

## For instance that he made it into an אפותיקי – כגון דשוייא אפותיקי

### OVERVIEW

Initially the גמרא assumed that the ברייתא (which requires the מלוה to pay the כשיעור ארעא for the יציאה לוקח) is discussing a case where the בע"ה is owed only. The difficulty was why cannot the לוקח insist that the בע"ה should leave him a part of the field for the value above the loan amount. The גמרא concluded that it is an אפותיקי and therefore the בע"ה is entitled to keep the entire field (even the additional שבח), but is required to pay the לוקח for the יציאה. The issue תוספות considers is whether we are now (when we say that it was an אפותיקי) still discussing a case where he is owed only כשיעור ארעא (however if he were owed ארעא ושבחא he would not be required to pay the יציאה [(even) by an אפותיקי]),<sup>1</sup> or now (that it is an אפותיקי) we can say the ברייתא is even discussing a case where he is owed ארעא ושבחא and nevertheless he is required to pay the יציאה.<sup>2</sup>

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השתא מצי איירי דמסיק ביה אפילו שיעור ארעא ושבחא –

Now that we establish the ברייתא in a case of an אפותיקי, the ברייתא can even be discussing a case where he is owed the equivalent amount of the land and the improvements -

ואפילו הכי<sup>3</sup> כיון דשוייא אפותיקי צריך ליתן היציאה<sup>4</sup> כדין יורד כולי<sup>5</sup> –

And nevertheless, since it was made into an אפותיקי, the בע"ה is required to pay the לוקח for the expenses, as is the rule regarding one who goes, etc. into his friend's field and improves it, where the owner is liable for the expenses (up to the amount of the improvement).

תוספות proves his point that the בע"ה must pay for the expenses, even though he will then not collect his full debt:

כדאמרינן בפרק המקבל (שם). גבי יתומים אומרים אנו השבחנו ורוצים היציאה –

<sup>1</sup> The ruling of שמואל that the בע"ה is גובה the שבח [without paying anything to the לוקח] applies whether or not this field is an אפותיקי, provided that the מלוה is owed ארעא ושבחא.

<sup>2</sup> The ruling of שמואל (see footnote # 1) is only if it is not an אפותיקי and ארעא ושבחא.

<sup>3</sup> One would think that since he is owed ארעא ושבחא, the מלוה should not pay the לוקח anything, for then he will not fully collect his loan, nevertheless תוספות rules that he is required to pay the יציאה.

<sup>4</sup> The ברייתא states נוטל וכו' והיציאה מבעל חוב.

<sup>5</sup> The fact that it is an אפותיקי makes it (when the מלוה collects it [from the לוקח]) retroactively as if it was always the מלוה's field, and so the rule of יורד לתוך שדה חבריו applies. [We are not concerned that the מלוה is not receiving the amount due to him (which may make him reluctant to lend in the future), for since he was told אלא מו, he agreed to take this field as payment in full, regardless of its worth.]

As the גמרא states in פרק המקבל regarding where the תומים claim 'we improved the land', and they want to be compensated for the expense <sup>6</sup> and the מלוה claims your father improved the field and therefore I do not owe you for the expense -

**דמיירי באפותיקי ואף על גב דמסיק בהו שיעור ארעא ושבחא –**

**Which that case is regarding an אפותיקי, and the תומים will receive the expense (if they can prove השבחנו), even though that the בע"ה is owed – שיעור ארעא ושבחא**

- דמסיק בהו שיעור ארעא ושבחא proves that the case there is where תוספות

**דהא אם אביהם השביח גובה הכל –**

For the rule there is that if it can be proven that the father (the לווה) improved the property, the מלוה would collect everything and would not pay for the expense.<sup>7</sup> If the לווה does not owe ושבחא ארעא ושיעור, then the מלוה would surely have to pay the father for the expense if he was משביח.<sup>8</sup> This proves that the בע"ה is owed and are entitled to the השבחנו תומים claim and nevertheless the שיעור ארעא ושבחא and even though it is an אפותיקי. We derive from here that in a case where the מלוה is owed the equivalent of the entire property including the שבה which the לקוחות improved, nevertheless he must pay the לקוחות for their expense, even though he will not collect his entire loan.

reconsiders this proof: תוספות

**ומיהו אין ראיה דשאני תומים שאין להם על מי לחזור ליקח היציאה –**

**However there is no proof from the case of תומים (that the בע"ה must pay the לוקח), for תומים are different (it is understood why the בע"ה must compensate them for their expenses) since they have no recourse from where to be paid for their expenses, therefore the בע"ה must compensate them -**

**דכיון שעשה אביהם אפותיקי<sup>9</sup> הרי הוא כיורד לתוך שדה חבירו שלא ברשות –**

**For since their father made the field into an אפותיקי, therefore the תומים are considered as a חבירו שלא ברשות - יורד לתוך שדה חבירו**

**שאינו מפסיד היציאה –**

<sup>6</sup> See (also) טו,א תוס' ד"ה בעל (at the end).

<sup>7</sup> This is the claim of the בע"ה; that the father was משביח and therefore I do not owe for the expense.

<sup>8</sup> See TIE 'Thinking it over' # 2 and footnote # 9

<sup>9</sup> תוספות explains that paying the תומים for their יציאה does not contradict that which תוספות taught us previously on טו,א ד"ה בע"ה (ועיי"ש), that a בע"ה collects from תומים and does not compensate them (even though they have no recourse), for here it is an אפותיקי which makes it as if it was the מלוה's field; therefore they are entitled to collect the יציאה as a חבירו. However previously we were discussing where it was not an אפותיקי, therefore it never belonged to the מלוה. The תומים improved their field, and when the מלוה collects it for his loan he is not required to compensate them (even) for their expense. See [however] בל"י אות תקכ for an alternate explanation.

**Who does not lose his expense** which he invested in the owner's property -  
**אבל בלוקח שאינו מפסיד כלום שהמוכר משלם לו היציאה והשבח שזה פוטרו מחובו-**  
**However by a לוקח who is not losing anything** if the בע"ח will not pay him  
for the expense, **for the seller is obligated to pay him for the expense and**  
**the improvements, since the לוקח freed him from his debt,**<sup>10</sup> in such a case -  
**מצינו למימר דאפילו באפותיקי כיון דמסיק ביה שיעור ארעא ושבחא שקיל הכל -**  
**We can possibly argue that even by an אפותיקי** (which is considered as the  
s'ח"ח field, but) **since he is owed ושבחא ארעא שיעור**, the בע"ח **takes**  
**everything** including the שבח and does not pay the לוקח anything<sup>11</sup> -  
**שבשביל שעשאה אפותיקי לא יגרע כחו**<sup>12</sup> -  
**For it is logical to assume that because the לוח made this an אפותיקי** (which  
is intended to strengthen the collection capabilities of the בע"ח) **the strength**  
of the בע"ח **should not be diminished.**

תוספות asks:

**ואם תאמר כיון דאמר ליה לא יהא לך פרעון אלא מזו -**  
**And if you will say; since the לוח said to the מלוה, 'your payment will only**  
**be from this field** (an [מפורש] אפותיקי) -  
**כשמוכר לאחר הוה ליה כלוקח מגזלן שהרי אינו של מוכר -**  
**When the לוח then sells it to another person, it should be considered as if**  
**the לוקח is buying it from a גזלן, since this field does not belong to the**  
**מוכר for the לוח** (the מוכר) designated it as an אפותיקי for the מלוה -  
**אם כן למה נוטל מן המוכר השבח היתר על היציאה -**  
**If this is indeed so** (that it is considered like a לוקח מגזלן), **why does the לוקח**  
**collect from the מוכר the היציאה על היתר על היציאה the מוכר -**  
**והא לוקח מגזלן לשמואל לית ליה שבחא -**  
**Since according to שמואל, one who purchases from a גזלן cannot collect**  
**for the שבח** (for it appears to be similar to רבית)!

תוספות answers:

<sup>10</sup> We are discussing a case where מסיק ביה שיעור ארעא ושבחא. After the מלוה takes away the entire field for his loan, the מוכר must compensate the לוקח for the entire שבח including the יציאה since it all went to pay his loan.

<sup>11</sup> The ברייתא which states that the לוקח collects the יציאה from the בע"ח is discussing (as the גמרא originally answered) a case where מסיק ביה אלא שיעור ארעא, דלא מסיק ביה אלא שיעור ארעא, therefore even though the מלוה may take the entire field (since it is an אפותיקי), however he must pay the לוקח for the יציאה. See 'Thinking it over' # 1.

<sup>12</sup> In a regular case where there is no אפותיקי and the בע"ח is owed ושבחא ארעא שיעור, the בע"ח collects ארעא without paying anything to the לוקח since this is what he is owed, so certainly by an אפותיקי, the בע"ח should be able to collect everything without paying anything to the לוקח (if he is owed ושבחא ארעא שיעור).

ויש לומר כגון שמכרה קודם שבא זמנו של בעל חוב דחל המקח עד הזמן<sup>13</sup> –

And one can say; we are discussing a case where for instance the לווה sold it before the due date of the loan, so the sale is effective until that time -

ולא דמי לגזלן שלא חל המקח כלל –

So it is not similar to buying from a גזלן, in which case the sale is not effective at all -

דזוזי הוו הלואה ואם ישלם שבה הוה ליה רבית –

Where the money which was paid to the גזלן is considered a loan and if the גזלן will pay for the שבה it will be considered רבית, however here the sale is valid until the due date and therefore it is not רבית.

שוספות adds:

ואפילו מכרה אחר הזמן היה סבור לפייס בעל חוב בזוזי וחל המקח עד שטרפה ממנו:

And it is possible to say that even if the לווה sold it after the due date of the שטר, nevertheless it is a valid sale, for the לווה planned to appease<sup>14</sup> the ה"ה with money, so the ה"ה will relinquish his rights to the לוקח, and therefore the sale is valid until the ה"ה took it away from the לוקח.

## SUMMARY

Initially תוספות assumed that (even) in a case where the מלוה is owed כשיעור (as a יורד לתוך שדה) יציאה the מלוה must pay the אפותיקי and it is an ארעא ושבה (וכו'), and proves it from יתומים. However תוספות reconsiders and differentiates between יתומים who have no recourse (and therefore the מלוה compensates them for the יציאה) and a לוקח who has recourse (so the מלוה may not be required to compensate him). [Selling an אפותיקי field is not the same as selling a stolen field.]

## THINKING IT OVER

1. Why is it that (in a case of an אפותיקי where ארעא כשיעור ביה אלא לא מסיק ביה אלא כשיעור ארעא) the לוקח collects the שבה from the מוכר and the יציאה from the ה"ה?

2. states that (even by an אפותיקי) the מקח is effective until the due date of the שטר.<sup>15</sup> Why then is the לוקח considered as a שדה חבירו<sup>16</sup>?! (וכו')

<sup>13</sup> See 'Thinking it over' # 2.

<sup>14</sup> See 'Thinking it over' # 3.

<sup>15</sup> See footnote # 13.

<sup>16</sup> See גבורים.

3. When the לווה makes an (מפורש) אפותיקי saying לא יהא לך פרעון אלא מזו, and the מלוה insists on taking the field as payment, can the לווה pay him off with money<sup>17</sup> and retain the field?<sup>18</sup>

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<sup>17</sup> See footnote # 13.

<sup>18</sup> See בל"י אות תקכב and נח"מ בד"ה הי'.