמא דרב יוסף דלא אמרין מיגו הכא –**

**And the ר"י is of the opinion that the reason רב יוסף maintains that we do not invoke here the rules of מיגו, is that –**

**כיון דלית ליה הכא מיגו אלא אם כן שקר תחלה שהוצרך לשקר תחלה ולומר והא שטרא –** since here the מיגו would have no unless he initially lied; for it was necessary for him to initially lie and to claim 'והא שטרא'. The only way the מיגו has a is because he clearly lied initially when he said 'והא שטרא'. The מיגו is that he could have kept up this lie. We cannot base a מיגו on a lie.<sup>9</sup> In a regular case of מיגו (for instance the original claim (החזרת) is not known to be either a truth or a lie. Its truthfulness is established through the power of a מיגו. In our case however, we begin initially with a blatant self-confessed lie on behalf of the המיגו. A מיגו is not effective under these circumstances.<sup>10</sup>

– offers another explanation why there is no effective מיגו here: תוספות

**אי נמי משום הכי לא אמרין הכא מיגו משום דהוי חוזר וטוען –**

**Or we may also state that the reason we do not employ a מיגו here, is because he is retracting his original claim -**

**דמעיקרא טען והא שטרא –**

**For initially he claimed 'והא שטרא'.** He based his proof of ownership on the (false) שטרא -

**ועתה חוזר בו ומודה דחספא בעלמא הוא אלא שטרא מעליא הוה לי:**

**חספא בעלמא שטרא is a שטרא** **And now he is retracting this claim and he admits that** **but rather his new claim is that I had a valid שטרא.** A person may not change his arguments in בי"ד, when the latter argument contradicts the former, as in this case.<sup>11</sup> Previously

<sup>9</sup> According to the ר"י this is what רב יוסף meant when he said שטרא אהאי סמכת; the basis of the מיגו is the (false) שטרא that the מחזיק introduced originally. However this שטרא is a חספא בעלמא, and we cannot base a מיגו on a lie.

<sup>10</sup> A popular explanation is that the purported purpose of a מיגו is to prove the honesty of this individual. However, here the בעל המיגו is showing that he is not honest.

<sup>11</sup> רב יוסף is saying that originally you depended on this שטרא (שטרא אהאי סמכת); however now you can no longer depend on this שטרא (since it is a חספא בעלמא). You can therefore not accept any conflicting claims (even with a מיגו), since it is considered to be a חוזר וטוען. See שיטה מקובצת בשם הרא"ש.

he stated 'this is the שטר'; subsequently he admits that it is not a valid שטר; but rather I had another שטר.

### **SUMMARY**

תוספות offers three interpretations why a מיגו is ineffective here:

1. It is a מיגו להוציא. 2. It is a מיגו that is prefaced by a lie. 3. He is a חוזר וטוען.

### **THINKING IT OVER**

According to the ר"י, what are the reasons that רבה disagrees with רב יוסף?