I will suppress the mortgage – אכבשיה לשטר משכנתא ואוכלה שיעור זוזי contract and I will consume the amount of the monies owed to me

Overview

רב"ש maintained that he would be believed against the יתומים without a שבועה. He argued that he would have suppressed the שטר משכנתא and could claim therefore that he bought the field from their father. תוספות will discuss why it is necessary to suppress the שטר משכנתא? He could have claimed that he bought the field any time afterwards.[1] Why should the שטר משכנתא be in conflict with his subsequent claim of לקוחה היא בידי?!

דוקא משום דכבש לשטר משכנתא מצי למימר לקוחה היא בידי –

It is only because he suppressed the mortgage contract, that רב"ש **would have been able to claim** (in his מיגו): **'I bought it' –**

דלא היה ידוע דבתורת משכנתא אתא לידיה[2] –

for (since he was כובש the שטר משכנתא) **it was not known that he came to be in possession** of the field **on the basis of the mortgage** payments. Therefore, if he had claimed that he bought it and lived there for three years he would have been believed, since there were עדים that he lived there for three (or more) years (however they did not know that he was there initially בתורת משכנתא). However -

דאי הוו ידעי דמעיקרא בתורת משכנתא אתא לידיה –

Were it were known that initially he occupied the field בתורת משכנתא then -

לא היה טוען רבא בר שרשום שיכול לומר לקוחה היא בידי –

רב"ש would not have argued that he has a מיגו **for he could have said: 'I bought it'.** Even if there would not have been a rumor that it is ארעא דיתמי, nevertheless רב"ש would not have a מיגו of לקוחה היא בידי, if it was known that he originally occupied the field בתורת משכנתא. The reason is –

מידי דהוה אאומן[3] ואריס דאין לו חזקה בשדה אריסותו –

for it is similar to a craftsman or sharecropper where the sharecropper **has no חזקה in the field that he sharecrops –**

כיון דידוע דמעיקרא בתורת אריסותא אתו לידיה –

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[1] See footnote # 7.

[2] In this case there was a קול that it belonged to the יתומים. Nevertheless, a קול could not counter the claim of לקוחה היא בידי; it would require עדים.

[3] A craftsman would be a launderer or a tailor וכיו"ב. If they claimed concerning a garment in their possession that they purchased it from the מרא קמא, they would not be believed. We believe the מרא קמא who claims that he gave it to them for cleaning or mending.

since it is known that initially the field **was in his possession as a sharecropper**.[4] If a sharecropper were to claim concerning a field, which he sharecropped for a period of time, that he purchased it from the owner, and owns it for more than three years, he would not be believed. The fact the he has a חזקה is meaningless. An אריס cannot retain his אריסות field, as his own, based (only) on the חזקה.[5] The owner can claim that the אריס is in the field as a sharecropper.[6] A חזקה is valid only if the מחזיק initially had no right to be in possession of the property (except as a purchaser). Similarly here, if it is known that he originally occupied the field בתורת משכנתא, he cannot subsequently claim I bought it from the owner and have a חזקה. The owner originally permitted him to be in the field for his mortgage payments. The laws of חזקה do not apply to people who originally had a right to be in the property.[7]

תוספות brings additional examples where there is no חזקה, if there is a reasonable cause (besides purchasing) why the מוחזק possess it:[8]

וכן דברים העשויין להשאיל ולהשכיר–

And the same rule applies concerning **objects that it is customary to** either **lend them or rent them out.** If the person in possession claims that he bought the object from the מרא קמא and the מרא קמא claims that he merely lent it or rented it to him, the חזקה is meaningless and we return it to the מרא קמא.

וגזלן[9] דמעיקרא ידעינן דגזל שדה זו דאין לו שום חזקה:

And similarly regarding **a thief, who we know that initially that he stole this field**, and later he claims that he bought it and lived there for three years, the דין is **that** the גזלן **has no** חזקה **whatsoever.**

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[4] It is only by an אריס [and by a גזלן (see later in תוספות)] that it is necessary (to state) that we knew that he is in the field בתורת אריסות [or בגזל], however by an אומן [or by דברים העשויים להשאיל ולהשכיר (see later in תוספות)], even without knowing how it came into their possession we assume that it was given for אומנות or בתורת שאלה ושכירות and there is no חזקה

[5] The אריס will retain the field if he presents a שטר מכירה.

[6] See the משנה and the גמרא from א,מב דף onwards. See רשב"ם מב,א ד"ה והאריסין.

[7] It would appear from this תוספות that in the case of רב"ש, the term of the משכנתא ended (at least) three years prior to the father's death. רב"ש continued to consume the produce of the land for the succeeding three years to (partially) collect the additional debt. Otherwise, if the term of the משכנתא did not end until less than three years before the demise of the father, then תוספות assertion is not understood. Obviously רב"ש had to suppress the שטר משכנתא, otherwise it would be clearly stated in the שטר משכנתא that רב"ש was occupying the field בתורת משכנתא, and could not claim לקוחה היא בידי during the period of the משכנתא. If he claimed that he bought it after the משכנתא, there is no חזקת ג' שנים. However if the משכנתא concluded three years prior to the death of the father, we may have thought that רב"ש could claim לקוחה היא בידי after the משכנתא, and he has three חזקה years (after the משכנתא) to verify his claim. תוספות teaches us (that we derive from אריס), that since he originally entered the field ברשות on account of the משכנתא, he no longer can claim the field on the basis of חזקה alone, if he were not כובש the שטר משכנתא. See סוכ"ד אות כ"ה. See 'Thinking it over' # 1 (& 3).

[8] The basis for every חזקה is, if the מחזיק did not purchase it, how come he is in possession of this item (field). If, however there is an alternate reasonable explanation why the מחזיק has possession (besides purchasing), we assume that reason (i.e. דברים העשויין להשאיל וכו' or an אריס וכיו"ב) and deny the מחזיק ownership.

[9] The הגהות הב"ח amends this to read וגזלן דידעינן דמעיקרא גזל שדה.

Summary

There can be no חזקה if the item in question came into the possession of the מוחזק with the consent of the מרא קמא.

Thinking it over

1. If we assume the explanation that the שטר משכנתא ended in the lifetime of the father,[10] why did not רב"ש present his claim in בי"ד, against the father, during his lifetime? He would not be מחוייב a שבועה then!

2. Why does תוספות find it necessary to bring all these examples from an אומן, אריס, דברים העשויים להשאיל ולהשכיר and a גזלן?

3. Seemingly the case of משכנתא is different from the examples תוספות brings. By a משכנתא it should be a חזקה (even if it is known that he was there בתורת משכנתא), if רב"ש lived there for three years after the משכנתא was paid up. The owner should have made a מחאה after the conclusion of the משכנתא. In the other cases, however, there is seemingly no such argument.[11]

[10] See footnote # 7.

[11] By an אומן ודברים העשויין להשאיל ולהשכיר, there is no possibility of מחאה; in fact he is making it now. By an אריס, the owner can argue that he did not make a מחאה since he assumes that the אריס is continuing with his אריסות (עי' בהסוגיא שם). As far as a גזלן is concerned, the owner did not make a מחאה, for he fears the גזלן.