ולחזי זוזי ממאן נקט – And let us see; whose money is he holding

Overview

The גמרא initially assumed that the case of כולה שלי by מקח וממכר was in a situation where one person purchased an item, and another grabbed it from him and claims that he bought it. The גמרא therefore asks let us find out whose money the seller is holding, and we will award the item to that person. תוספות discusses the validity of the seller's testimony in this situation and offers alternate explanations, other than רש"י.

פירש רש"י נשאל למוכר –

רש"י explained that the statement of 'ולחזי זוזי ממאן נקט' means that בי"ד **should ask the seller,** which of these two litigants paid the money, and we will award it to him based on the testimony of the seller.

רש"י anticipates a difficulty with this explanation:

ואף על גב דאין המוכר נאמן כשאין מקחו בידו –

An even though that the seller is not to be believed in a situation **where the** contested **item is not in his possession -**

כדאיתא בעשרה יוחסין (קדושין דף עג,ב ושם דיבור המתחיל במה דברים אמורים)[1] –

as the גמרא **states in עשרה יוחסין** פרק**.** What is the purpose of asking the מוכר, since his testimony is not acceptable?!

רש"י explains:

הני מילי בדנקיט מתרוייהו אבל בדנקיט מחד נאמן אפילו אין מקחו בידו[2] –

This is so (that his testimony is not acceptable) **when he received** money **from both** parties, **however if he is holding money from** only **one** party

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[1] The גמרא there cites a ברייתא which states that the seller is believed to say, 'I sold it to this one and not to that one'. The ברייתא then qualifies this statement; the seller is believed, only when the item in question is still in his possession (for then the seller must remember to whom he sold it in order to give it to the right party), however when it is not in his possession (he already gave it to one of the litigants), then he is not believed; since it is of no interest to him anymore, we assume he does not remember.

[2] When two people paid him and he agrees to sell it to only one of them, then once they left he will not remember exactly to whom he sold it to; however if only one person bought it from him (the other possibly was never there), then the seller will surely remember who was the purchaser and who is the stranger. The גמרא in קידושין also states that a midwife is believed to say this child is (the son of) a כהן, this one a לוי, etc. The reason (the חכמים instituted that) she is believed is one of practicality; otherwise there would be bedlam at to whose child belongs to whom. They entrusted this testimony to the midwife because she is not merely an observer but rather an unbiased and involved participant. The same applies to the מוכר. He is trusted more than an ע"א, since he is unbiased and involved. However his judgment is clouded when he received monies from both and he no longer possesses the item in question.

then he is believed, even if the merchandise is not in his possession.

תוספות continues citing פרש"י:

וגרסינן בתר הכי[3] ולא ידעינן –

And the text later reads 'and we do not know' from whom he received the money willingly, etc.

תוספות comments on פרש"י:

ובחנם דחק לפרש כן[4] דהכא פריך שפיר –

And it was unnecessary for רש"י **to explain it so, for here the question of** ונחזי זוזי ממאן נקט **is a proper one,** without the distinction between one person paying and two people paying -

דאף על גב דאין מקחו בידו נאמן הוא כעד אחד –

For even though he is not in possession of the merchandise and does not have the same level of נאמנות as when it was in his possession, nevertheless the seller **is believed as a single witness,** and the s'גמרא question is -

ואמאי שניהם נשבעין אותו שהמוכר מסייעו יפטר משבועה[5] –

So why should both litigants **swear; the one whom the מוכר supports should be exempt from swearing -**

ואידך ישבע שבועה דאורייתא[6] –

And the other whom the מוכר contradicts **should be administered a תורה oath** (and not merely a שבועה דרבנן), since he is contradicting an ע"א.

תוספות continues with the גירסא later on:

והשתא גרס שפיר ולא ידע[7] דאי ידע הוה נאמן כעד אחד –

And now the text can **properly** be **read, 'and he (the seller) does not**

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[3] Initially we assumed that only one person paid the מוכר, and therefore the question was raised, why do we not ask the מוכר, since he is believed (when one person paid). The גמרא concluded that both paid, in which case, the testimony of the מוכר is not acceptable, therefore the גירסא must be 'ולא ידעינן', that we בי"ד do not know who the real buyer is, and even if the seller claims that he knows who was the real buyer, that would make no difference, since his testimony is unacceptable. The גירסא cannot be ולא ידע ('and the seller does not know'), for his knowledge or lack of knowledge is immaterial, since he is not believed.

[4] תוספות maintains that if אין מקחו בידו, then the מוכר is never believed, even if only one person paid for the item. See (the abovementioned) תוספות in קידושין that the reason he is believed when מקחו בידו is because the מוכר has a מיגו, he could claim I never sold it to you, or that I repurchased it from you. However if it is אין מקחו בידו and there is no מיגו then the מוכר is never believed (more than a regular עד אחד).

[5] תוספות maintains that just as an ע"א has the power to require an oath from the party that contradicts him; in a similar vein, the ע"א has the power to remove the obligation of a שבועה from the litigant which the ע"א supports. This is known as עד המסייע פוטר משבועה (a witness who assists exempts one from an oath).

[6] The rule is that one who contradicts an ע"א in monetary issues is required to take a שבועה דאורייתא and deny the testimony of the עד (otherwise he loses the case).

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

know (who paid him willingly), **for if** the מוכר **would know he would be believed as an ע"א.**

תוספות comments on an anticipated difficulty:

ומיהו הוה מצי לשנויי דליתיה קמן דנשייליה[8] –

However the גמרא **could have answered** (on the question of וליחזי זוזי וכו') **that** the מוכר **is not present before us that we can ask him.**

תוספות offers an alternate explanation:

ורבינו יצחק מפרש דנשאל להם[9] ממי קבל המוכר המעות –

And the ר"י explains that the question (of וליחזי זוזי וכו') is **that we should ask** the litigants **from whom did the seller accept the money -**

שאין אנו חושדין אותן לשקר בזה לומר נתתי והוא לא נתן[10] –

For we do not suspect them of lying; that either **should say 'I gave', when** indeed **he did not give[11] -**

וגם הם אינם חלוקים אלא למי נתרצה המוכר אבל בנתינת המעות אינם חלוקין:[12]

And in addition they are not arguing who gave the money, **only as to who the מוכר agreed to sell, but there is no argument as to who gave the money.**

SUMMARY

According to רש"י, the question of וליחזי זוזי ממאן נקט means that the מוכר

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[8] This would (seemingly) be a better answer than the מוכר does not remember, for not remembering is somewhat unusual (even if both gave the money); however it is very possible that the מוכר is not available for this דין תורה. See 'Thinking it over' # 2. This question of ומיהו applies only to תוספות interpretation; according to רש"י, there is no difficulty at all, for the גמרא wants to establish the משנה in all situations even when the מוכר is present. Therefore we establish the משנה when both gave the money, in which case the testimony of the מוכר is immaterial.

[9] The גמרא did not mean we should ask the seller (as רש"י and תוספות both explain) [for that is not such a difficult question, for we can answer that the מוכר is not present or he does not know], but rather we should ask the litigants.

[10] Their initial claim is כולה שלי; each one claims he bought it from the מוכר. When the גמרא asked וליחזי זוזי ממאן נקט, it was understood that both litigants agreed that only one (ראובן) gave the money, but nevertheless the other (שמעון) claims that the מוכר never agreed to sell it to ראובן, but rather to שמעון, and שמעון made a משיכה on the item and therefore it belongs to שמעון. The question of the גמרא is that if שמעון admits that ראובן gave the money, then his claim that the seller did not willingly accept s'ראובן money is spurious, for we assume that whoever paid the money, the seller agreed to sell it to him. The גמרא answered that both gave the money and each claims the מוכר accepted only his money willingly.

[11] He will be afraid to falsely claim that he gave the money, for he may be directly contradicted by the seller. However if he merely claims that the seller did not want to sell it to the other party, then even if the seller contradicts him it will not be a blatant lie.

[12] See footnote # 10.

should be asked and believed (since he took money only from one), even though the item is not in his possession. The גמרא responded that since they both gave money, therefore the מוכר will not be believed and as a result *we* (the בי"ד) do not know from whom the מוכר accepted the money willingly. תוספות maintains that the question was that the מוכר should be considered an עד המסייע and therefore exempting one (whom the עד supports) from a שבועה altogether and obligating the other (whom the עד contradicts) in a שבועה דאורייתא. The גמרא answered (that since two people paid) the מוכר does not remember. The ר"י explains that we should ask the litigants, and the גמרא answered that the litigants are sure that they both paid but disagree as to whose money the מוכר accepted willingly.

THINKING IT OVER

1. According to תוספות the reason we do not ask the מוכר is because the מוכר does not know.[13] Why then did the גמרא have to establish the משנה in a case where both paid; if the מוכר does not know, then even if he accepted money from only one of the litigants, we cannot ask the מוכר?![14]

2. תוספות asks that the גמרא could have answered that the מוכר is not present.[15] Seemingly if the מוכר is not present, then there is no מורי היתירא, since the מוכר cannot return the monies![16] This would contradict the צריכותא of רב פפא!

[13] See footnote # 7.
[14] See מהר"ם שי"ף.
[15] See footnote # 8.
[16] See בל"י אות לב.