

The רבנן said he who comes to collect, אמור רבנן הבא ליפרע כולי etc.

Overview

knew that if he tried to collect the father's debt directly from the יתומים he would be obligated to swear. He wanted to circumvent taking this oath, by collecting his debt under the pretense that the field was his.¹

In this case these יתומים were קטנים (as אב"י mentions). By יתומים קטנים there is a greater restriction; one cannot collect at all from יתומים קטנים even with a שבועה (unless their assets will be diminished on account of interest payments). תוספות will discuss the ramification of this דין of יתומים קטנים in our case.

anticipates a question:

even though that even with an oath – אף על פי שאף בשבועה – he would not have been able to collect his debt from them – לא היה יכול ליפרע מהם

until they grow up and become adults – עד שיגדלו

as אב"י shortly states: 'and when they will grow up you can involve them in a lawsuit; meaning that until they mature there can be no דין תורה. Why therefore did רב"ש only mention the difficulty that he would have to take an oath, he should have also mentioned that he would be required to wait until they are גדולים, thus tying up his monies due to him.

answers:

he was not particularly disturbed concerning the waiting period – לא היה מקפיד על ההמתנה

but rather he was disturbed only about taking an oath². אלא על השבועה

Therefore he only addressed this issue. In truth however he decided to collect the monies while they were still קטנים and would not wait, because he wanted to circumvent the שבועה.

¹ After רב"ש would have collected his (additional) debt, he planned to return the property to the יתומים. If they would then claim that he collected more than the mortgage, he would show the שט"ח, that he was owed additional monies. רב"ש would not have to swear to the יתומים, since he (thought that he) has a מיגו of לקוחה. היא בידי. The מיגו would exempt him from the שבועה. It seems from the conduct of רב"ש that the rule of הבא ליפרע מנכסי יתומים לא יפרע אלא בשבועה, is a דין for בי"ד only. The בי"ד will require that whoever wishes to collect from יתומים, or even whoever already collected a debt from יתומים is required to swear that he is/was owed the monies. An individual, however, is not bound by these rulings. If an individual can find a way to collect from יתומים without a שבועה he may do so. Eventually he may have to answer to בי"ד why he took the monies. He may then either have to swear, or as in the case of רב"ש be exempt from the שבועה if he has a מיגו. Initially however רב"ש could not use this מיגו, since it would be a מיגו להוציא. See footnotes # 3 & 7 for additional reasons why רב"ש did not initially go directly to בי"ד and use this מיגו.

² It is known that one should refrain from taking an oath even if one is swearing truthfully.

anticipates the following difficulty: Granted that רב"ש thought that he could circumvent the שבועה on account of the מיגו.³ However how could he circumvent the ruling that one may not collect at all from יתומים קטנים?! Seemingly the מיגו itself would not be able to override this ruling⁴. responds:

רב"ש and it seems that – ונראה דרבא בר שרשום סבר כרב הונא בריה דרב יהושע agrees with ר"ה בדרי"י –

מסכת – who explains at the end of our (טעמא⁵) בשלהי מכילתין (דף קעד,א) the reason for the ruling that we do not attach the assets of (minor) orphans to pay off any debts. There is a dispute between רב"ה בדרי"י and רב פפא for the reason of this ruling⁶. רב"ה maintains that the reason of יתומים קטנים לנכסי יתומין is –

because of ‘bundles’ of money. There is a concern that the father of the יתומים already settled the debt by giving a bundle of money to his creditor (to hold as a security for the debt).⁷ רב"ה agrees with רב"ש that this is indeed the reason. Therefore רב"ש argued that since he knows for sure that the father of these יתומים did not place any צררי by רב"ש, therefore he may collect his debt (even) from יתומים קטנים⁸.

– ר"פ would agree with רב"ש – דאי כרב פפא

who explains the reason for (קטנים) יתומים לנכסי יתומים is –

because since the obligation of repaying a creditor is ‘merely’ a מצוה⁹ – משום דפריעת בעל חוב מצוה

and יתומים are not obligated to perform מצות – ויתמי לאו בני מיעבד מצוה ניהו

– אם כן – if this were so; that רב"ש agrees with ר"פ that the reason for יתומים לנכסי יתומים is because יתומים קטנים are מצוה בני מיעבד מצוה, then –

³ It would seem from our סוגיא that אמרינן מיגו לאפטורי משבועה. See however עליות דר"י, who maintains that (מיגו) with this בי"ד (which may explain why he could not have initially gone to בי"ד with this מיגו), however here he would be considered a משיב אבידה for returning the field to the יתומים, when he (thought that he) could have kept it. A משיב אבידה is exempt from a שבועה.

⁴ The מיגו can be effective in responding to the claim of the יתומים, that רב"ש collected more than he was due. The fact that he has a מיגו allows רב"ש to keep the monies he collected for his שט"ח without the need for a שבועה. However how was רב"ש initially permitted to collect from the property of יתומים קטנים?!

⁵ See הגהות הב"ח.

⁶ See (also) תוספות דף ה,ב ד"ה ואפילו.

⁷ This concern of יתומים קטנים by צררי prevents the collection of a debt even with a שבועה. (One of) The reason(s) given is because since they are יתומים קטנים it is considered as if they are not present in בי"ד. There is a ruling that we do not accept evidence in the absence of the (opposing) litigant. This may also explain why רב"ש did not initially come to בי"ד with his מיגו of לקוחה בידי מיגו. This would not be accepted since they are יתומים קטנים. See רמב"ן. שלא בפני בעל דין we do not accept any evidence. יתומים קטנים.

⁸ The גמרא there (קעד,ב) states that in certain cases, where we are certain that the ליה owed the money, the rule of יתומים קטנים לנכסי יתומים, does not apply according to ר"ה בדרי"י. See ‘Thinking it over’.

⁹ According to ר"פ in the case of a (ע"פ) מלוה, the מלוה has no inherent שיעבוד on the properties of the ליה. It is merely an obligation (מצוה) on the ליה to repay the מלוה. The properties that the children inherit are not משועבד to the מלוה. The יתומים however are obligated to repay their father's loan. If the יתומים are קטנים, there can be no obligation on them until they become גדולים. See the various commentaries whether ר"פ maintains his stance even by a מלוה בשטר and whether this relates to the מחלוקת if דאורייתא or not.

even if it his claim were true; that their father owed him additional monies, nevertheless –

would not have been legally capable to withhold the land from the יתומים on account of his debt –

since the יתומים קטנים are not obligated to perform any מצוה. רב"ש wanted to have his debt repaid without having to take an oath. However he wanted to collect it legally; as is evident in his claim to אב"י, that he could have received it through the מיגו. However if רב"ש agrees with רב פפא, then it is immaterial whether or not his claim is valid. ר"פ maintains that in all situations one may not collect from the estate of יתומים קטנים. This proves that רב"ש agreed with the reason of ר"ה בדרי"י.

concludes:

and there too the rules according to ר"ה – וכדבר הונא נמי פסקינן התם. This supports the contention that רב"ש follows the view of ר"ה בדרי"י, in accordance with the הלכה.

Summary

רב"ש maintains (like ר"ה בדרי"י) that it is on account of the חשש צררי that one may not collect from יתומים קטנים even with a שבועה. Therefore since רב"ש knew there was no צררי, he (thought that he) was able to collect the debt from the estate of the יתומים קטנים and would be able to circumvent the שבועה through the מיגו of בדידי היא.

Thinking it over

It seems that if we assume the reason of יתומין קטנים is on account of צררי, then רב"ש was justified in collecting his debt, because he knew there was no צררי¹⁰. In this is true, then why did רב"ש require a מיגו to circumvent the שבועה, he could have claimed that he knows for sure that he is owed the money.

¹⁰ See footnote # 8.