האי כשורא דמטללתא – This beam of a (temporary) hut

Overview

רבינא teaches us that if one places a beam [to support the roof of a temporary hut] on his neighbor's wall; if it stood there for less than thirty days it is not considered a חזקה[1], if it remained there more than thirty days, without the owner of the wall protesting, it is considered a חזקה for the owner of that beam.

The question arises; in reference to what, are we discussing whether or not it is a חזקה. Presumably it would seem that it is in reference to whether or not the owner of the beam may keep the beam on the other person's wall indefinitely[2]. This type of a חזקה is called חזקת תשמישין; the right to use another person's property.

However this presents a difficulty according to some opinions. There is a dispute among the ראשונים as to how חזקת תשמישין is established. According to certain opinions (the תוס' אחזיק להורדי mentioned in רש"י דף ו,א ד"ה תוס' and others) this חזקה is established immediately; as soon as the owner is aware that someone is using his property and he does not protest, the user acquires the right to continue using his neighbor's property (in this manner) forever[3]. Other ראשונים, however maintain that this חזקת תשמישין can be acquired only if it was utilized for three years, without any protest from the owner, and the user claims that the owner sold him or gifted him the right of usage.

The question arises; why are thirty days required by a כשורא דמטללתא? It should either be immediately or after three years. Those that maintain that חזקת תשמישין is immediately; they will answer that since it was a beam which supported a temporary hut, the owner would not mind, for up to thirty days. However more than thirty days indicates that it is not temporary anymore, therefore if he does not protest after thirty days the user acquires the חזקת תשמישין for this כשורא.

However according to the ר"ת who maintains that even חזקת תשמישין requires a three year חזקה, why is there a חזקה by a כשורא דמטללתא in only thirty days; it should require three years. תוספות addresses this issue

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[1] Even if the owner of the wall did not protest during the entire thirty day period, it is not a חזקה.

[2] See רש"י ד"ה לא הויא חזקה

[3] There is a further dispute in this opinion itself. Some maintain (רש"י mentioned in תוס') that the מחזיק must have a claim, that he either bought this right or it was gifted to him. However others maintain that he needs no טענה, the mere fact that the owner did not protest indicates that the owner gave up his exclusive right to the property and is מוחל it to the user.

אומר רבינו תם דאמתניתין קאי – The ר"ת says that this rule concerning the כשורא דמטללתא, is **referencing** back **to our משנה;** where it was stated that if the neighbor built an adjacent wall next to the dividing wall (which belonged to the other party), he is liable for the expense of the party wall, even if he did not place a roof over both walls. The משנה continues there, that he is assumed not to have paid for the dividing wall unless he can substantiate his payment. The inference from the משנה may be that if he put a roof over both walls and claims that he paid for his share in the dividing wall he will be believed[4]. The ר"ת says that our גמרא is discussing a case where he placed (merely) a כשורא דמטללתא over both walls. רבינא says that the דין is –

דעד שלשים יום – that until thirty days have passed since he placed the כשורא דמטללתא on the dividing wall –

לא הוי חזקה – it is not considered yet **that he has a חזקה,** for since it is a temporary structure the owner may not mind his using the wall.

והוי בחזקת שלא נתן – and therefore it is still **presumed that he did not pay** for the dividing wall unless he brings proof to substantiate his claim. However -

מכאן ואילך – from thirty days **onward;** once thirty days have passed since he placed the כשורא דמטללתא on the dividing wall and his neighbor did not protest –

הוי בחזקת שנתן – it is presumed that he paid for his share in the dividing wall, and if he claims that indeed he paid it, he is not required to substantiate his claim.

The ר"ת explains that we are not discussing here חזקת תשמישין, for that would require a three year חזקה. Rather the second party who built the adjacent wall becomes obligated to pay for the party wall. Our גמרא is discussing at what point he is considered בחזקת שלא נתן and when he is considered בחזקת שנתן. It is obvious that if he built a finished roof over both walls without the owner protesting, that he is בחזקת שנתן immediately; otherwise why did the original owner of the dividing wall allow him to place a permanent roof over the dividing wall. It must be because he paid him already for his half of the wall. By a כשורא דמטללתא, however, which is a temporary roof; thirty days are required for him to be considered בחזקת שנתן.

תוספות adds that by interpreting this case as referencing our משנה, (as opposed to חזקת תשמישין) there is an (additional) advantage.

ואתי שפיר דנקטיה הכא – and it properly understood **that he mentions** this ruling **here –**

ולא בחזקת הבתים –and not in חזקת הבתים פרק**.** If we are discussing a חזקה of ownership and rights; then that belongs in פרק חזקת הבתים, not here in this פרק, where we are discussing the rules of division of property[5].

<u>Summary</u>

In a case of סמך לו כותל and then he placed a כשורא דמטללתא over the party wall; if it remained there for (over) thirty days he is בחזקת שנתן.

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[4] The reason is, because the original owner would not permit him to place a roof over the party wall unless he paid up for his half of the wall.

[5] See 'Thinking it over'.

Thinking it over

The ר"ת maintains that if we were discussing חזקת תשמישין, this case of כשורא דמטלטלתא should have been mentioned in חזקת הבתים. Why then does the גמרא mention here the laws of אחזיק לכשורי אחזיק להורדי וכו'; they are certainly laws of חזקת תשמישין?[6]

[6] See footnote # 5. See ראש beginning of סי' יד.