והלכתא כוותיה דרבה בארעא –

And the law is according to רבה regarding property

Overview

There is a dispute between רבה ורב יוסף concerning the מיגו of שטרא מעליא הוה לי. In a case of a property dispute, רב אידי בר אבין ruled according to רבה, that it is a valid מיגו (we leave the land in the possession of the מוחזק); however in the case of a loan we follow the opinion of רב יוסף that the מלוה cannot collect (the monies are left in the possession of the לוה). This ruling seems incongruent. If רבה is correct that it is a valid מיגו then the בעל המיגו (והשטר) should always collect, even by a loan. If it is not a valid מיגו as רב יוסף maintains then it should never be valid even by קרקע.

רבינו שמואל פירש דמספקא ליה כמאן הלכתא –

The רשב"ם explained the apparent discrepancy that by property the law is according to רבה and by a loan the law is according to רב יוסף, by saying **that** רב אידי בר אבין **was unsure according to whom is the הלכה;** whether according to רבה or רב יוסף. Therefore he ruled that we grant the assets to the present מוחזק.

תוספות anticipates a difficulty with the fact that (on account of the ספק, then) in the case of property we grant it to the present מוחזק as opposed to the מרה קמא.

וצריך לדחוק ולפרש ולחלק בין ספיקא דתרי ותרי לספיקא דדינא –

And it will be necessary, with difficulty, to explain and differentiate between a ספק of תרי ותרי (where we grant the property to the original owner (מרה קמא) [as תוספות will shortly state]) **to a** ספק **of law;** where we cannot ascertain what the law is (in which case we award it to the present מוחזק [as in our case]).

תוספות will now present the contradiction (and the explanation):

דהא דלא אוקמה בחזקת מרה קמא כמו בנכסי דבר שטיא[1] –

for the reason ראב"א **did not place** the property **in the possession of the 'first owner';** the מערער who is the מרה קמא (which seemingly he should have) **as in** the case **of the properties of the 'incompetent' –**

דאמרינן (כתובות דף כ,א) אוקי תרי בהדי תרי ואוקי נכסי בחזקת בר שטיא –

where the גמרא **states, 'we place the two** עדים **against the two** contradicting עדים;

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[1] This בר שטיא was lucid at certain times and insane in others. He sold his property, and there was a dispute between two groups of עדים (תרי ותרי) whether he was rational or not when he sold it. If he was insane when he sold the property the sale is voided.

they cancel out each other **and we place the** disputed **properties in the** original **presumptive possession of the בר שטיא';** even though that the properties were now in the possession of the buyer**.** Seemingly the same ruling should apply here. We are not sure who should retain the property; just as in the case of בר שטיא. The property should be retained by the מרה קמא; not the present מוחזק! The ruling of בר שטיא teaches us that a חזקת מרה קמא takes precedent over the current מוחזק. Here is where the differentiation is necessary.

תוספות explains that there is a difference between the case of בר שטיא and our גמרא:

התם הוו תרי ותרי כמאן דליתנהו דמי[2] ואוקמינן ארעא בחזקת מרה קמא[3] –

There the contradiction of **תרי ותרי renders it as if there are no** עדים **and** therefore **we place the land in the possession of the מרה קמא -**

אבל הכא דמספקא לן דינא כמאן –

However, here where we are in doubt whose ruling we should follow –

התם לא שייך כולי האי למימר אוקמה אחזקת מרה קמא ונוציא מיד המוחזק[4] –

in that situation **it is not that appropriate to rule** that we should **place it in the possession of the מרה קמא and we should extricate it from the** possession of the current **מוחזק.**

תוספות concludes:

ודוחק הוא[5] –

And this distinction (between a ספיקא דדינא and a ספיקא of תרי ותרי) **is a forced one.** It is not a clear and definitive distinction.

תוספות adds an additional difficulty with this interpretation:

ועוד דהילכתא משמע דלגמרי פוסק כרבה ולא מספק –

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[2] See previous תוספות לב,א ד"ה אנן footnote # 8.

[3] If we assume that by תרי ותרי it is כמאן דליתנהו דמי, then there are no עדים to support the buyer's claim that the field was sold while the בר שטיא was lucid. It remains a ספק to whom the land belongs. Therefore since the מחזיק cannot prove that the בר שטיא was sane, we rely on the original חזקה that it belonged to the בר שטיא, and maintain that nothing changed in the ownership and that it still belongs to the בר שטיא.

[4] In our case there is a valid rabbinical ruling that it belongs to the מוחזק, and not to the מערער. The fact that there is an opposing view does not eliminate the former view (as in the case of תרי ותרי). The מערער, therefore, cannot remove it from the מוחזק, unless he can prove that the opposing view is the correct one. Other commentaries note that a חזקת מרה קמא can only determine the facts; since we are not sure what happened we 'assume' that it remains as it was originally (therefore it is effective by תו"ת). However when we are not sure what the הלכה is (whether this is a valid מיגו), we cannot maintain that since originally it belonged to the מרה קמא, it still belongs to him. The חזקת מרה קמא cannot determine the law (therefore it is not effective by a ספיקא דדינא). See 'Thinking it over' # 1. עי' בספריהם באריכות.

[5] תוספות may argue that a חזקה דמעיקרא (by תו"ת) is (also only) a דין (not a בירור); otherwise, if were a בירור how can it be a determining factor between two עדים. If it is a דין, then it can resolve by a ספיקא דדינא as well. ועיין , ואכמ"ל במפרשים באריכות.

And furthermore the term **'והלכתא' indicates that** רב אב"א **ruled completely like רבה** by קרקע **and not** because **he was in doubt** whether the הלכה is like רבה or רב יוסף. This implies that –

אפילו עבד כרב יוסף בדיעבד לא עבד –

Even if one already (mistakenly) acted **according to רב יוסף** and awarded the land to the מערער **he did not accomplish** anything. The land must revert back to the מוחזק. If ראב"א ruled according to רבה only מספק (as the רשב"ם maintains), then if a בי"ד mistakenly ruled like רב יוסף, the result would be that it would remain by the מערער; for now the מערער is the מוחזק. However the term 'והלכתא' indicates that in a case of ארעא the law is inherently like רבה; and not merely by default, since we are not sure who to follow.

תוספות offer his interpretation:

ונראה לרבינו יצחק דהיינו טעמא דהלכתא בארעא כרבה וכרב יוסף בזוזי –

And it seems to the ר"י that this is the reason that the ruling is according to רבה concerning land and like רב יוסף concerning money -

משום דאמרינן מיגו לאוקמי ממונא ואית לן לאוקמי ארעא בחזקת מרה דקיימא השתא[6] –

Because we use the מיגו principle **to maintain the monies** under its current ownership **and it is proper that we award the land in the possession of the current owner.** In the case of ארעא the בעל השטר has a מיגו להחזיק; therefore he is awarded the field legally. However in the case of a loan, even though the בעל השטר has a מיגו, but it is a מיגו להוציא. Therefore the monies remain in the possession of the לוה.

תוספות anticipates a question:

ובהכותב[7] (כתובות דף פה,א ושם) דאמר –

And that which the גמרא **states in הכותב** פרק -

מיגו דיכלי למימר לא היו דברים מעולם יכלי למימר הני סיטראי נינהו –

since the מלוה **could have argued 'it never took place';** the agent never paid any money at all **he can also claim that this** payment was for **another** debt. The מלוה can still collect his חוב with the שטר even though he admitted that the agent paid him money. It seems evident from that גמרא that a מיגו is effective even to extract money. This would contradict what תוספות is saying here that מיגו להוציא לא אמרינן.[8]

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[6] It seems that the ר"י agrees with the ריב"ם of the previous תוספות ד"ה אמאי; that מיגו להוציא לא אמרינן. [However (at least according to ראב"א) it is considered a מיגו להחזיק by ארעא. See previous תוספות ד"ה אמאי footnote # 8.] Therefore ראב"א agrees with רבה that the מיגו of שטרא מעליא הוה לי it is a valid מיגו. However in the case of זוזא it is a מיגו להוציא. See 'Thinking it over' # 2.

[7] An agent was sent to repay a debt. After he paid (without witnesses present) he asked that the שטר חוב be returned. The מלוה told him that this payment was for another debt; not the debt of this שטר חוב.

[8] See 'Thinking it over' # 3.

תוספות responds:

אף על גב דמיגו להוציא לא אמרינן שאני התם דאיכא שטרא:

Even though מיגו להוציא לא אמרינן nevertheless in **that** case **it is different, for there is a** valid **שטר.** The מלוה has a שטר that the לוה owes him money. The לוה claims that the monies were paid. The מלוה argues that the monies paid, were for a different debt. We believe the מלוה with a מיגו (for he could have claimed I never received any payment at all), concerning the monies that were paid; that indeed they were for another debt. In this argument the מלוה is the מוחזק. He has the money. Concerning the debt of the שטר, the לוה has to pay, for the מלוה has a bona fide שטר. In our case however, there is no שטר at all. The מלוה wants to extract money from the לוה only on the basis of a מיגו. A מיגו להוציא is not effective.

Summary

The רשב"ם maintains that ראב"א ruled like רבה (בארעא) [and רב יוסף (בזוזא)]; since he was in doubt whom to follow. The reason in our case we award it to the מחזיק and not to the מרה קמא as in תו"ת; is because by תרי ותרי they cancel each other out, however here it is a ספיקא דדינא.

תוספות maintains that ראב"א ruled like רבה, however by זוזא it is a מיגו להוציא.

Thinking it over

1. In the case of בר שטיא, the ספק is whether he was sane or not.[9] The חזקת מרה קמא does not seem to address this issue at all (as in other חזקות דמעיקרא).[10] It would seem that the חזקה דמעיקרא transcends the ספק and goes to the heart of the matter; to whom does the field belong. It should therefore follow that even by a ספיקא דדינא, the חזקה should transcend the ספק and deal with the essential ספק; to whom does the field belong.[11]

2. According to תוספות why does ראב"א state that the הלכה is כרב יוסף בזוזא. Seemingly ראב"א agrees (only) with רבה that it is a valid מיגו.[12] However in a case of a loan it is a מיגו להוציא. He does not however seemingly agree at all with רב יוסף that it is not a מיגו![13]

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[9] See footnote # 4.

[10] Other חזקות דמעיקרא include a מקוה which was בחזקת מ' סאה and it was found to be a חסרה; or a woman בחזקת בתולה who was found to be a בעולה, וכיו"ב.

[11] See בל"י אות קסז.

[12] See footnote # 6.

[13] See נח"מ (עד"ז).

3. Why did תוספות ask the question from כתובות on the ר"י in this תוספות?[14] He should have asked it on the ריב"ם of the previous (ד"ה אמאי) תוספות, who clearly states that מיגו להוציא לא אמרינן?[15]

[14] See footnote # 8.
[15] See בל"י אות קע.