For instance if he mortgaged it – כגון שעשאו אפותיקי

Overview

The גמרא explained that the ruling of ר"א, that a מלוה can collect his payment from the עבדים of the לוה is even if he sold the עבדים. The reason for this is (not [necessarily] because עבדים are like קרקע but rather) because he made the עבד an אפותיקי to the מלוה for this loan. There is therefore a very specific lien on this עבד; and even if he was sold, the מלוה has a lien on him and may collect the עבד as his payment. The גמרא explains the reason why the לוקח must relinquish ownership of this עבד to the מלוה, is because the אפותיקי of an עבד has a קול, and the לוקח is aware that the עבד is משועבד to the חוב, therefore the לוקח bought the עבד knowing the risk that he may be taken away from him by the מלוה as payment for his loan.[1] It would seem that if not for the reason that the לוקח knew of the risk (and therefore forfeited his right to the מלוה); the מלוה would not be able to collect this עבד as payment (as is the case by עשה שורו אפותיקי).[2]

The question arises concerning the יתומים of the לוה who inherited the עבד. We cannot say that they knew of the risk when they acquired the עבד and forfeited their right. The יתומים took no action at all. Should we allow that the עבד be taken away from them through no fault of theirs? תוספות will be discussing this issue[3].

והשתא גבי מיתמי כמו מלוקח –

And now that we are discussing a case of an אפותיקי, the מלוה **can collect** the עבד **from the orphans just as** he can collect **from the buyer.**

תוספות anticipates a difficulty:

ואף על גב דמיתמי לא שייך טעמא משום קלא כמו בלוקח –

And even though concerning the יתומים the reason of publicity is non applicable, as opposed to a buyer[4] -

דלגבי דידהו אפותיקי ולא אפותיקי שוה –

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[1] See תוספות ב"ב קעה,ב ד"ה לא that the מלוה collects נכסים משועבדים (in general) from the לקוחות since the לקוחות עשו חוצפה לקנות דבר שיש עליה קול שהיה משועבד.

[2] An אפותיקי alone is insufficient. It is necessary to protect the (innocent) buyer. It is only when the לוקח knew and accepted the risk of losing the עבד, that we allow the מלוה to collect the עבד as payment.

[3] Initially ר"נ asked עולא if the עבד can be collected מיתמי. The גמרא concludes that if he made the עבד an אפותיקי he can collect the עבד from לקוחות. However it is not clear if he can collect it מיתמי by an אפותיקי.

[4] Concerning a לוקח we can argue that since there is a קול that the עבד is משועבד, and nevertheless he bought him, this indicates that the לוקח is relinquishing his rights to the עבד in favor of the מלוה. In a case where there is no קול, and there is no indication that the לוקח is relinquishing his rights, the מלוה cannot collect the עבד as payment. Concerning the יתומים there is never any indication that they are relinquishing their rights; for they inherit automatically, without any involvement on their part. It would seem that the מלוה should be prevented from collecting the עבד as payment from the יתומים.

For as far as they (the יתומים) are concerned **it is the same whether there is an אפותיקי or there is no אפותיקי;**[5] so why are we distinguishing in the case of יתומים whether there is an אפותיקי (the slave can be used for collection) or whether there is no אפותיקי (where the slave cannot be used for collection)?!

תוספות responds:

מכל מקום היכא דגבי מלקוחות גבי נמי מיתמי –

Nevertheless whenever one collects from buyers one may also collect from יתומים (even though there is no סברא of קלא by יתומים).[6]

תוספות supports this view that if you are גובה מלקוחות you are גובה מיתומים:

מידי דהוה אמלוה בשטר דגבי מיתמי ומלקוחות –

It is similar to a documented loan which collects from יתומים and לקוחות -

אפילו למאן דאמר שיעבודא לאו דאורייתא –

Even according to the one who maintains that there are no liens in תורה law.[7] It is the חכמים who instituted that a מלוה בשטר should collect from יתומים ולקוחות (as תוספות will shortly explain), but not מן התורה -

ומלוה על פה לא גבי ממשעבדי ולא מיתמי[8] **–**

However an oral loan does not collect from encumbered properties and not from יתומים (according to the מ"ד שעבודא לאו דאורייתא), because the חכמים did not make the תקנה in the case of a מלוה ע"פ (as תוספות will shortly explain).

תוספות will now analyze these rules of מלוה בשטר ומלוה ע"פ by לקוחות ויתומים:

ובשלמא בלקוחות איכא לפלוגי בין על פה לבשטר –

It is well understood **that concerning the buyer we can distinguish between an oral and a documented** loan -

דבמלוה בשטר גובה משום נעילת דלת –

That by a מלוה בשטר the רבנן instituted that the מלוה can collect from the לקוחות **because** of the concern of **'shutting the door** in the face of borrowers'. If the מלוה cannot collect from the לקוחות, he will refuse to lend the money.

ובמלוה על פה לא גבי משום דליכא קלא -

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[5] Seemingly all the אפותיקי accomplishes is that there is a קול. This is irrelevant as far as the יתומים are concerned. See 'Thinking it over' #'s 1 & 2.

[6] תוספות does not explain the reason for this ruling. The רא"ש (here in סי' יד) explains that the חכמים did not want the יתומים to have any superiority over the לקוחות. [It would seem unfair that the person who paid money for the field (and is a stranger to the לוה) is required to give up his purchase to the מלוה; whereas the יתומים who received this property as an inheritance from the לוה (and they are his children) are exempt from paying their father's debt with his assets which they inherited.]

[7] According to this view it is only the debtor (as a person) who is liable for his debt. His assets are not subjugated to the debt. If he sells them or dies, the creditor has no claim on the לקוחות ויתומים (מן התורה).

[8] If we maintain, however, שעבודא דאורייתא, then one can collect מיתומים even by a מלוה ע"פ. See קידושין יג,ב. There is no need to 'protect' the יתומים; only the לקוחות are spared by a מלוה ע"פ (מדרבנן) since there is no קול.

And by a מלוה ע"פ the מלוה **cannot collect** from the לקוחות **since there is no publicity** for this loan (the buyers are unaware that the seller, the לוה, owes money, and they will suffer needlessly). In this case the חכמים did not make any תקנה and the rule remains as it is מדאורייתא that there is no שעבוד.[9]

ובשטר אית ליה קלא –

However by a בשטר מלוה **there is a קול** (and the לקוחות took this risk knowing full well that the מלוה may collect their purchases.

This distinction (according to the מ"ד שעבודא לאו דאורייתא) is valid concerning לקוחות -

אבל מיתמי מה לי מלוה על פה מה לי מלוה בשטר –

However concerning collecting **from the יתומים what difference is there between a מלוה ע"פ or a מלוה בשטר[10]?!** Why can the מלוה collect מיתומים by a מלוה בשטר and not collect by a מלוה ע"פ, since the idea of קול is irrelevant by the יתומים?![11]

The fact is however that concerning יתומים we make the same distinction between מלוה בשטר and מלוה ע"פ as we do by לקוחות -

אלא ודאי כל היכא דגבי מלקוחות משום נעילת דלת גבי נמי מיתמי כמו מלוה בשטר –

Therefore we must certainly conclude **that whenever** the מלוה **collects from לקוחות on account of נעילת דלת,** the מלוה **will also collect from יתומים; for instance by a מלוה בשטר** (he collects both from לקוחות and יתומים) -

או מלוה הכתובה בתורה למאן דאמר ככתובה בשטר דמי –

Or if it is **an obligation which is written in the תורה** (he also collects from יתומים ולקוחות) **according to the one who maintains** that a מלוה הכתובה בתורה (like payment for damages, which is explicitly written in the תורה[12]) **is like it is written in a שטר** and can be collected מלקוחות ומיתמי -

או כשעמד בדין גבי נמי מיתמי –

Or if the case was adjudicated (in the presence of the debtor), then the creditor **can also collect from the יתומים** of the debtor. In conclusion; whenever the מלוה can collect from the לקוחות (whether it is in account of נעילת דלת [as by a loan], or by נזיקין [which is a מלוה הכתובה בתורה וככתובה בשטר דמיא], or כשעמד בדין) he can also collect from יתומים.

תוספות will now explain why the מלוה cannot collect from the יתומים by a מלוה ע"פ:[13]

אבל במלוה על פה כיון דלא חש לעשות שטר לגבות מלקוחות –

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[9] There is no נעילת דלת, for the מלוה has the option of insisting on a מלוה בשטר.

[10] If we maintain שעבודא לאו דאורייתא, then if we are concerned for נעילת דלת by יתומים as well (that if the מלוה cannot collect from the יתומים he will be reluctant to lend), then in all cases (even by a מלוה ע"פ) the מלוה should collect (there is no issue of קלא, for the יתומים inherit regardless) and if we are not concerned for נעילת דלת by יתומים (it makes no difference to the מלוה if he can or cannot collect from the יתומים) then the מלוה should never collect from the יתומים even by a מלוה בשטר (since שעבודא is לאו דאורייתא).

[11] See 'Thinking it over' # 3.

[12] A regular מלוה is not considered כתובה בתורה, but rather it is an obligation that the לוה accepts upon himself (for receiving the loan). However by נזיקין it is the תורה which obligates that מזיק to pay; the מזיק never assumed the obligation to pay the ניזק.

[13] Seemingly since קול is not an issue, if the מלוה collects from יתומים by a מלוה בשטר, why should he not collect even by a מלוה ע"פ?

However concerning a מלוה ע"פ since the מלוה **was not** so **concerned** about his loan as to **write a שטר to collect from לקוחות**, this indicates that he feels secure about this loan, therefore **-**

כי לא גבי נמי מיתמי ליכא נעילת דלת[14] **–**

Even if he will not collect from the יתומים there will be no נעילת דלת; his inability (in this case) to collect from יתומים will not deter him from making this מלוה ע"פ (which he feels secure [or is not concerned] about) since he did not insist that it be a מלוה בשטר.

תוספות will now explain the גמרא:

והכי פירושא[15] **אמר רבי אלעזר אפילו מיתמי בלא אפותיקי משום דהוי כקרקע –**

And this is the explanation of the flow of the גמרא; ר"נ asked עולא: '**did ר"א state that** he can collect the עבד **even from יתומים if he did not** make the עבד **an אפותיקי'?! A**nd the reason why he can collect the עבד **is because** an עבד **is considered as קרקע!** עולא replied **–**

לא מיניה פירוש בלא אפותיקי לא גבי אלא מיניה –

'No! Only **from him'! The explanation** of this reply is that **without an אפותיקי,** the מלוה **can only collect from** the לוה; but not from the יתומים.

ופריך מיניה לכול[16] **ומשני באפותיקי**[17] **וגבי נמי מיתמי ומלקוחות –**

And the גמרא asked **'From him, etc.'!** He can certainly collect anything that the לוה owns (including the עבד). **And** the גמרא answered**; it was with an אפותיקי,** and therefore **he may collect from the יתומים and לקוחות as well.**

תוספות offers a slight variation in פשט:

אי נמי דקרי מיניה אף על גב דגבי נמי מיתמי –

If you will you may **also** say[18]; that the גמרא means to say **that it is called מיניה for even though** the מלוה **may also collect** the עבד **from the יתומים,** but nevertheless it is called 'מיניה' -

כיון דמכח הלוה שעשאו אפותיקי קא גבי:

since the reason the בע"ח **may collect** from the יתומים **is** based on **the initiative of the לוה who made** the עבד **an אפותיקי.**

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[14] The same ruling will apply by an עבד. If the לוה made the עבד an אפותיקי where the מלוה can claim the עבד from לקוחות (because אית לה קלא), he can also claim him מיתומים; however when there is no אפותיקי and the מלוה cannot claim him from the לקוחות, ha can also not claim him מיתומים, just as by a מלוה ע"פ.

[15] תוספות anticipates an apparent difficulty in the give and take of the גמרא. ר"נ asked, 'can he collect the עבד even from the יתומים' to which עולא replied; 'No, only from him!' (indicating that he cannot collect the עבד מיתומים). Then (seemingly) the גמרא asks that from the לוה he can certainly collect anything. To which the answer was that the עבד was an אפותיקי (indicating that we can collect the עבד even not 'מיניה'). However the גמרא never stated clearly that by an אפותיקי one may collect מיתמי(מלקוחות ו). The גמרא was never clearly חוזר from the answer of עולא that he can collect only מיניה.

[16] The marginal gloss amends this to read וכולי.

[17] The answer of אפותיקי is the retraction of the original answer; 'מיניה'.

[18] This א"נ maintains there is no retraction of s'עולא original statement 'מיניה'. However, it is slightly reinterpreted.

Summary

Whenever you collect from לקוחות you may collect from יתומים.

Thinking it over

1. According to תוספות the reason the מלוה can claim the עבד by an אפותיקי is because there is a קול. Why then can the מלוה not collect the עבד by a מלוה בשטר even if he is not an אפותיקי, since there is a קול?[19]

2. תוספות maintains[20] that concerning the יתומים there is no difference whether or not there is an אפותיקי. Seemingly there is a difference; if there is no אפותיקי then the מלוה certainly cannot collect the עבד from the יתומים since the מטלטלין of the לוה are not משועבד to the מלוה (we are now assuming that עבדי לאו כמקרקעי דמי), if there is an אפותיקי the שעבוד can perhaps be חל. Rather תוספות should have phrased his question that concerning the יתומים there should be no difference between שורו and עבדו; either the אפותיקי creates a שעבוד by both (the עבד and the שור) or by neither; since קול is irrelevant by the יתומים. Why does תוספות say that there is no difference if there is an אפותיקי or not?![21]

3. This תוספות assumes ([granted] according to the מ"ד שעבודא לאו דאורייתא) that there is more reason to collect from לקוחות than from יתומים (on account of קלא). However it would seem to be the opposite. Even if we maintain שעבודא לאו דאורייתא, nevertheless the חכמים made a תקנה to be גובה from משועבדים (and also from יתומים) for otherwise there would be נעילת דלת בפני לוין. This seems to be the basis. However in order to protect the לקוחות, the חכמים limited this שעבוד to a מלוה בשטר only, since it has a קול. However by a מלוה ע"פ where there is no קול one cannot collect from the לקוחות because the לקוחות will lose unfairly. Concerning יתומים it would appear that the reason of נעילת דלת applies to them as well[22]. Therefore collecting from יתומים is just as necessary as collecting from לקוחות. The fact that קול is irrelevant to יתומים, should only make it possible that the מלוה should collect from them even by a מלוה ע"פ. However it is not understood why we should think that the מלוה cannot collect from them by a מלוה בשטר, just because קול is irrelevant. קול (seemingly) is only a limitation on the תקנה of נעילת דלת; it is not the basis of the תקנה. Wherever there is נעילת דלת the מלוה should collect, even from יתומים (and maybe even by a מלוה ע"פ)!!!![23]

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[19] See מהוד"ב למהרש"א.
[20] See footnote # 5.
[21] See נח"מ.
[22] If the מלוה cannot collect from the יתומים he will not lend.
[23] See חי' ר"נ אות תלב.