And they shall divide it – ויחלוקו

Overview

The משנה rules יחלוקו in the case of שנים אוחזין. Seemingly this is a fair and equitable ruling to settle this dispute. However, on the other hand it seems to be a travesty of justice. Each of the litigants claims כולה שלי and the other is a swindler. By ruling יחלוקו we are depriving the real owner from his property and rewarding a swindler. Indeed the גמרא challenges the ruling of our משנה from other משניות, which seek different solutions for these types of disputes. There is, in addition to the משניות, a מימרא from an אמורא which seemingly also contradicts the ruling of our משנה, yet the גמרא does not mention this discrepancy. תוספות will resolve this contradiction and derive new guidelines in the ruling of יחלוקו.

תוספות asks

תימה[1] דמאי שנא מההיא דארבא[2] –

It is astounding! For why is the case of our משנה **different from that** case **of the ship -**

דאמר כל דאלים גבר[3] פרק חזקת הבתים (בבא בתרא דף לד,ב ושם) –

Where the ruling in פרק חזקת הבתים is כל דאלים גבר?! Why do we not rule the same here as well, that it should be כל דאלים גבר?![4]

תוספות answers:

ויש לומר[5] דאוחזין שאני דחשיב כאילו כל אחד יש לו בה בודאי החצי –

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[1] The question may be compounded by the fact that the גמרא fails to mention this obvious contradiction between the ruling of an אמורא and the ruling of our משנה. The גמרא saw fit to mention the contradictory משניות (on ב,ב and ג,א); so why not explain this contradiction as well.

[2] The case there was that there were two people disputing the ownership of a ship; each one claiming that it was his ship.

[3] Literally; 'whoever is stronger will overpower'. The party that can physically overpower his opponent and take possession of the ship, he retains ownership. We assume that the real owner (and not the swindler) will put more effort into retaining what is rightfully his, since he will be losing something if the swindler takes possession. The swindler however, will not expend that much energy for something which is not his. Similarly if one party can bring sufficient proof that he is the owner then he takes ownership.

[4] It would seem from the expression מ"ש מההיא דארבא (and from the subsequent answer) that the question was (mainly) that by טלית the ruling should also be כדא"ג (but not that by ארבא we should rule יחלוקו). See 'Overview', that the ruling of יחלוקו is (somewhat) troubling.

[5] תוספות may be saying that the distinction between ארבא and טלית is so obvious that it did not deserve mention in the גמרא. See (footnote # 1 and) 'Thinking it over' # 1. Other commentators explain that the difference between ארבא and טלית is that by ארבא there is a ודאי רמאי (as opposed to טלית). However תוספות may argue that this difference is not so apparent and decisive to warrant a different הלכה of כל דאלים גבר as opposed to יחלוקו and ([even] if it is true) the גמרא should have mentioned it. See footnote # 19.

And one can say; that 'holding' (by the טלית) **is different (**than the case of ארבא where neither is holding the ship), **for it is considered as if each one** who is holding the טלית **certainly[6] owns half** of the טלית[7] -

דאנן סהדי דמאי דתפיס האי דידיה הוא[8] –

For we the בי"ד **testify that whatever this one is holding belongs to him.**

In summation: The rule of יחלוקו applies only when the litigants are in possession of the item; otherwise we rule כל דאלים גבר.

תוספות anticipates a difficulty:

וכן במנה[9] שלישי[10] דמדמי בגמרא לטלית[11] –

And similarly in the case of the third מנה which the גמרא compares to the case of our משנה regarding two people who are holding a **טלית**. Seemingly how can the גמרא compare the case of מנה שלישי to the case of טלית; by טלית both parties are holding on to the טלית (therefore we say יחלוקו), however by מנה שלישי neither of the litigants is holding anything (and therefore we rule יהא מונח).[12]

תוספות replies:

חשיב ההוא שהנפקד תופס בחזקת שניהם[13] כאילו הם עצמם מוחזקים בו –

The fact that the custodian is holding the money **in trust for both** parties; that **is considered as if** the parties **themselves are in possession of** the מנה שלישי[14] -

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[6] There is a general presumption that whatever is in a person's possession is his. In our case, where they are both holding the טלית, we presume that each one [certainly] owns half.

[7] Therefore, since it is considered as if each person owns half the טלית, we cannot rule כל דאלים גבר, for we have no right to forcefully take away from either party that which is rightfully his. As opposed to ארבא where there is no reason to assume that it belongs to either of them. By ruling כל דאלים גבר we are not (to our knowledge) depriving anyone from their ownership.

[8] See the גמרא later on א,ג (towards the bottom of the עמוד)

[9] A מנה is a hundred (זוזים) דינרים.

[10] The case of מנה שלישי is when two people deposited money (in the presence of each other) by a third party. One deposited one מנה and the other two מנה. When they came to retrieve their deposit each one claimed that he deposited two מנה. The חכמים rule that we give each of the parties a מנה (which is rightfully due to them), and the third מנה (the מנה שלישי) remains in the custody of בי"ד until (הנביא) אליהו will come and tell us to whom it belongs. ר' יוסי argues and maintains that in order to induce the swindler to admit, we deposit all three מנה by בי"ד עד שיבא אליהו (or until one of them admits that he is entitled to only a מנה).

[11] The גמרא later on א,ג suggests that our משנה does not coincide with the view of ר' יוסי (or even the רבנן) regarding מנה שלישי, for ר' יוסי maintains that in the case of מנה שלישי we say that all the money should be מונח עד שיבא אליהו (and the רבנן rule that we say יהא מונח for the third מנה) and our משנה rules יחלוקו.

[12] We cannot rule כל דאלים גבר by מנה שלישי, because (unlike the ארבא), here the custodian is holding the three מנה (for their respective owners). If we would rule כל דאלים גבר, we may be taking away the מנה שלישי from its rightful owner. However by ארבא no one is holding anything.

[13] תוספות is teaching us a novelty; the custodian is not holding the מנה שלישי for the rightful owner, but rather (in his mind) he is holding all three מנה for both. The individuals gave him the money in the presence of each other, indicating that the two parties are considered as one, and he is holding three מנה for the two of them as one unit.

לכך[15] משני דהתם ודאי דחד מינייהו הוא[16] –

Therefore the גמרא **answers that there** by the מנה שלישי; this מנה **certainly belongs to** (only) **one of them[17] -**

ואין החלוקה יכולה להיות אמת ולכך יהא מונח –

And therefore **dividing it cannot** possibly **be truthful and therefore it must remain** in the custody of בי"ד, until שיבא אליהו.

אבל טלית דאיכא למימר דתרוייהו הוא[18] יחלוקו –

However in the case of שנים אוחזין בטלית **where it is possible to assume that it belongs to both of them,** the ruling is **יחלוקו.**

תוספות further clarifies the concept of החלוקה יכולה להיות אמת:

וכן שנים אדוקים בשטר -

And similarly in the case where **two** people (the מלוה and the לוה) **were grasping the שטר** (where the מלוה claims it is my שטר [that I lost and subsequently found] and the לוה owes me the entire loan, and the לוה claims it is my שטר [which I lost and subsequently found] for I repaid the entire loan),

דמדמי לקמן (דף ז,א) למתניתין –

which the **גמרא later compares[19]** the case of שטר **to** the case[20] of **our משנה -**

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[14] Therefore the גמרא argued that according to the logic of our משנה that when both litigants are in possession of the item, the rule is יחלוקו, then by מנה שלישי, since (as תוספות argues now) they are both in possession of the מנה שלישי, we should also rule יחלוקו. What is the difference between our משנה and מנה שלישי. See 'Thinking it over' # 2.

[15] תוספות may be alluding with the word לכך to what he maintained previously that the difference between ארבא and טלית is that by טלית they are both מוחזקין (as opposed to ארבא), but not that by ארבא there is a ודאי רמאי (and not by טלית); for ודאי רמאי is not a sufficient reason not to say יחלוקו. Therefore the גמרא did not [initially] answer (according to the רבנן) that מנה שלישי is different since there is a ודאי רמאי (as the גמרא subsequently answered according to ר' יוסי), but rather that אין החלוקה יכולה להיות אמת.

[16] תוספות gives the answer which the גמרא uses to explain why there is no discrepancy between the רבנן of מנה שלישי and our משנה. The גמרא there later explains that according to ר' יוסי there is also no discrepancy since by מנה שלישי there is a ודאי רמאי and in our משנה there is no ודאי רמאי. However תוספות chooses to ignore this answer, indicating that תוספות assumes that (להלכה) there is a difference whether החלוקה יכולה להיות אמת (where we say יחלוקו) and אין החלוקה יכולה להיות אמת (where we do not say יחלוקו). There is no difference however whether or not there is רמאי (in a case where החלוקה יכולה להיות אמת); in all cases we say יחלוקו. See תוספות ב,ב ד"ה אי and במקח ב,א ד"ה רש"י.

[17] All the parties agree that only one gave two מנה and the other one מנה. If we were to rule יחלוקו, then בי"ד would be fraudulently taking away half-a-מנה from its rightful owner and granting it to a thief.

[18] It is possible that they picked it up (or bought it) together and it belongs to both of them [or that one sold (or gifted) half the item to the other]. It is possible to have a ודאי רמאי and החלוקה יכולה להיות אמת, as in the following case of שנים אדוקים בשטר.

[19] תוספות is anticipating that one may argue how can we say in the case of a שטר that החלוקה יכולה להיות אמת, if the לוה and the מלוה completely contradict each other. According to the מהר"ם שי"ף and others תוספות wants to prove that we rule יחלוקו even by a ודאי רמאי as the case is by שטר. (See footnote # 5.)

[20] The גמרא there maintains that by שטר the דין should be יחלוקו (that the לוה should pay the מלוה half the loan).

תוספות explains that the reason the גמרא compares שטר to our משנה is -

משום דשניהם אדוקים בו דהחלוקה יכולה להיות אמת דאפשר שפרע לו החצי –

Because there by שטר **they are both grasping it** (as in our משנה), therefore we can compare it to טלית since **there** too **the division can be true for it is possible that** the לוה **paid half** to the מלוה.

תוספות anticipates the following question. If by שטר we consider it to be a חלוקה יכולה להיות אמת for it is possible that the לוה paid half (disregarding what the לוה and מלוה are claiming), then by מנה שלישי it is (seemingly) also possible that the owner of the מנה שלישי gifted his partner half of the third מנה; thus making מנה שלישי also a case of החלוקה יכולה להיות אמת; why does the גמרא state that by מנה שלישי it is ודאי דחד מינייהו הוא and אין החלוקה יכולה להיות אמת?!

תוספות responds:

ובמנה אין דרך שיקנה לו החצי אחרי שהוא ביד חבירו[21] –

And by the case of שלישי **מנה there is no way in which he could transfer half** of the מנה to the other depositor **since it is in the possession of the** custodian.

תוספות anticipates a question; if we assume that החלוקה יכולה להיות אמת is a reason for יחלוקו, then by ארבא let us also rule יחלוקו since there too החלוקה יכולה להיות אמת.

אבל בארבא אף על גב דאפשר שהיא של שניהם –

However by a ship, even though that it is possible that the ship belongs to both **of them,** nevertheless we do not rule יחלוקו, for -

כיון דאין מוחזקין בו הוי דינא כל דאלים גבר –

Since the two litigants **are not in possession** of the ship, **the ruling is כל דאלים גבר.** There is no compelling reason to say יחלוקו since they are not מוחזקים.

Is summation: we rule יחלוקו only if שניהם מוחזקין and החלוקה יכולה להיות אמת.

ולסומכוס [22] אף על גב דאין מוחזקין בו ואין החלוקה יכולה להיות אמת –

And according to סומכוס even though the litigants **are not in possession** of the disputed item **and the division cannot possibly be valid,** nevertheless -

היכא דאיכא דרא דממונא[23] פירוש שבלא טענותיהם יש ספק לבית דין[24] יחלוקו:

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[21] He cannot grant it to him by giving it to him since it is not in his possession and he also cannot grant it to him through קנין חליפין since אין מטבע נקנית בחליפין. See אמ"ה # 178.

[22] סומכוס maintains יחלוקו in the following two cases (while the חכמים maintain המוציא מחבירו עליו הראיה): Where an ox gored a cow and an aborted fetus was found next to the cow and we are uncertain whether it was aborted before the goring (releasing the ox's owner from any liability for the fetus), or whether it aborted after (and because of the) goring. Similarly if two people traded their respective donkey and pregnant cow with each other, and in the duration the cow gave birth and we are unsure whether the calf was born before the transaction took place or afterwards. In both these cases there is no שנים אוחזין and אין החלוקה יכולה להיות אמת (the ox's owner either owes the money entirely or he does not owe it all, and similarly with המחליף פרה בחמור, the calf belongs to only one of them), and nevertheless סומכוס maintains יחלוקו. This seems to contradict תוספות assumption.

Wherever there is a דררא דממונא, which means that בי"ד is in doubt even **without the claims** of the litigants, in such a case סומכוס maintains **יחלוקו.**

Summary

We only rule יחלוקו if שניהם מוחזקים and החלוקה יכולה להיות אמת (except for סומכוס who always rules יחלוקו when there is a דררא דממונא).

Thinking it over

1. תוספות distinguishes טלית from ארבא that by טלית they are . Seemingly this אוחזין[25] distinction is obvious; what was the תימה of תוספות initially?![26]

2. When the גמרא initially compared the case of מנה שלישי to טלית (before we answered that we rule יחלוקו only when החלוקה יכולה להיות אמת),[27] are we to understand that the two cases are entirely similar in their status of מוחזקין, or that the מוחזק status of טלית differs from the מוחזק status of מנה שלישי.[28]

3. Why is there a difference according to סומכוס between דררא דממונא (when we say יחלוקו even if אין החלוקה יכולה להיות אמת) and ליכא דררא דממונא (where we say יחלוקו only by מוחזקים והחלוקה יכולה להיות אמת)?[29]

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[23] However when there is no דררא דממונא (as in the cases of טלית, מנה שלישי and ארבא), there סומכוס too will agree that we say יחלוקו only if they are מוחזקין and החלוקה יכולה להיות אמת. See 'Thinking it over' # 3.

[24] In the cases of שור שנגח את הפרה and המחליף פרה בחמור the doubt arises not on account of their claims (as is the case by טלית, ארבא, שטר, etc.) but rather by the circumstances. The doubt is there even if both parties claim ignorance as to what occurred. According to סומכוס such an intrinsic doubt creates a יחלוקו.

[25] See footnote # 5.

[26] See אמ"ה # 143.

[27] See footnote # 14.

[28] See נח"מ and אכן בד"ה בל"י אות ו.

[29] See אמ"ה # 214.