נתנה לו בזמנו נשבע ונוטל –

He gave it to him; in the time, he swears and takes

Overview

The ברייתא teaches of a case where there is a dispute between the owner (בעה"ב) and the worker (the אומן) as to the price of the job done by the אומן, where the בעה"ב said it was one זוז and the אומן claims two. The ruling is if the אומן returned the repaired item to the בעה"ב and is claiming his pay within the proscribed time,[1] the אומן is believed and he swears that the fee is two זוזים and he collects it.[2]

תוספות asks:

ואם תאמר והא אמר בפרק המקבל (בבא מציעא דף קיב,ב ושם) אומן אומר שתים קצצת לי -

And if you will say; but in פרק המקבל the ברייתא **states** regarding a case **where the אומן claims, 'you fixed** the price for **me** at **two'** זוזים -

והלה אומר לא קצצתי לך אלא אחת המוציא מחבירו עליו הראיה דקציצה מידע ידיע -

And the employer **claims, 'I only fixed** the wages **for you at one'** זוז, the rule is **המע"ה,** and the אומן must prove his case; otherwise he receives only one, **for regarding the wage** the employer **certainly knows** what wage he agreed to.[3] We have a contradictions between these two ברייתות; in our ברייתא the אומן is believed (נשבע ונוטל), and in ב"מ the בעה"ב is believed (המע"ה)!

תוספות answers:

ובפרק[4] כל הנשבעין (שבועות דף מו,א ושם) פריך ליה -

The גמרא **in פרק כל הנשבעין asks this** question regarding the contradiction between the two ברייתות -

ומשני דהך דהכא כרבי יהודה דקציצה נמי לא דכיר דטרוד הוא בפועליו -

And answers that this ברייתא **here** which believes the worker, **is according to ר"י**

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[1] However if it is after the proscribed time for receiving payment, the rule is המוציא מחבירו עליו הראיה; the worker must bring proof as to the agreed upon wage; otherwise he receives what the employer claims.

[2] There is a general rule regarding an employer and employee in a case where the employee claims he was not paid yet for his work, and the employer claims that he paid him already, we rule in favor of the employee (if he made his claim with the allotted time for payment), for we assume that the employer is busy with all his employees and became confused, and thought that he paid this employee, when indeed he did not. The employee swears that he was not paid, and collects his full wages. Presumably the ruling in our case here is in accordance with this general rule.

[3] The גמרא there distinguishes between the case where the argument is whether the worker was paid or not (in which case the worker is believed, since בעה"ב טרוד בפועליו), and between the case where the argument is what wage was agreed upon (where the בעה"ב is believed, for קציצה מידע ידיע).

[4] A marginal note amends this to read בפרק (instead of ובפרק). This question and answer is cited here in תוספות (even though it is an explicit גמרא), in order to set up the following question in תוספות.

who maintains that the owner **does not even remember the** agreed upon **wage, since he is preoccupied with his workers,** and the ברייתא in ב"מ follows the opinion of the רבנן that קציצה מידע ידיע.

תוספות asks:

ואם תאמר אם כן לאחר זמנו נמי אמאי אמר המוציא מחבירו עליו הראיה -

And if you will say; if indeed it is **so,** that we are following the view of ר"י, so **even** if the worker is making his claim **after the** proscribed **time, why does** the ברייתא **rule** in this case that **המע"ה,** and the worker loses -

הוה לן למימר נשבע ונוטל -

The ברייתא **should have ruled** that the אומן **swears and takes** what he claims!

תוספות explains the logic behind his question:

דמאי טעמא אמרינן בעלמא[5] לאחר זמנו[6] דאין נשבע ונוטל כדמפרש בריש כל הנשבעין[7] -

For what is the reason that we say elsewhere regarding a dispute between the worker and the employer; if the worker made his claim that he was not paid, **after the time** (when he needs to be paid), the rule is that **he cannot swear** that he was not paid **and take** his wages (even though there is the סברא of בעה"ב טרוד בפועליו), **as** the גמרא **explains in the beginning of כל הנשבעין** פרק -

דחזקה דאין שכיר משהה שכרו ואין בעל הבית עובר בבל[8] תלין[9] -

For there is a presumption that a hired worker **will not wait** that long for his wages, **and the בעה"ב will not transgress** the prohibition of **בל תלין** -

והכא[10] הרי שהה שכיר ובעל הבית עבר דמודה שקצץ לו אחת ועדיין חייב לו -

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[5] This is referring to the general rule that in a dispute between the worker and owner (whether he received payment or not), if the claim was made בזמנו (see footnote # 6), the worker is believed (since בעה"ב טרוד בפועליו), however if it was made לאחר זמנו (after the proscribed time when the employer must pay the worker), the בעה"ב is believed.

[6] זמנו (the time proscribed to pay a worker) is the next half day after he finished working; for a day worker it is the following night, and for a night worker it is the following day. Any claim made after that time is considered שלא בזמנו. See footnote # 8.

[7] שבועות מה,ב.

[8] The תורה writes in יט,יג (קדושים) ויקרא that ולא תלין פעולת שכר אתך עד בוקר. This is referring to a day laborer that he must be paid the following night, before day break (see footnote # 6). The owner does not want to transgress this לאו, so he makes sure to pay him on time.

[9] Therefore when a worker claims לאחר זמנו that he was not paid, so even though there is the סברא of בעה"ב טרוד בפועליו (which should support the worker's claim), nevertheless there are two סברות that he was paid, because a) a worker does not wait to be paid, he wants his wages immediately, and b} the owner pays before זמנו is over, for otherwise he will be עובר a לאו. This is the reason why בעלמא, the worker is not believed לאחר זמנו, since his claim contradicts these two חזקות.

[10] It is necessary for תוספות to point this out (instead of saying that since the dispute here is whether it was one זוז or two, but not whether he was paid or not, so seemingly the whole idea of עובר ב"בעה ואין שכיר משהה is moot) because otherwise we can ask how can we believe the שכיר that he is owed two, since אין שכיר משהה and אין בעה"ב

However here (where they are not disputing whether he was paid or not, rather the dispute is the amount of wages they agreed upon), so we see **that the worker tarried, and the owner transgresses** the לאו, **for he admits that he agreed to one** זוז, **and he still owes it[11] to him** (לאחר זמנו) -

תוספות anticipates a possible solution to his question:

וליכא למימר דמיירי כגון דאמר לא קצצתי לך אלא אחת ופרעתי לך[12] -

And we cannot answer that we are discussing a case **where for instance** the owner **claims, 'I only made up** to pay **one** זוז, **and I paid you** the one זוז' –

תוספות rejects this answer:

דאם כן בזמנו אמאי נשבע ונוטל הא כרבי יהודה מוקמי לה[13] ואיהו בעי הודאה במקצת[14] -

For if indeed it is **so** that the owner claims, 'I owe you nothing', **why** then is the rule that if the שכיר made his claim **בזמנו** that he is **נשבע ונוטל, for since we established this** ברייתא **according to ר"י,** but **he requires a partial admission** in order to rule נשבע ונוטל –

תוספות anticipates another possible solution to his question:

ואין לתרץ נמי כגון שאומר אותה אחת שקצצתי לך ברשותך השהיתי דלא עבר בבל תלין[15] -

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עובר, therefore תוספות explains that in this case it is not an argument since we see that this שכיר is משהה (and similarly this בעה"ב is עובר).

[11] We cannot say that we should not believe the worker that he was not paid (two זוז), since אין שכיר משהה, for the שכיר can rightfully claim that he is the type of שכיר that is משהה שכרו, for both agree that he did not receive his wages at all up to now (לאחר זמנו). Similarly we cannot say that the שכיר should not be believed, since he is accusing the בעה"ב of being עובר, this is not so, since the בעה"ב himself agrees that he was עובר for withholding the one זוז. Therefore we should revert back to the סברא of בעה"ב טרוד בפועליו, and award the worker his claim (נשבע ונוטל)!

[12] The owner therefore is really claiming 'I owe you nothing', so we can use the חזקה arguments against the שכיר, which support the בעה"ב, namely that אין שכיר משהה שכרו and אין בעה"ב עובר בל תלין. The שכיר must by lying, for he surely was paid. This would explain why the שכיר is not נשבע ונוטל.

[13] See (footnote # 4 and) previously in this תוספות (after footnote # 4).

[14] According to ר"י, we only say נשבע ונוטל if there is a partial admission from the בעה"ב; the שכיר claims, 'you owe me two' and the בעה"ב claims, 'I owe you one'; it is a case of מודה במקצת, so instead of the owner swearing that he owes only one and swear a שבועת מודה במקצת and be פטור, the חכמים in order to appease the worker, instituted that the worker swear that he is owed two and he can collect. However if the בעה"ב is a כופר הכל (where there is no שבועה מה"ת), the חכמים never instituted this rule of נשבע ונוטל according to ר"י.

[15] This will (seemingly explain both cases; if it was בזמנו we rule נשבע ונוטל since the בעה"ב is a מודה במקצת (for the בעה"ב admits that he owes him the one). And when it is לא בזמנו, the שכיר loses because the בעה"ב was not עובר בל תלין in this case. תוספות original question was that the שכיר loses only if his claim implies that the בעה"ב is עובר בל תלין (which is untenable), but in this case (as we initially understood it), the בעה"ב admits that he was עובר on בל תלין. However according to this ואין לתרץ, the בעה"ב does not admit that he was עובר, it is the שכיר who claims that the בעה"ב is עובר בל תלין on the second זוז. The שכיר only agreed to wait for the wages of one זוז, not the second זוז. Regarding the second זוז, the שכיר is accusing the בעה"ב of בל תלין, therefore his claim is unacceptable. Everything is seemingly understood.

And we also cannot answer, that we are discussing a case where **for instance** the בעה"ב **said, 'this one** זוז **that I made up with you, I held it back with your permission', so** the בעה"ב **did not** admit to **transgressing בל תלין** –

תוספות rejects this answer:

דמכל מקום חזקה דאין שכיר משהה שכרו ליכא[16] דהרי שיהה אחת -

But nevertheless the other חזקה, against the שכיר, which is **that אין שכיר משהה, does not exist, for** we see that the שכיר **was משהה one** זוז –

תוספות rejects a possible response

ודוחק לומר דמאי דחזינן דשיהה שיהה[17] ומאי דלא חזינן[18] דלא שיהה לא שיהה:

And it is unreasonable to assume that this which we saw that he tarried (the one זוז), **he was משהה, however this which we did not see [know] that he tarried, he was not משהה;** this is a דוחק. Our תוספות does not answer the question, why is he not believed even לאחר זמנו.[19]

Summary

Seemingly in the case where the שכיר claims two and the בעה"ב claims one, where the שכיר, is not contradicting the two חזקות of אין שכיר משהה and אין בעה"ב עובר, the שכיר should always be נשבע ונוטל even אחר זמנו (according to ר"י).

Thinking it over

We are saying that a שכיר should not be believed, when by his claim he is accusing the בעה"ב of transgressing the לאו of בל תלין. Why don't we rather say that the שכיר should not be believed because by his claim of שתים קצצת לי he is accusing the בעה"ב of transgressing the לאו of לא תעשוק; he is robbing the שכיר of his wages?!

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[16] In order to counteract the סברא that בעה"ב טריד בפועליו (which supports the שכיר) we require <u>two</u> opposing חזקות, one that אין שכיר משהה and two that אין בעה"ב עובר. In the proposed answer just given, there is the חזקה of אין בעה"ב עובר (which contradicts the claim of the שכיר [see footnote # 15]), however the second חזקה of אין שכיר משהה does not contradict the שכיר in this case, for all agree that he was משהה (at least one זוז), therefore the שכיר can claim that he is the type of שכיר that does not rush to receive his wages, so why should we not believe him, since only one חזקה opposes him but not two (see מהרש"א).

[17] One may argue that the שוכר, who is claiming (לאחר זמנו) two, is contradicting the חזקה of אין שכיר משהה, and even though we know that he was משהה one (both agree to that), nevertheless we can argue that he was willing to forgo partial payment on time (one זוז), but we will still assume that no one is willing to forgo and wait for his entire wage (of two זוזים), so the שוכר is indeed contradicting the other חזקה as well. However, תוספות maintains that this is a דוחק, presumably because a person who can/t wait for his wages will not wait even for a partial payment, and one who is willing to wait for a partial payment will just as likely wait for the entire payment.

[18] The הגהות הב"ח amends this to read שיהה חזינן **דשיהה לא (instead of חזינן דלא).**

[19] See תוספות הרא"ש.