אי בעי לא עביד – If he wants; he will not do

Overview

רב סמא explained that the rule of אין שליח לדבר עבירה applies when the שליח has the option whether to do or not to do the שליחות (in such a case the משלח is not liable for the action of the שליח), however when the 'שליח' has no option (like a חצר) then the משלח is liable for the 'מעשה השליח'. Our תוספות redefines the concept of אי בעי עביד.

תוספות asks:

ואם תאמר והא דתנן[1] (בבא קמא דף עט,א ושם) היה מושכו ויוצא –

And if you will say; and that which we learnt in a משנה, 'he was pulling it while going out -

[ומת ברשות בעלים] פטור[2] הגביהו[3] [או הוציאו מרשות בעלים ומת] חייב –

[and it died while on the owner's premises] the thief **is פטור** from paying; **if he picked it up [or he took it out of the owner's premises and it died]** the thief **is חייב** to pay.

ופירש רש"י בלשון אחד שאמר גנב לשומר –

And רש"י explained there, in one interpretation, that the case there is where **the thief said to a שומר -**

שור אחד יש לי בבית פלוני קחנו ותהא עליו שומר חנם –

"I have an ox in that house, take it from there **and become a שומר חנם on this** ox for me'; the rule is, if -

הוציאו השומר מרשות בעלים ומת חייב הגנב במשיכת השומר –

The שומר removed the ox **from the owner's premises and** subsequently the ox **died, the thief, through the משיכה of the שומר, is liable** to pay the owner.[4] This concludes the citation of the משנה according to פירש"י. תוספות concludes the question:

ואמאי והא אי בעי לא עביד[5] –

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[1] The משנה there states as follows: נתנו וכו' לשומר חנם וכו' והיה מושכו ומת ברשות הבעלים פטור, הגביהו או שהוציאו מרשות הבעלים ומת חייב (The גנב gave it over to an unpaid watchman and the שומר was pulling it and it died on the owner's premises, the (גנב) משלח is פטור, if the שומר picked it up or he removed it from the owner's premises and then it died, the משלח is חייב).

[2] There is no קנין משיכה ברשות בעלים; therefore there was no קניני גניבה. It died ברשות הבעלים.

[3] קנין הגבהה is effective even in רשות בעלים, it was acquired for the גנב and he is חייב even for אונסין.

[4] See 'Thinking it over'.

[5] תוספות ask this question on רב סמא but not on רבינא (who maintains that if the שליח is a בר חיובא then אשלד"ע, and here seemingly the שליח is a בר חיובא). The concept of בר חיובא is that he is liable (at least conceptually) for his actions; meaning the שליח did something wrong, like the אשה ועבד when they stole (knowingly). However, the שומר is certainly not considered a בר חיובא, since (even conceptually) he did

And why should the גנב be חייב to pay?! **For** the שומר **did not have to** steal it **if he would so desire!** רב סמא ruled that if שליח has the option to refuse to do the עבירה then the משלח is פטור. Here too the שומר had the option of not removing the ox from the premises of the owner.

תוספות answers:

ויש לומר כיון שאין השומר יודע שהוא גנוב הוה ליה כחצר דבעל כרחו מותיב ביה:

And one can say, since the שומר does not know that the ox is stolen (he thinks it belongs to the משלח who told him to watch it), therefore **this** case **is considered as a חצר where one places** an item in a חצר **against its will.** Here too the שומר is not considered אי בעי עביד, but rather כ"בע.[6]

Summary

The criterion of אי בעי לא עביד which is a precondition for אין שליח לדבר עבירה (which causes that the משלח is not liable for the actions of the שליח), means that the שליח knew that he was engaging in a prohibited activity and had the option to decline. However if the שליח was unaware that this activity is prohibited, it is considered as if he had no option to decline, and the משלח is liable for the actions of the שליח, and אין שליח לדבר עבירה does not apply.

Thinking it over

In the case of the שומר,[7] when he took the ox he had no intention of making any קנין for he thought it belongs to the משלח, how was the משלח קונה this ox, since there was no intention of a מעשה קנין by the שומר?[8]

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nothing wrong. [The גמרא initially thought that even עבד ואשה are not בר חיובא since they do not have to pay! The only reason they are בר חיובא is because they have to pay. Otherwise they would not be בר חיובא, even though they knowingly stole; certainly the שומר is not a בר חיובא.] תוספות however assumed regarding אי בעי לא עביד, that it merely means that he had the possibility of not doing the action (regardless of whether he knew it was right or wrong). Therefore תוספות asks that the שומר had the option of not doing it and therefore the rule should be אשלד"ע (see מהר"ם and בל"י אות שמא).

[6] תוספות answers that אי בעי לא עביד does not merely mean he had the power not to do so, but rather within the scope of אשלד"ע it means that the שליח knew it was wrong and he should not do it (which would exempt the משלח, for in the s'משלח mind he is thinking דברי הרב ודברי התלמיד דברי מי שומעין; so the שליח must be doing it on his own). However if the שליח does not know that it is wrong, there is nothing preventing him from doing it (and the rationale of דברי הרב ודברי התלמיד וכו' cannot apply).

[7] See footnote # 4.

[8] See בל"י אות שמב.