An oral loan מלוה על פה אינו גובה לא מן היורשין ולא מן הלקוחות – cannot collect neither from the heirs, nor from the buyers

Overview

רב ושמואל both ruled than an oral loan cannot collect from the heirs of the לוה, and not from those who bought properties from the לוה (even) after the loan.[1] תוספות explains the reason (and novelty) of this ruling.

There is a dispute[2] whether שעבודא דאורייתא or שעבודא לאו דאורייתא;[3] when a לוה borrows money do we maintain that there a lien on his assets מן התורה that they are indentured to the מלוה for the loan – שעבודא דאורייתא, the view of עולא, or we maintain that מן התורה only the לוה is obligated to repay the loan, however there is no lien on his assets[4] – שעבודא לאו דאורייתא, the view of רב ושמואל.[5]

לא איצטריך אלא משום יורשין דלקוחות תנינא בהדיא[6] –

It was not necessary for רב ושמואל to teach us this ruling regarding לקוחות, **only regarding יורשין, for** regarding **לקוחות the משנה taught it explicitly** that המלוה בעדים without a שטר, he is גובה only from נכסים בני חורין.

וקסבר שעבודא לאו דאורייתא[7] –

And רב ושמואל who maintain that a מלוה ע"פ is not גובה מן היורשין **maintain that there is no** concept of **שעבור** according to **תורה** law.

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[1] A מלוה בשטר can collect (even) from those who bought property (לקוחות) from the לוה after the loan (if the לוה does not own sufficient assets).

[2] לקמן קעה,ב.

[3] If שעבודא דאורייתא then all the assets of the לוה at the time of the loan are משעובד to the מלוה, therefore even if he sells them or he dies and they are inherited, nevertheless the מלוה has the right מן התורה to collect these assets (which were bought or inherited) from the לקוחות or the יורשים. In truth this would apply even to a מלוה ע"פ, however the חכמים enacted that a מלוה ע"פ cannot collect from the לקוחות since there is no publicity and so the לקוחות would be unfairly harmed (and/or people would be reluctant to buy, out of concern that the seller owes money). See footnote # 5.

[4] Nonetheless (even according to the שעבודא לאו דאורייתא (מ"ד), the חכמים were מתקן that a מלוה can collect from יורשים ולקוחות (by a מלוה בשטר [only]), in order that people should be willing to lend money [for they are assured that they will be repaid, since the properties of the לוה are indentured to the מלוה]. See footnote # 5.

[5] One practical difference whether we maintain שעבודא דאורייתא or לאו דאורייתא is regarding collecting a מלוה ע"פ from יורשים. If we maintain שעובדא דאורייתא so therefore since מה"ת even a מלוה ע"פ can collect from יורשים ולקוחות (see footnote # 3); it is only that the חכמים prevented collection from לקוחות so that they should not be unduly harmed (for they paid money and will lose their purchase), however regarding יורשים who are not losing any money they invested, we will follow the תורה ruling that שעבודא דאורייתא and the מלוה will collect from the יורשים. However if we maintain שעבודא לאו דאורייתא, it is only the חכמים who created a שעבוד (see footnote # 4), we can say that the שעבוד was only במלוה בשטר but not במלוה ע"פ, therefore one cannot collect from the יורשים, since they did not borrow any money and the assets of the לוה are not משעובד by a מלוה ע"פ.

[6] לקמן קעה,א.

[7] See footnote # 5.

ומלוה בשטר שהוא גובה היינו שלא תנעול דלת בפני לוין[8] –

And the reason a מלוה בשטר collects from יורשים ולקוחות **is** only **because 'you should not close the door in the face of the borrowers'**

ומכר[9] נמי משום תקנת השוק[10] –

And also regarding a sale there is a שעבוד on the assets of the seller **because of 'improving the market'.** However by מלוה ע"פ (where the מלוה showed that he was not concerned about his loan), there was no תקנת חכמים, therefore the מלוה cannot collect from either the לקוחות or the יורשים.

תוספות anticipates a difficulty:

ואף על גב דביורשין לא שייך לחלק בין מלוה על פה למלוה בשטר[11] –

And even though by heirs it is not applicable to differentiate between a מלוה ע"פ and a מלוה בשטר so why do רב ושמואל maintain that a מלוה בשטר can collect from the יורשים and a מלוה ע"פ cannot collect from the יורשים?[12]

תוספות responds:

מכל מקום כל היכא דגבי לקוחות חיישינן משום נעילת דלת[13] כמו מלוה בשטר –

Nonetheless, wherever regarding לקוחות we are concerned for the מלוה **because of נעילת דלת like by a מלוה בשטר** where we allow the מלוה to collect from לקוחות –

[תוספות offers other examples where the creditor collects from לקוחות besides a מלוה בשטר:]

או מלוה הכתובה בתורה[14] למאן דאמר (קדושין כט,ב) ככתובה בשטר דמי –

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[8] If there will be no lien on the s'לוה properties, no one would lend money, out of concern that they will not be repaid. See footnote # 4.

[9] When a sale is made, the assets of the seller are משעובד to the buyer that in case the property bought is taken away from the buyer, either by a מלוה (whom the seller owes money to) or by a נגזל (the field never belonged to the seller); in these cases the buyer can be compensated for his loss from any property that the seller had in his possession at the time of the sale, even if he subsequently sold those properties, this buyer can collect from them.

[10] If the buyer is not assured that his purchase is guaranteed by the assets of the seller, he will be reluctant to buy, out of concern that there may be a lien on this field, or it may not even belong to the seller. See footnote # 9.

[11] The reason why the חכמים were מתקן (according to the מ"ד שעבודא לאו דאורייתא) to collect from יורשים ולקוחות (even though מה"ת there is no שעבוד) is in order שלא תנעול דלת בפני לוין (see footnote # 4). However the חכמים distinguished between a מלוה בשטר (which has publicity), where the מלוה collects from the לקוחות (since they were aware there is a lien on this property), and a מלוה ע"פ (which has no publicity) where the מלוה does not collect from לקוחות (since they were not aware of any loan or lien on this property), so that they should not by unduly harmed. However יורשים inherit the land automatically, regardless if it is a מלוה בשטר or a מלוה ע"פ and in any case they are not unduly harmed (for they merely inherited the property; they did not pay for it) so the ruling by מלוה ע"פ should be the same as by a מלוה בשטר. See footnote # 5 & 12.

[12] The ruling (regarding יתומים) should seemingly be either that we never collect from יתומים (for their protection) or we always collect from יתומים (because of נעילת דלת בפני לוין).

[13] See 'Thinking it over'.

[14] The example discussed there in קידושין is regarding the redemption of the first born. One מ"ד maintains that פדיון

Or a debt which is written in the תורה, according to the one who maintains that it is like it is written in a שטר -

או כשעמד בדין[15] או עשה עבדו אפותיקי[16] -

Or where the case was **decided in בי"ד, or he mortgaged his slave,** in all these abovementioned cases[17] where the creditor collects from the לקוחות -

גבי נמי מיתמי[18] –

He also collects from the יתומים (even though the concept of publicity is irrelevant as far as the יתומים are concerned) -

אבל מלוה על פה כיון דלא חשש לעשות שטר לגבות מלקוחות –

However by a **מלוה ע"פ since** the מלוה **was not** sufficiently **concerned** about his loan **to make a שטר** in order **to collect from the לקוחות** indicating that (in this situation) he is willing to lend without a guarantee, therefore -

כי לא גבי נמי מיתמי ליכא נעילת דלת –

If he will not collect from the יתומים either, there is no נעילת דלת for this מלוה has already shown that he is willing to lend without any concern about repayment.

תוספות mentions an anticipated difficulty:

והא דאמרינן בפרק קמא דבבא קמא (דף יא,ב) גבי[19] הלכה גובין מן העבדים –

And that which [עולא said in the name of ר' אלעזר] 'the rule is, a מלוה **may collect** his debt by taking **slaves** as payment'; **regarding** this statement -

אמר רב נחמן לעולא אמר רבי אלעזר אפילו מיתמי –

ר"נ said to עולא, 'did ר"א say that the מלוה can collect the slave as payment **even from the orphans** of the לוה'? עולא answered -

לא מיניה מיניה ואפילו מגלימא דעל כתפיה[20] –

'No'; ר"א said that the מלוה can collect the slave as payment only **from** the לוה. To which ר"ה responded, '**from** the לוה'!? Obviously he can collect עבדים from the לוה,

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הבן since it is כתובה בתורה it is ככתובה בשטר דמי and the assets of the father are משעובד for this obligation.

[15] Once בי"ד rules that a person owes money to another [even if it was not in a case of מלוה בשטר, but (even in a מלוה ע"פ or) for other reasons; he owed wages or he damaged his property, etc.], there is sufficient publicity to warrant that the creditor may collect from the נכסים משועבדים of the debtor (i.e. from any property the debtor sold after the העמדה בדין).

[16] If the לוה designated his slave to be the (sole) source of payment for the מלוה, the מלוה can claim this עבד as payment, even if the לוה sold him (and even if it was a מלוה ע"פ [see תוס' מד,ב ד"ה עשה]).

[17] See 'Thinking it over'.

[18] The מלוה wrote a שטר חוב to insure that his loan is guaranteed by the assets of the לוה (even if he sells them); however if he cannot collect from the יורשים his loan is not guaranteed, for perhaps the לוה will die [without selling any property] before he paid up his debt and the מלוה will not be able to collect his loan from the יורשים.

[19] The הגהות הב"ח amends this to read הלכה **<u>אמר עולא אמר רבי אלעזר</u>** גבי.

[20] The גמרא there concludes that this rule of גובה מן העבדים is in a case where he made the עבד an אפותיקי (see footnote # 16), in which case the מלוה may collect the עבד as payment even if the לוה sold the עבד.

for the מלוה **can even take the 'shirt off his back'** for collecting a loan; why is it necessary to teach us that he can collect the slave as payment. This concludes the citation of the גמרא there.[21]

תוספות concludes, the answer to the difficulty -

שם[22] מפורש:

Is explained there in ב"ק.

SUMMARY

The ruling of מלוה ע"פ אינו גובה מן היורשין follows the view that שעבודא לאו דאורייתא. Whenever one is גובה from the לקוחות one is גובה from the יורשים and vice versa.

THINKING IT OVER

תוספות explains why we collect from יתומים by stating that whenever there is נעילת דלת and we collect[23] from לקוחות we also collect from יתומים (presumably for there too there is נעילת דלת). תוספות chooses to give other examples (besides מלוה בשטר) where we collect from לקוחות (i.e. העמדה בדין, אפותיקי) and we should also collect from יתומים.[24] However in the aforementioned cases there is seemingly no נעילת דלת; why then does תוספות mention (in the beginning of his explanation) the concept of נעילת דלת?![25]

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[21] The difficulty from that גמרא is (as תוס' explains later ב"ב קעה,ב ד"ה לא) that it is seemingly indicated from the גמרא there (by the exchange אפי' מיתמי – לא מיניה) that even though he may collect the עבד from the לקוחות, nevertheless he cannot collect the עבד from the יתומים. This (seemingly) contradicts the entire thrust of תוספות here that there is more reason to collect from יתומים (who are not losing invested capital) than to collect from לקוחות (who stand to lose their investment). Why is it that by עבד you collect from לקוחות but not from יתומים?

[22] כגון ב"ק יא,ב תוס' ד"ה. There תוס' explains that in the מסקנא the מלוה can collect the עבד from the יתומים as well as from the לקוחות. [However תוס' later ב"ב קעה,ב ד"ה לא maintains that in the case of עשה עבדו אפותיקי he collects from the לקוחות and not from the יתומים. The reason as תוספות states there is because משום שעשו חוצפה לקנות דבר שיש עליו קול' שהוא משועבד, והאי טעמא לא שייך ביורשין. In the case of a מלוה ע"פ however the ruling is that you collect from the יורשים but not from the לקוחות (at least according to the מ"ד שעבודא דאורייתא); because the לקוחות did nothing wrong since there was no קול and they need to be protected.]

[23] See footnote # 13.

[24] See footnote # 17.

[25] See נח"מ.