

## Interpret it also by a creditor

## תריץ נמי בבעל חוב –

### OVERVIEW

It is known that by a documented loan (a מלוה בשטר), the מלוה can collect from the משועבדים. נכסים משועבדים. This means that if the לווה sold his property after the loan, the מלוה can collect his loan from the sold property, providing the לווה has no assets of his own to pay the debt. שמואל poses a query in ב"ב; is this שעבוד limited to properties which the לווה owned at the time of the loan (which became indentured [משועבד] to the מלוה at the time of the loan) or does this שעבוד extend even to properties which the לווה bought [and then sold] after the loan. Those properties were not משועבד to the מלוה at the time of the loan; the query is can one be משעבד something which is not in his possession.<sup>1</sup> This case is referred to as אקני קנה ומכר [meaning I (לווה) will be משעבד to the מלוה the properties that I will buy (אקני) so that when the לווה buys it (קנה) and then sells it (ומכר) it will be משעבד to the מלוה and he can collect from it]. The גמרא there says that according to ר"מ who maintains אדם דחייב מאיר היא דאמר אדם מקנה דבר שלא בא לעולם, the שעבוד is certainly effective. The query is according to the רבנן who maintain דשלב"ע (אין אדם מקנה דשלב"ע); is שעבוד different (stronger) than קנין (and there is a שעבוד) or not (and there is no שעבוד). Our גמרא discusses this query in light of our תוספות.

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בפרק מי שמת (בבא בתרא דף קנז, ב ושם דיבור המתחיל גובה) רצה להוכיח –

In פרק מי שמת the גמרא wanted to prove -

דאקני קנה ומכר משתעבד מהכא דגבי בעל חוב שבח שלא היה בעין בשעת הלואה<sup>2</sup> –  
That ברייתא גמרא wanted to prove it from this משתעבד is אקני קנה ומכר. The גמרא wanted to prove it from this ברייתא which rules that the בע"ה collects the שבח which was not in existence at the time of the loan; for if אקני קנה ומכר is לא משתעבד then how can the בע"ה collect the שבח since it is the same as אקני.

ודחי רבי מאיר היא דאמר אדם מקנה דבר שלא בא לעולם –

However the גמרא there rejected the proof and explained that this ברייתא follows the view of ר"מ who maintains that a person can transfer an item

<sup>1</sup> If the לווה bought property after the loan and did not sell it (but it is in his possession), then obviously the מלוה can collect from it. The query is only in a case where the לווה sold it.

<sup>2</sup> Let us assume the loan was for a hundred זוז. The field which ראוּבן (the לווה) sold to לוי was worth eighty זוז. Then לוי improved the field and it is now worth a hundred זוז. The בע"ה (שמעון) can collect the entire field from לוי since he is owed a hundred זוז. The additional twenty זוז of שבח did not exist at the time of the loan. This proves that the שעבוד can be effective for a דבר שלב"ע; the same applies to אקני that even though it is a דשלב"ע, nevertheless it is משתעבד. See 'Thinking it over' # 1.

**that does not exist presently.** Therefore he can collect the שבה; however if we maintain דאקני קנה ומכר לא משתעבד א"א, then if we would maintain the שבה גובה בע"ה would not be the שבה.

Tosfos asks a question:

**ואם תאמר ולוכח משמואל דאמר בעל חוב גובה את השבח –**

**And if you will say; and let us prove that שמואל from אקני קנה ומכר משתעבד who rules that the שבה בע"ה collects the שבה –**

**ושמואל גופיה הוא דבעי ליה התם<sup>3</sup> –**

**And it was actually שמואל who posed this query there** in ב"ב. How can שמואל be unsure whether אקו"מ is משתעבד when he maintains את השבח בע"ה גובה which indicates (according to the רבנן of ר"מ) that אקו"מ is משתעבד.

Tosfos rejects a possible solution to his question:

**דלא מצי למימר דשמואל נמי סבר כרבי מאיר ומבעי ליה אליבא דרבנן –**

**For we cannot answer that שמואל also agrees with ר"מ** that אדם מקנה (בע"ה גובה את השבח and therefore דשלבל"ע). **And his query regarding אקו"מ is according to the רבנן** who maintain א"א מקנה דשלבל"ע. However we cannot assume that שמואל agrees with ר"מ –

**דהא בפרק אף על פי (כתובות דף נט,א) פסק שמואל כר' יוחנן הסנדלר –**

**Because in ר"י הסנדלר שמואל rules like פרק אע"פ** we see that

**דלית ליה אדם מקנה כולי –**

**Who maintains that a person cannot be מקנה, etc.** a דבר שלא בא לעולם.

Tosfos answers:

**ויש לומר דהא דאמר שמואל בעל חוב גובה את השבח –**

**And one can say; that which שמואל rules that a שבה בע"ה is –**

**היינו לפי המסקנא דהתם דפשיט דאקני קנה ומכר משתעבד אף לרבנן –**

**This is according to the conclusion of the גמרא there** in ב"ב where the גמרא resolved that א"א is משתעבד even according to the רבנן who maintain א"א. Therefore since the ruling is משתעבד אקו"מ, it is understood that בע"ה גובה את השבח שמואל can maintain

Tosfos asks a question:

**ואם תאמר אדרבה לוכח מהכא דלא משתעבד –**

**And if you will say; on the contrary, let us prove from this ברייתא that אקו"מ is not משתעבד –**

**מדלא טריף בעל חוב ממשעבדי דטריף לוקח –**

<sup>3</sup> See אקו"מ משתעבד בע"ה גובה את השבח שמואל's query since he maintains ב"ב קנא, א.

**Since the בע"ה does not collect from those משעבדי which the לוקח collects from.<sup>4</sup>**

deflects an anticipated solution to his question:

**דאין לומר דאחר שטרף בעל חוב קרקע מן הלוקח קנה המוכר קרקעות ומכרן<sup>5</sup> –**

**For we cannot say that the seller bought properties and sold them after the בע"ה collected the field from the first לוקח; this would explain why (even though משתעבד אקו"מ, nevertheless) the לוקח collects from the משעבדי but not the בע"ה for they were never in the possession of the ליה before the בע"ה collected his debt.**

explains that this cannot be the case:

**דאם כן גם השבח יגבה מהנהו משעבדי דגם השבח היה קצוב –**

**For if this is indeed so that the מוכר purchased this new field after the בע"ה collected from the original לוקח, then the original לוקח should also collect the שבח (which the בע"ה took away from him) from these משעבדי because even the amount of שבח was fixed -**

**כיון שכבר טרף הבעל חוב קודם שלקח זה הקרקע<sup>6</sup> –**

<sup>4</sup> Let us review the case. ראובן (the ליה) sells his field 'a' to לוי (the לוקח). ראובן has no money to pay שמעון (the בע"ה) so שמעון collects from לוי field 'a' (including the שבח). לוי (the לוקח) can collect the monies he lost on his field (which was taken away by שמעון (the בע"ה), from (either ראובן the מוכר and ליה if ראובן has assets, and if not, לוי can collect even from) someone (יהודה וכו') who bought field 'b' from ראובן after לוי bought field 'a' from ראובן. [When יהודה bought field 'b' from ראובן he knew that ראובן has an obligation (אחריות) to see that לוי keeps field 'a' or is compensated for it. This שעבוד is on field 'b' which יהודה bought.] The question arises since יהודה bought field 'b' from ראובן after לוי bought field 'a' from ראובן, the בע"ה should collect from יהודה and not from לוי (the בע"ה collects from the last field which the (ראובן) sold. We must therefore say that when שמעון lent money to ראובן he (only) had the field 'a' which he eventually sold to לוי but ראובן did not acquire field 'b' that he would eventually sell to יהודה until after the loan [and before he sold the original field 'a' to לוי], and then he sold this newly acquired field 'b' to יהודה. Therefore לוי can collect from יהודה because when לוי bought field 'a', field 'b' which would be sold to יהודה was in the possession of ראובן and it became משעבד for the אחריות of לוי's field 'a'. However ראובן did not own field 'b' when he borrowed money from שמעון, so there was no שעבוד on it at the time of the loan. ראובן bought field 'b' after the loan, and sold it to יהודה, it is precisely a case of קנה ומכר, and we see that the בע"ה cannot collect from it; proving that לא משתעבד אקו"מ. See 'Thinking it over' # 2.

<sup>5</sup> We can maintain that אקו"מ משתעבד but nevertheless שמעון cannot collect field 'b' from יהודה, because when שמעון came to collect his loan, ראובן did not buy yet field 'b'. ראובן bought field 'b' after שמעון took away field 'a' from לוי. However לוי can collect from יהודה because as soon as שמעון took away field 'a' from לוי, then ראובן owed לוי money for אחריות of field 'a'. When ראובן bought field 'b' it became משעבד to לוי (since אקו"מ משתעבד) and even though יהודה purchased it, nevertheless לוי can collect it for his אחריות.

<sup>6</sup> If we are to assume that ראובן bought field 'b' (which he sold to יהודה) after שמעון collected field 'a' from לוי then לוי should be able to collect from יהודה (not only the קרן but also) the שבח which שמעון took away from him. ראובן owes the שבח to לוי (as it says in the ברייתא). The שבח now has a fixed amount; we know how much שבח was taken away from לוי by שמעון. Therefore, any property which ראובן acquires is משעבד to לוי; up to the amount of the קרן and the שבח. The only reason שבח is not collected from משעבדי is because it is not a fixed amount so the buyers cannot protect themselves. However here it is a fixed amount (which

Since the **לוקח** purchased **this new** **שבה** before **ה"ה** already collected the **שבה** before **this new field**. The question remains that since the **ה"ה** does not collect from the **שבה** which the **לוקח** collects from, this proves that **אקו"מ** לא משתעבד.

answers: תוספות

ויש לומר דמייירי שזה הקרקע עשאו המוכר לבעל חוב אפותיקי<sup>7</sup> –

And one can say; that the **ברייטא** is discussing a case where the field which the **ה"ה** is collecting from the **לוקח**, was made an **אפותיקי** for the **ה"ה** by the **מוכר** –

ולכן גובה אותו בעל חוב ואף על פי שיש שאר משעבדי<sup>8</sup> –

And therefore the **ה"ה** collects from this field even though there are other fields **משועבד** to this **חוב** which (are now even **ה"ה** or) were sold to other buyers after the **אפותיקי** field was sold to the **לוקח** from whom the **ה"ה** collects.

asks: תוספות

אך קשה אמאי דחיק לדחויי בפרק מי שמת (בבא בתרא דף קנז,ב ושם) הא מני רבי מאיר היא  
However there is a difficulty (once we assume that we are discussing an **אפותיקי**); why does the **גמרא** in **פרק מי שמת** choose to reject the proof from the **ברייטא** that **ה"ה** משתעבד **אקו"מ** by offering a forced answer that the **ברייטא** follows the view of **ר"מ**, when instead the **גמרא** –

יעמיד כשעשאו אפותיקי<sup>9</sup> דאז בעל חוב גובה את השבח היתר על היציאה חנם<sup>10</sup> –

יהודה could ascertain) so לוי should collect the **שבה** from יהודה קרן.

<sup>7</sup> See later טו,ב. An **אפותיקי** is (somewhat) the equivalent of a present day mortgage, which gives the lender the right to collect his loan from a specific property (even if it is sold) regardless if there are other properties. The word **אפותיקי** is a combination of **אפה** תהא קאי which means your claim rests on this property.

<sup>8</sup> **ראובן** may have owned fields 'a & b' when he borrowed money from שמעון; however he made field 'a' an **אפותיקי** for שמעון and then sold it to לוי and he later sold field 'b' to יהודה (which makes field 'b' an **אפותיקי** to לוי). When the **ה"ה** comes he collects from field 'a' (which belongs to לוי) since this is his **אפותיקי** (regardless that field 'b' was sold later and normally would be the field he collects from if there were no **אפותיקי** לוי). לוי can now collect from יהודה קרן since יהודה bought the field from **ראובן** after לוי; however לוי cannot collect the **שבה** (which שמעון took from him) from יהודה since at the time יהודה purchased the field from **ראובן** there was no definitive **שבה** that was owed to לוי.

<sup>9</sup> The term **יעמיד** here does not merely mean that we should establish that the **ברייטא** is discussing an **אפותיקי** for we already assumed that, as תוספות explained previously (otherwise why does not the **ה"ה** collect from the **משעבדי** which לוי collects from), but rather that since it is an **אפותיקי**, the **מלוה** can collect the **שבה** that is more than the amount of the loan and therefore is not connected to the rule **אקו"מ**. See following footnote # 10. See **נח"מ** (and **אות תצא**) for a different interpretation.

<sup>10</sup> When the field is an **אפותיקי** and the **מלוה** ultimately collects his debt from the field; it is considered as if it was the **מלוה** field all along. Therefore he can keep the **שבה** even if it exceeds the mount of the loan. If, for instance the loan was for a hundred זוז and the field was worth a hundred זוז when the **לוקח** bought it. The **לוקח** invested an additional ten זוז and now the field is valued at a hundred thirty זוז. The rule is that the **מלוה** takes the entire improved field and pays the **לוקח** ten זוז for his expenses (as is the case of a **יורד לתוך שדה** which תוספות mentions). This has nothing to do with **אקו"מ** for the **שבה** which the **ה"ה** collects is not

**Should have established** that the ברייתא is discussing a case **where** the מוכר **made this field an אפותיקי** for the בע"ה; **for then the בע"ה can collect the improvement, which is more than the expense, for naught** (without paying for it) -

כדין יורד לתוך שדה חבירו כדמשמע לקמן<sup>11</sup> –

**As the rule is when someone enters his friend's field** and improves it, **as indicated later** in the גמרא that in the case of an אפותיקי the מלוה needs to pay the לוקח only for the expenses and not for the improvement (whatever is more than the expense).

אקו"מ adds that there are other ways to reject the proof regarding תוספות

**או יעמיד בלוקח מן הגזול<sup>12</sup> וכגון שיש לו קרקע או קנו מיזו כדמתרץ לקמן בשמעתין:**  
**Or** the גמרא **could have established** the ברייתא **where one bought a field from a גזול and for instance that the seller (the גזול) has property or the seller committed to be responsible for the שבה with a קנין סודר as the גמרא answers later<sup>13</sup>** the questions on שמואל (according to ר"נ).

## SUMMARY

אקו"מ משתעבד בע"ה גובה את השבה שמואל ruled. When there is an אפותיקי the מלוה collects from the אפותיקי regardless when it was sold, and he can also collect the שבה (היתר על היציאה) even if it is more than the loan (if it is an אפותיקי מפורש).

## THINKING IT OVER

1. How can we derive that אקו"מ משתעבד from the fact the מלוה collects the שבה? <sup>14</sup> The query regarding אקו"מ is whether the ליה can be משעבד to the מלוה a field that he will buy in the future. However here the לוקח made the שבה and he was never משעבד anything to the מלוה! Is it conceivable that the ליה can be משעבד the שבה which the לוקח produces?! <sup>15</sup>

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part of the שיעבוד החוב (since the loan was only for a hundred זוז), but rather he collects the שבה because the מלוה improved the field.

<sup>11</sup> (ד"ה כגון) and תוספות ד"ה הא לקמן טו,ב.

<sup>12</sup> The original reading of the ברייתא was שדה גזול שדה; the גמרא initially thought that the ברייתא should not contradict שמואל we will revise it to read בע"ה (instead of a גזול). However in truth the ברייתא can be discussing a גזול and there will be no question on שמואל (and [certainly] no proof regarding אקו"מ) as the גמרא says later.

<sup>13</sup> לקמן טו,א. The גמרא there explains that even according to שמואל it is possible to collect the שבה from the גזול [and it will not be considered רבית]; in a case where the גזול repays with קרקע (see ד"ה כגון there רש"י) or if the מוכר committed himself with a קנין to be responsible for the שבה (see ד"ה שקנו there רש"י).

<sup>14</sup> See footnote # 2.

<sup>15</sup> נח"מ, מבין שמועה.

2. asks if משתעבד מן אקו"מ why does not the בע"ה collect from the מלוה from which the לוקח collects from.<sup>16</sup> Perhaps the reason the מלוה does not collect from those משעבדים is that the לווה did not write (commit himself) in the שטר the term דאקני (the לווה was only משעבד the properties he currently owned, and not those that he will buy in the future)?!<sup>17</sup>

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<sup>16</sup> See footnote # 4.

<sup>17</sup> מהר"ם שי"ף, נה"מ.