

A protest not in his presence, etc.

מחאה שלא בפניו כולי –

OVERVIEW

Our גמרא discusses whether a מחאה שלא בפניו is a valid מחאה or not. תוספות explains why the discussion is regarding the מחאה שלא בפניו and not the חזקה שלא בפניו.

תוספות asks:

תימה דבכל דוכתי נקט מחאה ואמאי לא נקט חזקה שלא בפניו הויה חזקה¹ –

It is astounding! For in all instances the גמרא always mentions מחאה שלא בפניו, but why does it not discuss whether a חזקה is a חזקה or not –

תוספות answers:

ויש לומר² לפי שהטעם תלוי במחאה ולא בחזקה –

And one can say; because the reason (whether it is a חזקה or not) depends on the status of the מחאה שלא בפניו, and not on the חזקה; תוספות explains -

שאדם המחזיק בקרקעותיו של חבירו אית ליה קלא שהוא חוקר ושואל על נכסיו³ –

For a person who makes a חזקה in the land of his friend, that חזקה is publicized, for the (original) owner inquires and asks about his properties -

אבל המחאה אין לה קול כל כך שאין המחזיק מחזר אם מוחה לו בעל קרקע⁴ –

However the מחאה is not publicized so much, for the מחזיק is not searching if the initial owner of the land is protesting against him, and -

לפיכך אין חזקתו חזקה כשאין יכול לשמוע מחאתו דמה יועיל שמיחה⁵:

And therefore (since the מחאה does not have as strong a קול as a חזקה), his חזקה is not a חזקה, when the מחזיק will not hear the מחאה of the מערער, for of what avail is the מחאה that the מערער will make. The deciding factor, in determining if it is a חזקה or not,

¹ The relevant issue at hand is whether a חזקה שלא בפניו is considered a חזקה or not; i.e. can the מחזיק retain the field. [Even if we would assume (for instance) that a מחאה שלא בפניו is not a מחאה; it would not be clear what is the ruling if the חזקה was made בפניו, whether it is a valid חזקה, since he did not make a מחאה בפניו, or whether it is not a חזקה, since he could not make a מחאה בפניו (he was in another city; see תוס' כט,א ד"ה אלא). It would be much clearer if the ruling was regarding the חזקה שלא בפניו.]

² See also תוס' כה,ב ד"ה אלא מעתה מחאה.

³ Therefore there is always a greater possibility that the מרא קמא will hear about the חזקה, since the מ"ק is interested to know what is happening with his properties (in distant places). See 'Thinking it over' # 1.

⁴ The מחזיק (in a case where he bought the property) is secure in his knowledge that it is his property, and is not concerned that the מערער will be מוחה, therefore even if there is a מחאה (because the מערער heard of the חזקה), the מחזיק will not hear about it, since he is not inquiring whether there was a מחאה. See 'Thinking it over' # 1.

⁵ The מערער thinks there is no point in my מחאה, since the מחזיק will not hear it (and therefore it will not encourage him to keep the שטר). The lack of מחאה is not a proof of lack of interest on the part of the מערער, but rather his realization of the futility of his מחאה.

depends (only) on whether the מחאה will be heard or not (and even if the חזקה will be heard it will not be a valid חזקה if the מחאה cannot be heard).

SUMMARY

The מערער (who is interested in knowing about his distant fields) is more likely to hear about the חזקה, than the מחזיק (who is secure in his purchase) is likely to hear about the מחאה. Therefore we discuss מחאה שלא בפניו instead of חזקה שלא בפניו.

THINKING IT OVER

1. תוספות distinguishes between the publicity of a חזקה and a מחאה; that the מערער is more prone⁶ to hear the חזקה than the מחזיק is prone⁷ to hear the מחאה. Seemingly there is a difficulty; if we are to assume that the מרא קמא actually sold the field (and is lying when he makes the מחאה and ערעור), then why is he interested and inquisitive regarding the חזקה. On the other hand if the מחזיק is there illegally (he did not buy the field), then he will listen carefully if there are any מחאות, in order to protect himself.

2. What changed in our understanding of חזקה and מחאה in this תוספות from the question to the answer?

⁶ See footnote # 3.

⁷ See footnote # 4.