אי[1] אתה מוצא אלא ביין זה וספינה זו –

You cannot find it, except by this wine and this ship

Overview[2]

רב פפא concluded that the ruling of ר' נתן (regarding the ship and wine which sunk) is valid only if both the owner of the ship and the owner of the wine both said 'זה' (יין זה, and ספינה זו). It is only then that ר"נ rules אם נתן לא יטול ואם לא נתן לא יתן. Our תוספות explains this ruling.

דהמוחזק[3] יאמר לחבירו לית לך גבאי ולא מידי דקיים תנאך[4] -

For the מוחזק will say to the other party, **'you have no claim against me at all** unless **you fulfill your stipulation'.**

תוספות asks:

ואם תאמר דמכל מקום אם נתן כל השכירות -

And if you will say; that nevertheless if the בעל היין **gave the entire rental** fee **-**

אמאי לא יטול השוכר שכר דחצי הדרך שלא הלך וכי בשביל שמשכיר מוחזק ירויח -

Why should not the renter of the boat (the בעל היין) **take back the rent for the half way, which he did not travel; just because the משכיר** (the בעל הספינה) **is a מוחזק,** does that justify **that he should profit** for something which he did not provide?!

תוספות has an additional question:

ועוד דשכירות אינה משתלמת אלא לבסוף ולמה יפסיד השוכר שכר חצי הדרך שלא הלך[5] -

And additionally, the rule is **that rental** fees **are not** due **to be paid only until the end** of the rental agreement, **so why should the שוכר lose the rental for the half way that he did not travel;** he does not owe him for that service, since it did not happen, so there was never any obligation to pay it (for שכירות אינה משתלמת אלא לבסוף)?!

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[1] In our גמרא the text reads לא משכחת ליה אלא בספינה זו ויין זה (instead of אי אתה מוצא אלא ביין זה וספינה זו).

[2] See 'Overview' to תוס' ד"ה אילימא and אלא on the previous עמוד.

[3] The מוחזק is the one in the possession of the money. If no money was given (לא נתן) the מוחזק is the בעל היין, if the money was paid (אם נתן) the מוחזק is the בעל הספינה.

[4] Therefore in the case where the בעל היין did not pay yet (לא נתן) the rule is לא יתן, for the בעל היין (as the מוחזק) can argue that the בעל הספינה cannot provide ספינה זו. However where the בעל הספינה is the מוחזק (for the בעל היין paid him already [אם נתן]), he is not required to return the money (לא יטול) for he can argue that the בעל היין cannot provide יין זה.

[5] Regarding the half trip that he did take, it is understood why he has to pay (even though that שכירות אינה משתלמת אלא לבסוף and he did not finish the entire trip), because at this point the שכירות (for half the trip) ended since they are not capable of continuing the trip (for they both said זה).

תוספות answers:

ויש לומר כיון שנתן לו שכרו נתרצה שיהא שלו לאלתר -

And one can say; since the בעל היין **paid for the rental** already, this indicates **that he is willing that** the rent **should belong to** the בעל הספינה **immediately -**

אף על גב דאינה משתלמת אלא לבסוף לדעת כן נותנו שיהא שלו לאלתר אם לא ישאר בו[6] -

Even though that usually the ruling is that rent **is not due until the end,** nevertheless, here **the** שוכר **paid it with this intention that it should belong to** the משכיר **immediately; if** (eventually) **there will not remain for** the משכיר any obligation which he did not carry out.

תוספות offers a new and different interpretation of our סוגיא:[7]

ורבינו יצחק בן מאיר פירוש הא דפריך בספינה סתם ויין זה אם לא נתן אמאי לא יתן -

And the ריב"ם explained, this which the גמרא asked, **regarding ספינה סתם and יין זה, 'why if he did not give, he should not give';** this question -

לא פריך אלא אמאי לא יתן שכר חצי הדרך שכבר הלך -

Was not asked to mean that he should pay for the entire trip, **but rather why should he not pay** the **rental for the half way which he traveled -**

אבל שכר חצי הדרך שלא הלך פשיטא שלא יתן כיון שהוא אנוס[8] -

However the rental for the half way which he did not travel, it is obvious that he need not pay, since he is an אנוס.

תוספות responds to an anticipated difficulty:[9]

מכל מקום אהא דקתני אם נתן לא יטול -

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[6] In our case of יין זה, there is no remaining obligation on the בעל הספינה since the בעל היין cannot provide the יין זה (and the בעל הספינה cannot provide זו ספינה). [We assume that לדעת כן נותנו שיהא שלו לאלתר, since this שוכר deviated from the norm and paid the שכירות in advance, indicating his intent that the משכיר should retain it, if no outstanding obligation remains.]

[7] Previously בתוד"ה אלא [TIE footnotes # 10-12] on עט,א we understood the גמרא's question אם לא נתן אמאי לא יתן, to mean that he should pay for the entire trip (even for the half that he did not travel), since he said יין זה and he cannot fulfill his stipulation. Now תוספות will offer an opposing view.

[8] See previous תוד"ה אלא [TIE footnote # 7], where תוספות asked why should the שוכר pay the worker (the בעל הספינה) for the portion of the trip which he did not go, since the שוכר was the same אנוס as the worker, in which case the rule is that the שוכר need not pay the worker, עיי"ש. The ריב"ן there [TIE footnote # 14-1jn5] answered that here it is different since the בעל הספינה suffered an actual loss (as opposed to the פועלים where it was merely מניעת הריוח); however the ריב"ם here disagrees with the ריב"ן and maintains that indeed the שוכר need not pay for the second half of the trip. See 'Thinking it over' # 1.

[9] Previously, בתוד"ה אלא [TIE footnote # 12], תוספות 'proved' that אם לא נתן אמאי לא יתן means that he should pay even for the second half, from the ruling of אם נתן לא יטול, which 'surely' means that he cannot take back even for what he paid for the second half. However now that the ריב"ם maintains that he pays only for the first half, how can we understand the ruling that אם נתן לא יטול even for the second half, but why is that any different from אם נתן אמאי לא יתן, which refers only to the first half. In short; why does the גמרא assume that if he did not give for the second half, he is not required to give it, but nevertheless if he gave for the second half he cannot get it back?!

Notwithstanding the above (we do not require him to pay for the second half [if he did not pay it yet]), **regarding this which the** ברייתא ruled, **'if he paid he cannot take it** back -

דמשמע דלא יטול כלל אפילו שכר חצי הדרך שלא הלך לא קשה ליה -

Which indicates that he takes nothing at all back, even the rental payment **for the half way, which he did not travel,** the גמרא **had no difficulty** at all with this ruling (even though we maintain that if he did not pay yet, he is not liable for the second half); the reason he does not get back the second half is -

דכיון שהוא מוחזק ומזומן לקיים תנאו ניחא ליה שלא יחזיר כלל -

That since the בעל הספינה **is the מוחזק** in the money, **and he is prepared to fulfill his stipulation** (but he cannot since the שוכר said יין זה), **therefore it is understood that he need not return anything** to the בעל היין.

תוספות explains the continuation of the גמרא according to the ריב"ם:

ומשני ביין זה וספינה זו דמאן דתפיס לא מפקינן מיניה -

And רב פפא **answered** that the ruling of ר"נ is valid in a case of **יין זה וספינה זו, that whoever is holding** the money, **we cannot remove it from him -**

דהמוחזק יאמר לחבירו כיון שאינך יכול לקיים תנאך מזלך גרם המוציא מחבירו עליו הראיה:

For the מוחזק will say to the other party, **since you cannot fulfill your stipulation** (because you said זה), so **your מזל caused** your loss since the rule is **המוציא מחבירו עליו הראיה;** the onus of proof lies on the one who wants to take away money from the מוחזק.

The גמרא continues:

אבל[10] ספינה סתם ויין סתם חולקין -

'However by ספינה סתם and יין סתם (where both parties said סתם) the rule is **they divide'** the rental fee -

בהא מספקא ליה לרבינו יצחק בן מאיר אם חולקין שכר חצי הדרך שהלך דוקא ונותן רביעית -

Regarding this ruling of חולקין, **the ריב"ם is in doubt[11] whether they divide** only **the rental for the half way which he traveled,** so the בעל היין pays the בעל הספינה only **a fourth** of the entire rental trip, for he is not obligated at all to pay for the second half, which he did not travel -

או חולקין כל השכירות ויתן שכר הדרך כיון שכבר הלך[12] ועדיין מזומן לקיים תנאו:

Or they divide the entire rental fee, and he pays half of **the** entire **rental fee for**

[10] The מהר"ם maintains that from here on it is a new (different) תוספות.

[11] See 'Thinking it over' # 2.

[12] It is not clear what תוספות means with these words; כיון שכבר הלך. We are discussing the second half of the trip. [Perhaps תוס' means that by paying him for half the trip the שוכר is not really losing since he went half way.]

the journey, since he already traveled partially **and** the[13] בעל הספינה **is prepared to fulfill his stipulation** and bring another ship to take him the rest of the way if the בעל היין will bring new wine.[14]

Summary

By ספינה זו ויין זה the money remains by the מוחזק. By ספינה סתם ויין זה, the ריב"ם maintains that he only pays for the first half of the trip, even though that if he paid already he receives nothing back. By ספינה סתם ויין סתם the ריב"ם is unsure whether he pays a fourth or a half.

Thinking it over

1. The ריב"ם argues with the ריב"ן in the case of ספינה סתם ויין זה and maintains that he only needs to pay for the first half of the trip.[15] What would the ריב"ם maintain in the case of ספינה זו ויין סתם, where the גמרא asks אם נתן אמאי לא יטול, will the ריב"ם agree or argue with תוספות that the question is that he should get back all the money[16] even for the first half of the trip?[17]

2. Is the ספק of the ריב"ם (in a case of ספינה סתם ויין סתם חולקין),[18] when he did not pay yet, or even if he already paid the full half?

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[13] Alternately, this can perhaps be referring to the בעל היין, that he can bring more wine (see footnote # 14).

[14] The reasoning for the two sides of the query may be understood as follows; in the case of ספינה סתם ויין זה, he only pays for half the trip (according to the ריב"ם), so it follows that by ספינה ויין סתם, he should also not pay for the half which he did not travel. This is the first side of the query. However, one may argue, that in the case of ספינה סתם ויין זה, he is not obligated to pay for the second half, since the בעל היין is an אנוס; he said יין זה and he cannot produce it. However in the case of ספינה ויין סתם, where the בעל היין can bring new wine and continue with the trip, perhaps he should contribute to the second half of the trip as well (the second side of the query), since he is not an אנוס. [The בעל היין certainly does not have to pay for the entire second half, because the בעל הספינה is also not producing a new ship. It is as if they both agreed to end their rental agreement and split the rental fee.] See 'Thinking it over' # 2.

[15] See footnote # 8.

[16] See אילימא תוד"ה עמוד א' [TIE footnote # 7]. See there that there is a 'אין לפרש' [TIE footnote # 8], which maintains that the question of אמאי לא יטול was only for the second half of the trip, not the first.

[17] See ריטב"א.

[18] See footnote # 11.