

However if he transferred - אבל מסר לו שלא בעדים מתוך שיכול לומר כולי - it to him without witnesses, since he could say, etc.

Overview

The משנה rules that a craftsman (אומן) has no חזקה¹. רבה qualified this rule that it applies only if there are witnesses that it was given to the אומן. However if there are no witnesses, the אומן is believed, for he has a מיגו, since he could have said, 'this never happened (להד"ם)'. Our תוספות explains what is meant by the מיגו of להד"ם.

אין לפרש² מתוך שהיה יכול לומר אין בידי כלל -

We cannot explain the מיגו to mean, since he could have said, 'I have nothing of yours in my possession', we should therefore believe him that he bought it; this cannot be -

דהא בראה³ מיירי כדמוכח אתקפתא דאביי⁴ דראה עבדו -

For this is a case where witnesses saw the item by the אומן, as is evident from the challenge of אביי in the ruling of 'he saw his slave', etc.

להד"ם explains the meaning of תוספות:

אלא הכי פירושו מתוך שיכול לומר לא היו דברים מעולם שבא לידו בתורת אומנות -

Rather this is the explanation of the מיגו; since he could say, 'it never happened that it came into my possession as a job -

אלא בתורת מכר אי נמי אתה מכרתו לאחר ואחר מכרו לי כדפירש הקונטרס⁵ -

Rather it was sold to me', or he may also claim, 'you sold it to someone else, and he sold it to me', as the רשב"ם explained –

In summation: the מיגו of להד"ם is that the אומן could have claimed. 'it was never given to me as a craftsman, rather I bought it from you, or from someone else who bought it from you', therefore

¹ This means that if you gave you clothes to a tailor and the tailor claims that he bought it from you, and you have witnesses that it was yours, we do not believe the tailor even though he is in possession of the clothes. By anyone else (who is not an אומן) we believe the one who is a מוחזק.

² See (however) ד"ה אבל in the beginning of רשב"ם (who seems to disagree with תוספות).

³ ראה means that עדים saw the item by the אומן, currently, while the די"ת is taking place and recognize that this belonged to the claimant..

⁴ See מהב, רבה contradicts אביי. ראה, which indicates that רבה is also discussing a case of ראה, otherwise there is no question on רבה. Therefore להד"ם cannot mean that, 'I do not have it', since we are discussing ראה.

⁵ See ד"ה אבל. רשב"ם. Therefore since he has the מיגו that he could have said, 'I bought it from you, etc.' therefore even if the אומן admits that he first accepted it as an אומן (to repair it), and later he bought it, he is believed (see מהרש"א).

if he claims, 'I bought it from you after you gave it to me to repair',⁶ the אומן is believed. However להד"ם cannot mean that the אומן claims that he does not have it, because we are (even) discussing a case where witnesses saw the item by the אומן.

תוספות asks:

ואם תאמר מאי איריא אומן דאין לו חזקה היכא דמסר לו בעדים -

And if you will say why is the משנה teaching that an אומן (specifically) has no חזקה, (and only) in a case where it was transferred to him in the presence of witnesses, as רבה maintains -

אפילו אחר נמי כיון שיש עדים שבא לידו בתורת פקדון -

Even another who is not an אומן, also has no חזקה, since there are עדים that it came into his possession as a deposit –

ואפילו לא ראה למאי דמסיק⁷ שצריך להחזיר לו בעדים -

And even if it was not seen in his possession currently, nevertheless there is no חזקה, according to this which גמרא concludes in the name of רבה that he must return it to him with witnesses -

ולקמן⁸ פריך לה אבל מכל מקום קשה דמאי סלקא דעתיה דרבה?⁹ -

And later, indeed, ר"נ בר יצחק asks this very same question, but nevertheless there is a difficulty, for what did רבה assume to differentiate between an אומן and a non-אומן?!

תוספות answers:

ויש לומר כגון שמסר לו בעדים סתם¹⁰ ולא פירש בפניהם אם בתורת מכר אם בתורת פקדון¹¹ -

And we can say that we are discussing a case where for instance he 'merely' transferred the item in the presence of witnesses, but did not specify in the presence of the witnesses whether this transference is for a sale or as a deposit -

ולהכי דוקא אומן אין לו חזקה דמסתמא לתקנו מסר לו כיון דלא פירש¹² -

So therefore in this case, only an אומן has no חזקה, for presumably, he gave it to the אומן to repair it, since the אומן did not specify that it was a sale -

⁶ See 'Thinking it over' # 1.

⁷ מה,ב ruled there that if one deposits something by his friend in the presence of עדים, he must return it in the presence of עדים, otherwise he is not believed to claim, 'I returned it' (or I bought it).

⁸ מו,א.

⁹ If he gave it to him in the presence of עדים; how can there be a difference between an אומן and a non-אומן?!

¹⁰ Obviously the ruling that אומן אין לו חזקה certainly applies in a case where the עדים know that it was given for repairs, תוספות is saying that the distinction between אומן and אחר is in the case where בעדים סתם.

¹¹ A פקדון here (regarding the אומן) means that it was given for repairs.

¹² Usually one gives an item to an אומן to repair it, not as a sale. If the אומן bought it, he should have clarified it to the עדים.

אבל אחר מדלא פירש שהוא פקדון¹³ מסתמא מכר או מתנה הוא -

However regarding someone else, who is not an אומן, since the owner did not specify that it was a deposit, presumably it was either a sale or a gift –

¹⁴ responds to an anticipated difficulty: תוספות

ורב נחמן בר יצחק דפריך בסוף הסוגיא¹⁵ אומן הוא דאין לו חזקה הא אחר יש לו חזקה -
And סוגיא, saying why is there this difference that only an אומן איין לו חזקה however; what is the challenge, תוספות just explained the difference?!

responds: תוספות

לא מסתבר ליה לרב נחמן לאוקומה בראיה¹⁶ בלא ידיעה דלא שכיח -
It does not seem reasonable to establish the rule of אומן in a case where saw, without knowing what they saw, for this is uncommon!

כדפריך [לעיל מיניה¹⁷] אי דאיכא עדים ליחזו עדים מאי קאמרי¹⁸ -
A asked previously on אב"י, 'if there are עדים, let us see what the עדים say -
דלא שכיח שימסור בפניהם ולא ידעי הקציצה -

For it is not common that he transferred it in the presence of עדים, and the עדים do not know the fixed price, so just as there we assume the עדים know the price -
והכא נמי רב נחמן בר יצחק לא פריך אלא מכח סברא זו -

So here too ר"נ only asked his question on רבה based on this logic that if there are עדים, they certainly are aware of the circumstances surrounding this transfer -

והכי פריך אי דאיכא עדים אחר אמאי יש לו חזקה -
And this is the challenge of רנב"י, if there are עדים why does the אחר have a חזקה?!

הא על כרחך ידעי עדים דבתורת פקדון אתא לידיה -
For perforce the עדים know that it came into his possession as a deposit (just like by the אומן) -

¹³ When one gives a deposit he expects it to be returned, therefore the owner should have specified to the witnesses that this is a deposit (and he needs two witnesses to attest to it). Since the owner did not say it, this indicates that it is not a deposit, and so therefore the recipient has a חזקה.

¹⁴ How did רנב"י challenge רבה; seemingly we just gave a valid explanation why an אומן איין לו חזקה, however אחר יש לו חזקה, in a case where there were עדים, but the purpose of the transfer was not specified for the witnesses.

¹⁵ See footnote # 8. רנב"י asks if there are עדים why should there be a difference between אומן and אחר.

¹⁶ This ראה is referring to the עדים seeing the transfer of the item from the owner to the אומן. [This is not the ראה mentioned previously (footnote # 3) which means that they currently see the item by the אומן.]

¹⁷ on the very bottom. The case there is where the אומן and the owner are arguing on the price they agreed upon for the repair. The גמרא asks if there were witnesses, let us ask them what they have to say.

¹⁸ According to תוספות explanation previously, what is the question, there were עדים, but nothing was specified.

דלא מסתבר לאוקומה¹⁹ בדבר דלא ידעי דלא שכיח כלל -

For it is not logical to establish this ruling in a situation where [for instance] it is a matter where the עדים do not know the circumstances, for it is totally unusual!

In summation: רבה maintains that he reason an אומן is different from אחר (in a case where there are עדים), is because nothing was specified in the presence of the עדים, therefore by an אומן we assume that it was for repair and by אחר we assume it was for a sale. However רנב"י maintains that this is a very unusual situation that the עדים do not know the details, so the משנה is not discussing it. Therefore there is the question why is an אחר different from an אומן.

רשב"ם cites a question and answer from the תוספות:

הקשה בקונטרס²⁰ אמאי יש חזקה לאומן מאי שנא מדברים העשויין להשאל ולהשכיר²¹ -

The רשב"ם asked why did רבה state that an אומן has a חזקה if it was given to him without עדים; why is this different from items which are made to lend out or to rent out; where the rule is that by these items there is no חזקה?

ותירץ דדברים העשויין להשאל ולהשכיר שייך גבי כל אדם -

And he answered that דברים העשויין להשאל ולהשכיר applies to all people -

אבל הכא מצי למימר אומן אינך רגיל אצלי לתקן²² -

However here the אומן can claim, 'you are not accustomed to have me repair your items' -

ורבינו יצחק אומר דאפילו רגיל לתקן אצלו יש לחלק -

And the ר"י says that even if he is accustomed to repair by this אומן, nevertheless we can distinguish between דברים העשויין להשאל ולהשכיר (where חזקה אין לו חזקה) and the case of אומן (where חזקה יש לו חזקה) [if there are no עדים] -

דדברים העשויין להשאל ולהשכיר שייך בין לגבי אדם שמכיר שהוא נאמן -

For regarding the rule by דברים העשויין להשאל ולהשכיר that there is no חזקה, this rule applies whether it is regarding a person whom he recognizes as being honest -

¹⁹ The הגהות הב"ה amends this to read לאוקומה כגון דלא (instead of דלא בדבר).

²⁰ See רשב"ם ד"ה אבל. The reason a person is believed that whatever is in his possession belongs to him, is because we assume that if it was not his, how is it in his possession. However by דברים העשויין להשאל, we say that even though it is in his possession, nevertheless it is not sufficient proof that it is his, perhaps he borrowed it or rented it.

²¹ Presumably the item which he gave to the אומן are included in the category of חזקה אין לו חזקה; we can say it is in the אומן's possession because it was given to him to repair. (even if actually it is not להשכיר ולהשאל).

²² A person may rent or lend his items to anyone, so the owner can always claim to the holder of the item, 'I lent it to you'. Therefore there is no חזקה. however regarding an אומן if the owner claims that he gave it in for repairs, the אומן can counterclaim, 'you are not my customer, so it must be that I bought it from you'.

בין מכיר שאינו נאמן ואין יכול כל שעה להעמיד עדים כשרוצה להשאיל ולהשכיר -

Or whether he recognizes that he is not honest (he lends and rents to everyone), and he cannot have עדים present every time when he wants to lend or rent out.

the reason he cannot always require witnesses to be present, is in order -

שלא להשיא עצמו שם רע בשכניו²³ -

That he should not make a bad name for himself among his neighbors -

אבל לאומן אם צריך הוא לתקן יכול ליתן לאומן המכיר שהוא נאמן או להביא עדים -

However regarding an אומן, if he needs an item to be repaired, he can give it to an אומן whom he recognizes as being honest, or to bring witnesses when he gives him the item to repair -

לכך יש לו חזקה²⁴ שלא בעדים:

Therefore the אומן has a חזקה if it was not delivered to him in the presence of עדים.

Summary

The מגו of להד"ם is that it was never given to me for repairs, rather I bought it from you initially. The distinction between אומן ואחר where there are עדים is in a case where they were not explicit as to the nature of the transaction. The difference between להשאיל העשויין and אומן (עדים without) is that the former applies to all people while the אומן can claim you are not my customer (רשב"ם), or that by an אומן he should have brought עדים if he did not trust him.

Thinking it over

1. Why is the מגו claim of the אומן, that I initially bought it from you, a more believable claim,²⁵ than the actual claim of the אומן, that I bought it from you after you handed it to me for repairs?!

2. ²⁶עדים explains why an אומן has a חזקה in a case where there are no עדים. Seemingly if he has a חזקה, why is it necessary to say that he is believed because of a מיגו, he should be believed because of the חזקה?!

²³ Therefore it is not a חזקה, for the initial owner claims, 'I lent it to him, and the reason there are no witnesses is because I cannot afford to have witnesses by every transaction, for then people will say, 'I'm not a pleasant neighbor'.

²⁴ It is obvious that the owner trusts this אומן, otherwise why are there no עדים. Therefore since he trusts the אומן, the אומן is believed (with a מגו). See 'Thinking it over' # 2.

²⁵ See footnote # 6.

²⁶ See footnote # 24.