It is necessary to consult for placing a lien – שעבוד צריך לימלך

Overview

שמואל ruled that when a סופר writes a bill of sale (for a property) he must first consult with the seller whether he is guaranteeing this sale by placing a lien (שעבוד) on his (the seller's) property (against the sale). He must also consult with him regarding the extent of this guarantee; will it include any improvements (שבח) the buyer will make on this property, will the lien extend to the choice (שפר) properties of the seller. Only if the seller consents can the scribe include this in the bill of sale. Otherwise there are no guarantees. [In this a שטר מכר differs from a שט"ח where we assume that there is always a guarantee and a lien on the properties of the לוה.] תוספות discusses what happens if there is no guarantee, and the various obligations that come with a bill of sale.

This rule of שעבוד צריך לימלך is only referring -

בשטרי מקח –

to bills of sale as the גמרא shortly concludes (but not to שט"ח where we assume that the lack of אחריות is a טעות סופר).

ואי לא כתבו מבני חרי נמי לא גבי אי בעל חוב טרפה לה –

And if they did not write אחריות in a שטר מקח the buyer **cannot collect even from the בנ"ח** (of the seller)**, if the creditor** of the seller **collected it** (for his loan), from the buyer.

תוספות proves this point[1] that if there is no אחריות in a שטר מקח the buyer has no recourse against the seller and cannot collect anything from him:

כדאמר בסמוך[2] אפילו שלא באחריות דלא ניחא לי דלהוי תרעומת דשמעון עלי –

As the גמרא **shortly states** that the seller can intercede on behalf of the buyer even if the sale was **שלא באחריות, for** the seller can claim **it is not pleasant for me that שמעון** (who is the buyer) **should have complaints against me - אלמא לא הדר עליה –**

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[1] See 'Thinking it over' # 1.

[2] At the bottom of this עמוד. The case there is where ראובן sold a field to שמעון (with or without אחריות), and the creditor of ראובן comes to collect this field from שמעון as payment for the loan which ראובן owes him (a מלוה בשטר collects from לקוחות). The rule is that ראובן may intercede on behalf of שמעון and argue (whatever it may be) that the מלוה has no right to collect this field. The מלוה cannot claim that ראובן is לאו בעל דברים דידי (he is not a litigant in this case) for it is between the מלוה and שמעון; rather ראובן can claim that he is a party to this case; if it was sold באחריות then he is certainly a party since שמעון will wish to collect from ראובן, but even if the sale was without אחריות, nevertheless ראובן can claim that he is a party in this dispute.

It is evident from that גמרא that the buyer **cannot go back** and claim anything from the seller[3] if there is no אחריות in the שטר.

תוספות continues with a different scenario:

אבל אי נגזל[4] טרפה חוזר על הגזלן אפילו בלא אחריות ואפילו ממשעבדי –

However if the נגזל collected this bought property from the buyer; the buyer then **returns** and collects **from the גזלן** (the seller) **even if there was no אחריות** in the שטר, and he can collect **even ממשעבדי** and not only מבנ"ח. The reason for this difference is -

כיון דהוי מקח טעות הוי ליה שטר הלואה[5] –

Since it was a mistaken sale, the bill of sale **becomes a note of debt.** By a שט"ח we assume that אחריות טעות סופר and he can always collect ממשעבדי.

תוספות responds to an anticipated difficulty:

והשתא אתי שפיר דלא קאמר הכא פירי –

And now that we are discussing here a case of a בע"ח (and not a נגזל) **it is properly understood why** שמואל **did not mention 'produce'** here[6] -

דמיירי שבעל חוב טרפה[7] ולית ליה פירי –

For we are **discussing** here a case **where the בע"ח collected** the field **and a** בע"ח **does not collect the פירי -**

כדאמר לקמן (דף טו,א) בעל חוב גובה את השבח שבח אין פירי לא[8] –

As שמואל **states later, a בע"ח collects the improvement,** the גמרא infers from this; the בע"ח **does** collect **the שבח,** but **not the פירי.**

תוספות clarifies another anticipated difficulty:

והא ניחא נמי דלקמן (שם) אמר שמואל אמליך וכתוב שופרא ושבחא ופירי –

And this also explains that later שמואל stated regarding a scribe that **he**

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[3] If the buyer has recourse against the seller then why does the seller merely say 'I do not want שמעון to have תרעומות on me', he should say, 'שמעון will have a monetary claim against me'! See (however), 'Thinking it over' # 2.

[4] The seller (in this case) was not the rightful owner of this property; it belonged to someone else (the נגזל). The נגזל eventually came to retrieve his property which was currently occupied by our buyer.

[5] The שטר states that the 'buyer' gave the 'seller' money, but there was no sale, for the property did not belong to the 'seller', therefore the transfer of money is considered to be a loan בשטר from the buyer to the seller.

[6] Seemingly שמואל should have advised the סופר that he should also inquire whether the seller is guaranteeing the produce of the field, in case it is taken away by the מלוה or the נגזל.

[7] If it would be נטרף by the נגזל, there would be no need for the שטר to contain שעבוד as תוספות just mentioned. [See footnote # 9.]

[8] If the מלוה is owed one hundred זוז with a שטר and the field the buyer purchased from the לוה is worth eighty זוז, the מלוה can only collect the field for eighty זוז and must leave the פירות for the buyer.

should consult with the seller and upon his agreement **should write** in the שטר, that he is guaranteeing **שופרא** (collecting from the choice properties), **שבחא** (payment for any improvements on the property), **and פירי** (compensation for any produce taken away from the buyer) -

ולא קאמר שעבוד כדהכא –

But שמואל there **did not mention שעבוד** (the placing of a lien on the seller's property) **as** he mentions **here!** The answer is -

משום דלקמן מיירי בנגזל שטרפה[9] –

Because later in that גמרא there **we are discussing** a case **where the נגזל collected** the field from the buyer –

אף בלא כתיבת שעבוד חוזר עליו ואפילו ממשעבדי[10] –

Therefore the buyer **returns** and collects from the seller **even without writing שעבוד and** he can collect **even ממשעבדי -**

והיינו טעמא כדפרישית דכיון דיש לו שטר מקח והרי מקח בטל שגזולה היתה –

And this is the reason as I previously **explained, that since** the buyer **has a שטר מקח and the sale is nullified since** the property **was stolen -**

והוי ליה שטר הלואה דאמרינן ביה אחריות טעות סופר הוא –

So therefore this שטר מקח **becomes a שט"ח concerning which we rule that אחריות טעות סופר** by a שט"ח. It is not necessary to write it.

תוספות responds to an additional question:

והא דאמר שמואל בחזקת הבתים (בבא בתרא דף מג,א) המוכר שדה שלא באחריות[11] –

And concerning that **which שמואל ruled in** פרק **חזקת הבתים; one who sold a field without אחריות,** this seller -

אין מעיד לו עליה מפני שמעמידה בפני בעל חובו –

Cannot testify on behalf of the buyer **because** the seller intends **to set it up**

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[9] See נח"ד and אמ"ה # 58. It would seem that under certain circumstances the לוקח wants אחריות only for a בע"ח and not for a גזלן (he knows for instance that this property certainly belongs to the מוכר), and sometimes the לוקח wants אחריות only for a חשש of גזילה, but not for a בע"ח (if the seller is very wealthy and has many assets and there is no קול that he owes money). [To make this more palatable, perhaps the מוכר charges an extra fee for each type of אחריות.] שמואל in each case was discussing one type of אחריות.

[10] Nevertheless, the סופר must consult regarding שופרא שבחא ופירי. Otherwise even if the buyer collects, he will only collect from בינונית (as any מלוה would) and not from עידית. In addition even though the נגזל will take away from him the שבח and the פירות, the לוקח would not be able to collect it from the מוכר unless the מוכר specifically agrees to guarantee them. Otherwise the לוקח will only collect the קרן which he paid.

[11] The case there is where the מוכר sold a field to a לוקח and then a מערער came and claimed that it is his field (and it never belonged to the מוכר). The מוכר cannot testify in this case against the מערער and for the לוקח. The reason is because the מוכר has a vested interest that the field remains by the לוקח, for then the creditor of the מוכר will be able to collect his debt from this field (and it will be considered a if the לוה paid up his debt). However if the מערער should win the case, then it turns out that the מוכר never owned it and the בע"ח has no שעבוד on it (so the debt will not be paid and the לוה will be regarded as a לוה רשע ולא ישלם).

for his creditor -

הא לאו הכי מעיד לו עליה אפילו נמצאת שאינה שלו משמע דלא הדר עליה[12] **–**

But if not for this reason, the seller **could testify on behalf of** the buyer **even if it was discovered that it was not** the seller's; **this indicates that** the buyer **has no recourse** against the seller –

תוספות replies:

התם מיירי שפירש לו בשטר שלא באחריות אבל סתמא הדר עליה:

There we are discussing a situation **where** the seller **explicitly** wrote **in the שטר** that **there is no אחריות; however where nothing was specified** the buyer **has recourse against** the seller by גזילה.

Summary

A field that was sold שלא באחריות and a בע"ח claimed it for his debt, there is no recourse for the buyer. However if the נגזל reclaimed it, the buyer has recourse even from the משעבדי of the seller. There is no recourse in any event if the שטר specified that there is no אחריות.

Thinking it over

1. תוספות proves that the buyer without אחריות has no recourse, from the case of לא ניחא לי דליהוי לשמעון תרעומות עלי.[13] Why did not תוספות prove it from the episode of אבוה בר איהי where שמואל ruled זיל לשלמא for there is no אחריות?[14]

2. תוספות proves that the buyer without אחריות has no recourse, from the case of לא ניחא לי דליהוי לשמעון וכו'.[15] The rule is that a בע"ח can collect from משעבדי only if the לוה has no assets of his own. It is therefore evident in that case (from where תוספות derives his proof) that the לוה has no assets. That is why the לוה merely claims that he does not want שמעון to have תערומות on him, because he knows he will not have a monetary claim against the מוכר since the מוכר has no assets.[16] In addition perhaps the case of לא ניחא לי is in a situation where the מוכר explicitly wrote in the שטר that there is no אחריות!

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[12] If the rule is as תוספות maintains that by a נגזל the לוקח has recourse against the מוכר even if there was no אחריות, then obviously the מוכר cannot testify for the לוקח because the מוכר will lose money if the מערער takes away the field from the לוקח. Why mention מפני שמעמידה בפני בע"ח, when this is a much stronger vested interest.

[13] See footnote # 1.

[14] See מהר"ם שי"ף.

[15] See footnote # 3.

[16] See מהר"ם שי"ף and אמ"ה # 47.