אמר ליה מחילה בטעות הואי –

He said to him, it was a mistaken forfeiture

Overview

רב נחמן told רב ענן that he cannot keep the added property which the other party forfeited to him (by assisting him in making the wall [on his property]), since it is a mistaken מחילה (the neighbor did not realize that the fence was being erected on his property). תוספות reconciles our גמרא (in which ר"נ maintains מחילה בטעות לא הויא מחילה) with another גמרא which seems to imply otherwise.

תוספות asks:

וקשה דבפרק איזהו נשך (בבא מציעא דף סו,ב ושם דיבור המתחיל התם) אמר רב נחמן[1] –

And there is a difficulty; for ר"נ states in פרק איזהו נשך -

השתא דאמור רבנן אסמכתא[2] לא קני הדרא ארעא והדרי פירי[3] –

Now that the רבנן ruled that an אסמכתא is not legally **binding,** therefore **the land and the fruits revert back** to the לוה. The גמרא there continues -

למימרא דסבר רב נחמן מחילה בטעות לא הויא מחילה[4] –

Does this mean **to say that ר"נ maintains a mistaken forfeiture is not a מחילה?!**

והא איתמר המוכר פירות דקל לחבירו כולי[5] –

But it was taught, one who sell the fruits of a date palm to his friend, etc. -

ואמר רב נחמן ומודינא דאי שמיט ואכיל לא מפקינן מיניה[6] –

And ר"נ said, 'and I admit to ר"ה **that if** the buyer **pulled down** the dates **and ate**

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[1] The case there is where a מלוה and לוה agreed that if the loan will not be paid up by three years, a particular field (of the לוה) will belong to the מלוה. This type of agreement (if this, then that) is called an אסמכתא. See footnote # 2.

[2] אסמכתא means support or *dependence*. The לוה (in this case), when he agreed to transfer his field to the מלוה if he does not pay the loan after three years, did not really think it would happen, for he was certain that he will surely pay the loan and was *depending* on this payment that this transfer would never come to pass. He merely said it to assuage the concern of the מלוה, letting him know that his loan is secure. Therefore since there was no serious intent (on part of the לוה) to make this transfer, therefore this transfer (or קנין) is not effective.

[3] Even if the מלוה entered the field after three years (and the loan was not paid) and consumed the פירות, the מלוה must return the land and the פירות that he consumed to the לוה, for since אסמכתא לא קני it was never the s'מלוה field.

[4] The גמרא considers this case of אסמכתא as a מחילה בטעות. The לוה allowed the מלוה into his field as payment for the debt and agreed that he can keep the field and eat the פירות, for he mistakenly thought that it belongs to the מלוה. ר"נ ruled however that since this is a mistake, the transfer is invalid, indicating that a מחילה בטעות is not a מחילה.

[5] The case there is where he is selling the dates that will grow (in the future) on this דקל. The view of רב הונא is that once the dates are grown no one can rescind, however ר"נ maintains that the sale can be rescinded even after the dates grew, since at the time of the deal the dates did not exist and the rule is אין אדם מקנה דבר שלא בא לעולם.

[6] The reason is because at that point in time (when the seller did not yet realize that he can invalidate the sale) the seller is (mistakenly) forfeiting his rights to these פירות, because he mistakenly assumes that they belong to the buyer. This proves that מחילה בטעות הויא מחילה.

them, we do not extract from him the price of the dates, which the buyer consumed'. This indicates that ר"נ maintains מחילה בטעות הויא מחילה, which contradict the previous statement of ר"נ that הדרא ארעא והדרא פירי.

ומשני התם זביני והכא הלואה –

And the גמרא **answers; there** (by the fruit) **it is a sale, but here** (by the אסמכתא) **it is a loan.** We cannot compare the two cases.

ופירש הקונטרס[7] הכא הלואה ומיחזי כרבית שמתחלה בהלואה באו לידו וכרבית קצוצה דמו –

And רש"י explained; here (in the case of הדרא ארעא והדרא פירי) **it is a loan[8] (and it appears like interest),[9] for initially he received this** money **as a loan and it is similar to fixed רבית;[10]** רש"י continues -

ואין אבק רבית[11] אלא במכר כגון לקח ממנו פירות דריש מתניתין[12] –

And אבק רבית is only by a sale where **for instance he bought fruit from him** as mentioned **in the beginning of our משנה.[13]** This concludes the citation of the גמרא ופרש"י in ב"מ. תוספות continues with his question on פירש"י -

דהתם משמע דבכל מקום לרב נחמן מחילה בטעות הויא מחילה[14] –

So from the גמרא in ב"מ **it seems that according to ר"נ in all instances מחילה בטעות is a מחילה** (according to פירש"י) -

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[7] רש"י there הכא ד"ה.

[8] The הגהות הב"ח amends this to read הלואה שמתחלה (deleting the words ומיחזי כרבית). [However in our רש"י texts in ב"מ the words ומיחזי כרבית do appear.]

[9] The מלוה ate the פירות of the mortgaged property (after the three years); if he will not be required to return the value of the פירות which he consumed (together with the land), those פירות will be interest payments on his loan. The מלוה will eventually receive his loan back in addition to the פירות which he consumed. Therefore even though מחילה בטעות may be a מחילה, but we cannot allow the מלוה to keep the פירות since he would be transgressing the איסור of רבית. It is however, merely מחזי כרבית for it is considered as if the לוה sold him the field (to become effective after three years, if he does not repay him until then). This is not רבית. However since the sale is not valid for it is an אסמכתא, therefore if the מלוה would not return the פירות it would be מחזי כרבית.

[10] The reason רש"י states וכרבית קצוצה דמו is because the rule is that only רבית קצוצה has to be returned to the לוה (since רבית קצוצה is אסור מן התורה), however any other type of רבית (like אבק רבית) even though it is prohibited, nevertheless once it is taken, there is no obligation to return it (since it is only an איסור דרבנן). In our case the מלוה already took the רבית; he ate the פירות, therefore the reason he must return it is because כרבית קצוצה דמו; people will mistakenly assume that רבית קצוצה need not be returned.

[11] Literally אבק רבית means the 'dust' of רבית. Actual רבית קצוצה or רבית (which is אסור מדאורייתא) is when at the time of the loan the interest payments were set. However when it was not initially set up that there be interest payments (as in a purchase; see footnote # 12) it is called אבק רבית and is אסור only מדרבנן.

[12] ב"מ ס,ב. The case there is where someone pays twenty-five דינרים for a כור of wheat (which was the market price) but did not take delivery. Later when the price of wheat rose to thirty דינרים for a כור, the buyer asked for his wheat and the seller said he has no wheat in stock, but will sell him a barrel of wine (which he also did not have in stock) for the credit of thirty דינרים. The buyer has gained five דינרים (or perhaps more) in this transaction. This is considered אבק רבית and is אסור מדרבנן.

[13] Even though there was no רבית קצוצה by הדרא ארעא והדרא פרי, nevertheless since it was a loan and not a sale therefore it is כרבית קצוצה דמי and must be returned.

[14] See footnote # 9.

בר מהתם בהלואה דמיחזי כרבית –

Except for that case of הלואה where it appears to be **like רבית,** therefore only there is מחילה בטעות not a מחילה -

והכא סבר רב נחמן דלא הויא מחילה[15] –

However here ר"נ maintains that מחילה בטעות **is not a מחילה.**

תוספות mentions an additional difficulty with that פירש"י:

ומיהו בלאו הכי קשה על פירושו דהא אמר רבינא התם בריש פירקא (דף סב,א) –

However, without the aforementioned difficulty with פרש"י, **there is** another **difficulty with his interpretation, for רבינא stated there in the beginning of the פרק -**

דמשכנתא בלא נכייתא[16] בדיינינו אין מחזירין ממלוה ללוה דלא חשיב רבית קצוצה[17] –

That our courts do not return a משכנתא בלא נכייתא from the מלוה to the לוה for it is not considered רבית קצוצה -

ומסתמא דלא פליג עליה רב נחמן[18] –

And presumably ר"נ will not argue with רבינא and will agree that he does not return the פירות; so why does he maintain that הדרא ארעא והדרא פירי since it is not רבית קצוצה.

In summation: It appears from רש"י that ר"נ generally maintains מחילה בטעות הויא מחילה except in the case of the loan where (even though there is a מחילה [בטעות], nevertheless) the מלוה cannot retain the פירות since it is *similar* to רבית קצוצה.
תוספות asks, firstly our גמרא (which is not discussing a loan) states that ר"נ maintains מחילה בטעות לא הויא מחילה, and secondly in this type of רבית (eating the fruits of collateralized property), the ruling is that it remains by the מלוה since it is not רבית קצוצה.

תוספות offers his explanation of the גמרא in ב"מ:

ונראה לרבינו תם דהכי פירושו דבכל מקום סבר רב נחמן דלא הויא מחילה כדאמר הכא –

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[15] There was no loan here and nevertheless ר"נ told ר"ע that it is a מחילה בטעות and not an effective מחילה. See 'Thinking it over'.

[16] משכנתא בלא נכייתא literally means collateral without reduction. The לוה puts up his field as collateral for the מלוה; that until the loan is paid, the field is under the control of the מלוה and the מלוה can reap the harvest without reducing the amount of the loan. The לוה will have to repay the full amount of the loan regardless of how much פירות the מלוה consumes. Those פירות are actually רבית, nevertheless רבינא maintains that we do not return that (רבית) money from the מלוה to the לוה.

[17] The חכמים will make the מלוה return to the לוה any fixed רבית which the מלוה collected. However here there is no fixed רבית (since it is possible that nothing will grow on the fields). אבק רבית is not יוצא בדיינים. The same should apply to the אסמכתא field that it is also not רבית קצוצה for the same reason.

[18] רש"י explained that really מחילה בטעות הויא the only reason why the פירות must be returned is because it is like רבית קצוצה. However this type of רבית is not יוצא בדיינים as רבינא ruled (for it is not רבית קצוצה); it remains by the מלוה, so why does ר"נ rule that הדרא ארעא והדרא פירי?!

And it is the view of the ר"ת that this is the explanation; that ר"נ always maintains that מחילה בטעות **is not a מחילה, as** ר"נ **stated here -**

ובריש המפקיד (בבא מציעא דף לה,א) **קאמר נמי רב נחמן התם שומא בטעות הוא**[19] **–**

And ר"נ also stated in the beginning of פרק **המפקיד that there it was an erroneous assessment** and therefore it is voided **-**

ובסוף פרק קמא דגיטין (דף יד,א) **נמי אמר דקנין בטעות חוזר**[20] **–**

And ר"נ **also stated at the end of the first פרק of** מסכת **גיטין that a mistaken קנין can be retracted;** all of the above prove that a mistaken transaction is null. תוספות addresses now the גמרא in ב"מ, in which ר"נ differentiates between the פירות דקל which he may keep and the פירות האסמכתא which must be returned **-**

אלא היינו טעמא דרב נחמן דהתם זביני ולא הויא מחילה בטעות –

Rather this is the reasoning of ר"נ that there (by the פירות דקל) **it was a sale, and not a מחילה בטעות** (and therefore if שמיט ואכיל the buyer does not need to return the פירות); it is not a מחילה בטעות -

שאפילו היה המוכר יודע שיוכל לחזור לא היה חוזר –

For even had the seller known that he can retract the sale of the פירות, we may assume that **he would not have retracted -**

דניחא ליה דליקו בהימנותיה וגמר ומקני[21] **–**

For it is beneficial for him to retain his trustworthiness and he decides to transfer the פירות to the buyer in any event -

אבל הכא הויא הלואה והלוה אינו מקני ליה אלא בתורת מכר –

However here by the אסמכתא **it was a loan, and the לוה does not transfer** the rights to the land voluntarily, **only by the rules a sale** (in lieu of the money he received from the מלוה [as a loan]) **-**

והמכר אינו כלום דאסמכתא היא ולא גמר ומקני[22] **וכיון דהדרא ארעא הדרי נמי פירי –**

However the sale is meaningless for it is an אסמכתא and the לוה **never decided**

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[19] The case there is where a watchman lost the nose rings (כיפי) which were deposited by him. The watchman did not have with what to pay so they assessed and took away his house for the כיפי. Eventually the כיפי were found (in his possession; he misplaced them) and ר"נ ruled that house be returned, for the שומא was done mistakenly since the watchman was always in the possession of the כיפי.

[20] The case there is where gardeners thought that one of them received extra money, so they told him to return it to the owner and he made a קנין with the owner that he will return it; later they realized that there was a mistake in the accounting and no money was owed; ר"נ ruled that it was a קנין בטעות and he is not obligated to pay.

[21] The מוכר sold the פירות דקל to the לוקח; however it is legally non-binding so the מוכר could nullify the sale. However the מוכר feels that he will gain more by agreeing to the sale so his credibility remains intact, than voiding the sale and losing his credibility. In actuality the מוכר did not realize, at the time the לוקח was harvesting the פירות that the sale was not binding. This happened later, and at that time the מוכר indeed wanted to nullify the sale. However since at the time the buyer harvested the פירות, the מוכר did not object, we assume (that at least at that moment) he would not have objected even had he known that he could object.

[22] We do not say דליקו בהימנותא regarding the לוה since he never had any intention of granting the field to the מלוה as payment for the loan; however the מוכר פירות דקל had every intention of selling the פירות דקל.

to transfer the land,[23] **so since the land returns** to the לוה because the sale is invalid (since it is an אסמכתא) **the פירות also return** to the לוה (since the field never belonged to the מלוה) [24] -

אבל אם היה נותן בתורת רבית[25] היה קונה דאבק רבית אין יוצא בדיינים –

However if he would give the fruits **as רבית** (as in the case of משכנתא בלא נכייתא) the מלוה **would acquire** the fruits **since אבק רבית is not יוצא בדיינים.**

תוספות responds to an anticipated difficulty:

ורבא[26] דהוה בעי לאותובי אונאה[27] לא היה יודע זה הפירוש –

And רבא who wanted to refute ר"נ from the laws of **אונאה did not know this interpretation** (of s'ר"נ answer, which תוספות gave) -

שאם היה יודע לא היה מקשה כלום מאונאה –

For if רבא **would have known** תוספות interpretation, **he could not have asked anything from אונאה;** he could not have asked why by אונאה he gets back his money but by פירות דקל he does not get back the פירות -

דהכא לא הויא מחילה בטעות כדפרישית[28] גמר ומקני –

For here by פירות דקל **it is not a מחילה בטעות** (as by אונאה) **as I explained** that the reason he does not return the פירות דקל is [**because**] the owner convincingly

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[23] To review; ר"נ maintains מחילה בטעות לא הויא מחילה; however by פירות דקל there was no מחילה בטעות for the seller wants to keep his good name and even though he may be legally entitled to retrieve the פירות, we assume that at the time the buyer gathered the פירות, the seller did not mind (even though he may have known that legally there was no sale). It is therefore considered a bona fide מחילה. By the case of the loan (where the לוה committed his field to the מלוה if he does not pay), the only right the מלוה has to this field, is because it is considered like a sale (the field in exchange for the money he lent the לוה). However it is an invalid sale for the לוה never intended to give up his field since he was certain that he would have paid up the loan in time. Once the sale is invalidated the פירות which the מלוה ate must also revert back to the לוה since it grew on the s'לוה field. This has no connection to רבית.

[24] There is a basic difference between the אסמכתא case of ר"נ (where הדרא פירי) and the משכנתא בלא נכייתא of רבינא (where אינו יוצא בדיינים). By משכנתא בל"נ the לוה willingly gave his field to the מלוה to eat the פירות as רבית (אבק). It may not be permitted, but once paid it is not יוצא בדיינים. In the case of אסמכתא, the לוה did not give anything [willingly] since he assumed the field would never go to the מלוה, it was a sale based on an אסמכתא which is invalid. Therefore הדרא פירי; not because of רבית, but rather because there never was a sale.

[25] Perhaps תוספות means to say as follows. The לוה transfers the field to the מלוה (since he did not pay the loan). However, the לוה still retains the right to redeem the field from the מלוה should he have the funds to pay off the loan. The לוה assures the מלוה that even if he will eventually redeem the field he grants the מלוה all the פירות the מלוה will consume in the interim as a רבית payment for the loan. This רבית need not be returned, since it is רבית אבק.

[26] See there ב"מ סו,ב, that רבא (assuming that ר"נ maintains מחילה בטעות הויא מחילה [as רש"י explained the גמרא]) wanted to ask ר"נ how can one maintain מחילה בטעות הויא מחילה (and therefore he may keep the פירות דקל) when the rule by אונאה is (see footnote # 27) that one must return the אונאה (to the buyer) even though (the buyer) gave the extra money willingly and was מוחל בטעות.

[27] One rule regarding אונאה (swindling) is that if the price paid was one sixth more (or less) than the true value then (even though the sale is valid) the extra money must be returned.

[28] Others amend this to read, כדפירישית ומקני **<u>דגמר [משום]</u>**

decides to transfer the פירות to the buyer to protect his good name.[29]

תוספות clarifies one more difficulty from the גמרא there:

ורב נחמן היה משיב[30] מאיילונית[31] לפי סברת רבא –

And ר"נ who **was answering from** the case of **איילונית** (that the case of איילונית supports ר"נ)**,** it was only **according to the logic of רבא -**

כלומר אדמותבת לי מאונאה תסייען מאיילונית –

Meaning according to your (s'רבא) mistaken view that I (ר"נ) maintain מחילה בטעות הויא מחילה; so **instead of challenging me from אונאה** (which seems to prove that לא הויא מחילה) **support my view from איילונית** (which proves that מחילה הויא); what ר"נ meant to tell רבא is that -

אלא על כרחך[32] צריך אתה לחלק כדפרישית:

You (רבא) **perforce must rather differentiate** (between פירות דקל and משכנתא) **the way** תוספות **explained** ר"נ, but not the way רבא understood ר"נ.

Summary

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[29] Rather רבא thought the explanation of ר"נ's distinction between פירות דקל and אסמכתא is as רש"י explained it, whereupon ר"נ maintains מחילה בטעות הויא מחילה, and the question from אונאה is a valid question.

[30] Seemingly since רבא did not understand what ר"נ answered, ר"נ should have merely told him that he was mistaken in the understanding of his answer. תוספות explains why ר"נ responded to רבא as if it were a valid question.

[31] The rule regarding an איילונית (a woman who cannot bear children) is that if at the time of marriage we did not realize that she was an איילונית, when he divorces her (upon realizing that she is an איילונית) she does not receive a כתובה since the marriage was a מקח טעות. The obligation of a regular כתובה includes that the husband must give her back (if he divorces her) all the assets she brought into the marriage for which he accepted responsibility. By an איילונית however she does not even receive these assets either, since she has no rights of a כתובה. When the איילונית bought her assets into the marriage and gave them in the custody of her husband she did not know that she was an איילונית (for presumably had she known that she would lose these assets she would never agree to give them to her husband), and nevertheless her מחילה בטעות (mistakenly giving over her assets to her husband) is a מחילה; proving that מחילה בטעות הויא מחילה. This is what ר"נ answered רבא. However תוספות maintains that ר"נ is of the opinion that מחילה בטעות לא הויא מחילה, how can he argue that איילונית supports his view?!

[32] [ר"נ concluded there that there is no proof from אונאה since דלא ידע דאיתיה אונאה דמחיל גביה and there is no proof from איילונית since דניחא לה דתיפוק עלה שמא דאישות. If we assume the way תוספות explains the difference between the פירות דקל and אסמכתא (but generally מחילה בטעות לא הויא מחילה) then this answer of ר"נ is understood; we cannot compare פירות דקל to אונאה, since by אונאה the one who was cheated never realized that he was cheated (דלא ידע דאיתיה אונאה דמחיל גביה) it is a מחילה בטעות, however by פירות דקל he wanted to sell the פירות and did not mind the buyer keeping them since דליקו בהימנותיה. Similarly there is no question from איילונית (where מחילה בטעות הויא מחילה), since there she is willing to do anything to be considered married, including giving up her assets. However according to פרש"י that ר"נ maintains מחילה בטעות הויא מחילה, while we can understand why איילונית is no proof that מחילה בטעות הויא מחילה (since she wants to be considered married), it is difficult to understand why by אונאה it is not a מחילה (since he is not aware) and generally מחילה בטעות is a מחילה (for in all cases of מחילה בטעות seemingly the person does not know of his טעות, just like by אונאה). The question applies to פירות דקל as well (for רש"י does not mention anything regarding דליקו בהימנותא, only that it is מחילה בטעות) how is that different from אונאה? This is perhaps what תוספות means with the אלא ע"כ צריך אתה לחלק כדפי'. וצע"ג.(Alternately the אלא ע"כ is referring to the two questions תוספות had on פירש"י and therefore ע"כ צריך אתה לחלק כדפרישית)]

רש"י maintains that according to ר"נ we rule מחילה בטעות הויא מחילה (except by a מלוה where it is מיחזי כרבית). תוספות maintains that according to ר"נ any מחילה בטעות לא הויא מחילה except where there is the סברא of דליקו בהימנותיה.

THINKING IT OVER

תוספות question is how come by פירות דקל we find that ר"נ maintains מחילה בטעות הויא מחילה and here by ר"ע, it is not a מחילה.[33] Seemingly there are two differences between the cases. Firstly מחילה בטעות הויא מחילה means that if someone forgives a debt under mistaken assumption it is a valid מחילה since he is not taking anything away from anyone; he is allowing the money to remain where it is (as in the case of פירות דקל); however in the case of ר"ע he is being מוציא קרקע from the רשות of his neighbor in such a case perhaps the מחילה בטעות is not effective.

Secondly, in the case of פירות דקל the owner sees the buyer harvesting the fruits of his tree (which were sold to the buyer by the seller) and he is acquiescent. That is a מחילה albeit בטעות. However here the neighbor was not being מוחל anything to ר"ע, he assumed the wall was being built on the original boundary line; how was he מוחל anything?![34]

[33] See footnote # 15.
[34] See בל"י אות שפו.