And this one takes a fourth – וזה נוטל רביע

Overview

Our משנה rules that if one claims that the טלית is entirely his, while the other claims that he owns half the טלית (and agrees that his partner owns the other half), the rule is that the one who claims כולה שלי receives three fourths of the טלית and the one who claims חציה שלי receives one fourth of the טלית. Our תוספות explains why (on one hand) the חציה שלי does not receive half (since he has a מיגו), and (on the other hand) why he receives anything at all since it is a case of אין ספק מוציא מידי ודאי.

תוספות asks:

ואם תאמר יהא נאמן דחציו שלו מיגו דאי בעי אמר כולה שלי[1] –

And if you will say; let the one who claims חציה שלי **be believed that he owns half, with a מיגו, for he could have claimed כולה שלי -**

כדאמרינן בגמרא[2] (לקמן דף ח,א) האי מיגו גופיה לפטרו משבועה[3] –

As the גמרא states later that we would have utilized **this very same מיגו to exempt** the one that claims חציה שלי, **from taking an oath -**

אי לא משום דאיערומי קמערים[4] –

were it not for the concern that he is being deceitful. However, here he should be believed that חציו שלו if he swears, for he has the מיגו of כולה שלי.

תוספות answers:

ומפרש רבינו יצחק בן מרדכי דמיגו להוציא לא אמרינן[5] –

And the ריב"ם explains that we do not say a מיגו in order **to extract**

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[1] If he would have claimed כולה שלי he would receive half (with a שבועה), now that he claims חציה שלי he should also receive half (with a שבועה) since he has a מיגו; he could have (just as easily) claimed כולה שלי.

[2] תוספות brings a proof from the גמרא later that a טענה of חציו שלי has a מיגו of כולה שלי. One may argue that one who claims חציה שלי has no מיגו of כולה שלי for he may be reluctant to claim כולה שלי (just as a מודה במקצת has no מיגו of כופר הכל since 'וכו אין אדם מעיז). This גמרא, cited by תוספות, proves otherwise. See 'Thinking it over' # 1.

[3] The גמרא there asks that the one who claims חציה שלי should (be believed and) receive his quarter share without an oath since he has a מיגו of claiming כולה שלי. This proves that חציה שלי has a valid מיגו of כולה שלי.

[4] People are reluctant to swear falsely. We are concerned that he is falsely claiming חציה שלי (for he owns nothing) and the reason he does not claim כולה שלי (since he is lying anyway) is because he figures that if he will claim כולה שלי he will be required to take an oath (which he is reluctant to do, since he will be swearing falsely); if the law was that חציה שלי receives a fourth without a שבועה, this swindler would rather settle for a fourth without a שבועה, than receiving half with a שבועה. The מיגו is invalid because of the concern of איערומי קמערים. However תוספות is asking that we should give him half with an oath, where there is no concern of הערמה, since he will be required to swear. Why does he receive only a fourth?!

[5] In order to extract money witnesses are required; a מיגו is insufficient proof to warrant extraction.

money. A מיגו is only effective to retain money.[6]

תוספות explains why it is considered (a מיגו) להוציא.

דבחציו השני מוחזק זה כמו זה[7] **–**

For in the second half they both have equal possession.

תוספות anticipates a question on the ruling of the ריב"ם that מיגו להוציא לא אמרינן:

וההיא דחזקת הבתים[8] **(בבא בתרא דף לב,ב ושם) דגחין ולחיש ליה לרבה –**

And that case in חזקת הבתים פרק **where he bent down and whispered to רבה -**

אין שטרא זייפא הוא ומיהו שטרא מעליא הוה לי בידי ואבד –

'This indeed is a forged שטר, however I had a valid שטר and I lost it' -

והימניה רבה להוציא במיגו דאי בעי אמר שטרא מעליא הוא –

And רבה believed the מלוה **to extract** payment from the לוה, **with the מיגו that** the מלוה **could have said, 'this is a valid שטר'.** It is apparent from the ruling of רבה that we do say מיגו להוציא. This contradicts the view of the ריב"ם.

תוספות answers and differentiates between two types of מיגו:

התם היינו טעמא -

There by the שטרא זייפא **the reason** the מלוה is believed even להוציא **is** -

משום דאפילו הוה שתיק רק שלא היה מודה שהוא מזוייף היה נאמן –

because, for even if the מלוה **would have remained silent, provided that he would not have admitted that it was a שטר מזוייף, he would have been believed** and would have collected his debt, even though the לוה claimed מזוייף -

כי החתימה היתה נכרת לעומדים שם –

Because the signatures appeared valid to all those present. The argument of the לוה would have been dismissed since all those present agreed that the signatures on the שטר are valid (even though they were forged). This מיגו is referred to as a מיגו דאי בעי (not a מיגו דאי בעי טעין שתיק). By a מיגו דאי בעי שתיק all agree that we say מיגו להוציא. However in our משנה it is a מיגו דאי בעי טעין (כולה שלי), there we do not say מיגו להוציא.[9]

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[6] When a מיגו is supported by a חזקת ממון, then it can allow the money to remain where it is.

[7] One half certainly belongs to the one who is claiming כולה שלי, for the חציה שלי is ceding him this half; the disagreement is in the second half, where they both have an equal claim and possession; each one possesses one fourth. If we were to grant the entire second half to the חציה שלי, we would be extracting one fourth from the possession of the כולה שלי. This is a מיגו להוציא, which is not effective. See 'Thinking it over' # 2.

[8] The case there was concerning a loan, where the מלוה presented a שטר and the לוה claimed that it was a forged שטר. The מלוה at that point whispered to רבה the following.

[9] A מיגו דאי בעי טעין is not sufficiently conclusive. We can always say that he did not think of the other טענה or was reluctant to use it for some reason. However a מיגו דאי בעי שתיק is obvious, there is no way we can assume that he does not realize that he could remain silent and win his case, or that he is reluctant to remain silent. Therefore it is sufficiently conclusive even to be מוציא.

תוספות responds to an anticipated difficulty:

ורב יוסף[10] איתי ליה דאפילו מיגו לא הוה[11] –

And רב יוסף maintains there **that it is not even a מיגו -**

כיון שטענה ראשונה שהוא טוען בהאי שטרא[12] הוא שקר[13] –

For since the first claim of the מלוה **which he claimed** when he presented **this שטר was false** (it was indeed a שטר מזוייף), therefore there can be no מיגו to support his claim that שטרא מעליא הוה לי ואבד -

ואין לומר מיגו אלא היכא שטענתו ראשונה היא אמת מיגו שהיה טוען אחרת –

For we cannot use a מיגו unless the original claim is true based **on a מיגו that he could have presented a different claim.** However here his initial claim is false -

ולכך אינו מיגו אפילו להחזיק כגון בעובדא קמייתא[14] –

And therefore it is not a מיגו even to retain, as for instance in the first case there.

תוספות asks a different question:

ואם תאמר ונימא דאין ספק מוציא מידי ודאי –

And if you will say; let us claim that a questionable owner **cannot extract** (even a partial amount) **from one who is a proven** owner**.** תוספות explains why this is a case of ספק מוציא מידי ודאי –

דהאומר כולה שלי יש לו בודאי חציה והאומר חציה שלי ספק אם יש לו בה כלום –

For the one who claims כולה שלי certainly owns half of the טלית**, and the one who claims חציה שלי, it is doubtful whether he owns anything** of the

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[10] רב יוסף argues with רבה and maintains that the מלוה cannot collect his loan from the לוה. One may seemingly assume (initially) that רבה and רב יוסף are arguing whether מיגו להוציא אמרינן or not. תוספות disabuses us from this notion.

[11] רב יוסף maintains that not only is this not a superior מיגו (a מיגו דאי בעי שתיק which is effective even להוציא), but it is not even as good as a regular מיגו and it will not be effective even להחזיק.

[12] Others amend this to 'והא שטרא'; this was his original claim (as is stated in ב"ב); 'here is the שטר' that substantiates my claim of the loan (or the purchase of the property).

[13] The בעל השטר initiated his claim with a שטר מזוייף. Since the basis of his claim is a lie, the subsequent מיגו cannot empower him that his later claim should be validated [even] with a מיגו (especially if we view מיגו from the perspective that it shows that the בעל המיגו is an honest man; in this case we see that he is not honest at all, for he presented a שטר מזוייף).

[14] There is an identical מחלוקת there between רבה and רב יוסף regarding a property whose ownership was being challenged by a מערער. The מערער claimed that the property belongs to him and that the מחזיק is there illegally. The מחזיק presented a שטר which stated that the מחזיק purchased this property from the מערער. The מערער responded that it was a שטר מזוייף for he never sold him this property. The מחזיק told רבה that אין שטרא זייפא הוא מיהו שטרא מעליא הוה לי ואבד. There too רבה ruled that the מחזיק retains the property for he has a מיגו, while רב יוסף claims that the מערער receives the property, since the מחזיק does not have a valid שטר. In that case it is a מיגו להחזיק and nevertheless according to רב יוסף it is not an effective מיגו. This proves that the מחלוקת between רבה ורב יוסף does not concern the issue of מיגו להוציא לא אמרינן.

טלית, so the rule of אין ספק מוציא מידי ודאי should take effect and the ספק should receive nothing.

תוספות now shows the source of the rule that אין ספק מוציא מידי ודאי:

כדאמרינן[15] בפרק החולץ (יבמות דף לח,א) ספק[16] ויבם[17] שבאו לחלוק בנכסי סבא[18] –

As the גמרא **states in פרק החולץ; a ספק and a brother-in-law who came to divide the estate of the 'grandfather' -**

ספק אמר אנא בר מתנא אנא ואית לי פלגא ויבם אמר את ברא דידי ולית לך ולא מידי-

The ספק claims I am (possibly) **the son of** (ראובן) **the deceased and I own half** of the estate, **and the יבם claims you are** (possibly) **my son and you receive nothing;** the rule is -

הוה ליה יבם ודאי[19] וספק ספק[20] ואין ספק מוציא מידי ודאי –

That the יבם is a ודאי and the ספק is merely a ספק, so a ספק cannot be מוציא from a ודאי and the entire estate belongs to the יבם (שמעון). Our case of כולה שלי and חציה שלי seems exactly as the case there by a ספק ויבם. The question is that we should also rule here that אין ספק מוציא מידי ודאי and only the כולה שלי (the ודאי) should receive the entire טלית, while the חציה שלי (the ספק) should receive nothing.

תוספות answers:

ויש לומר דהתם יבם שהוא בנו של סבא הוי ודאי יורשו[21] -

And one can say; that there the יבם who is the son of the סבא is certainly an heir,

ולא יוציא הספק מספק ממונו –

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[15] The case there is as follows; יעקב had two sons, ראובן and שמעון, where ראובן died (childless) while יעקב was alive. שמעון was מיבם the wife of ראובן within three months of s'ראובן death. The יבמה had a child חנוך seven months after her יבום to שמעון. We are not certain whether חנוך is the son of שמעון (with a seven month pregnancy) or the son of ראובן (with a full term pregnancy). חנוך is either s'שמעון son or s'שמעון nephew. When יעקב dies there is a dispute between שמעון and חנוך concerning the inheritance of s'יעקב estate. שמעון claims that חנוך is (possibly) his son and therefore the entire inheritance belongs to שמעון (and nothing for חנוך). While חנוך claims that he is (possibly) the son of ראובן, and as the son of ראובן he is entitled to half the inheritance (as ראובן would be entitled to).

[16] This refers to חנוך who is a ספק whether he is the son of שמעון or ראובן.

[17] This refers to שמעון who is a יבם to ראובן (and was מייבם his wife).

[18] This refers to יעקב who is the grandfather of חנוך.

[19] The יבם is certainly an heir and owns part of the estate, for even if חנוך is the son of ראובן, nevertheless שמעון receives half.

[20] It is questionable whether חנוך is an heir at all; if he is s'שמעון son he is not an heir and owns nothing of the estate.

[21] An heir inherits the entire estate; if there are two heirs or more each inherits the entire estate. Inevitably they will have to divide but inherently each heir inherits everything. Therefore the יבם, who is certainly an heir, owns the entire estate; if the ספק would have been an heir he too would inherit the entire estate, but since he is merely a ספק he cannot be מוציא from the ודאי. However, here the כולה שלי is only a ודאי in half the טלית; that gives him no rights or privileges in the second half which they both share equally.

and therefore **the ספק cannot extract money from** the ודאי **on the basis of a ספק -**

אבל הכא אין סברא מה שהוא ודאי בחציו שיועיל לו לחציו השני:

However here by a טלית **there is no logic** to say **that** the **ownership** of the כולה שלי **in half** the טלית **should support** his ownership **in the second half** of the טלית.

Summary

The מיגו of כולה שלי cannot allow the חציה שלי to collect half since we do not say a מיגו להוציא (except by a מיגו דאי בעי שתיק). The כולה שלי is a ודאי only in half, and therefore the חציה שלי is not מוציא מידי ודאי as opposed to the יבם who is a ודאי and the ספק cannot be מוציא from him. According to רב יוסף a מיגו is valid only when the initial claim was not a lie.

Thinking it over

1. Why indeed is there a מיגו of כולה שלי by a טענה of חציה שלי,[22] however there is no מיגו of כופר הכל by a מודה במקצת?![23]

2. תוספות writes that if we would award half to the חציה שלי it would be a מיגו להוציא, since דבחציו השני מוחזק זה כמו זה.[24] This seemingly contradicts that which תוספות previously stated[25] that דחשיב כאילו כל אחד יש לו בה בודאי החצי, דאנן סהדי דמאי דתפיס האי דידיה הוא (indicating that we consider that each one is in possession of half the entire טלית). How can we resolve this contradiction?[26]

3. תוספות asks that the חציה שלי should be considered a ספק מוציא מידי ודאי as in the case of ספק ויבם. Seemingly however the two cases are not similar. In our משנה the כולה שלי is a ודאי only because of the admission of the חציה שלי, and in addition the חציה שלי is a מוחזק, while there the יבם is a ודאי without the admission of the ספק, and the ספק is also not a מוחזק. How can תוספות compare the two cases?![27]

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[22] See footnote # 2.
[23] See אמ"ה # 283 and onwards.
[24] See footnote # 7.
[25] בד"ה ויחלוקו.
[26] See בל"י אות י.
[27] See בל"י אות יב.