גופא אמר רב הונא אמר רב כולי תנהו לפלוני במעמד שלשתן קנה –

It was stated: רב הונא said in the name of רב, etc. 'give it to him' in the presence of all three, he acquires it.

Overview

The rule of מעמד שלשתן (the presence of all three) is when a benefactor wants to give a recipient money, which is owed to the benefactor by a לוה, or he wishes to give an object which the benefactor deposited by a נפקד; the benefactor tells the לוה or the נפקד, in the presence of the intended recipient, give him the money owed to me or the object which I deposited by you. As soon as the benefactor says this במעמד שלשתן, the לוה owes the money to the recipient and/or the פקדון belongs to the recipient. תוספות discusses various details of this rule.

אומר רבינו יצחק בן אשר וכן רבינו תם דבמעמד ג' קנה בעל כרחו של לוה או של נפקד -

The ריב"א and the ר"ת maintain that מעמ"ש is effective even against the will of the לוה or of the נפקד; even though they do not wish to transfer the loan or the פקדון to the intended recipient, it nevertheless belongs to the recipient.

תוספות proves his point:

דאי לא קני אלא מרצונו למאן דאמר דוקא בפקדון קנה[1] -

For if it is not effective unless they agree, then (there is a difficulty) **according to the one who maintains** that מעמ"ש **is effective only by a פקדון,** but not by a loan -

למה הוצרכו לתקן מעמד ג' יאמר לו זכי[2] -

Why was it necessary for the חכמים **to institute** this קנין of **מעמ"ש,** the benefactor **should** merely **say** to the נפקד, '**acquire**' the פקדון for the recipient?!!

תוספות rejects a possible refutation to his proof:

ואין נראה לומר דהוצרכו לתקן למקום שאין הפקדון ביד הנפקד אלא ביד אחרים[3] -

And it does not seem likely that it was necessary to institute מעמ"ש **in a situation where the פקדון is not in the possession of the נפקד, but rather** it is **in**

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[1] The גמרא shortly discusses whether מעמ"ש is only by פקדון (where the object exists and is present) or it applies even by a loan (where the money is merely owed but it is not [necessarily] in the possession of the לוה).

[2] The פקדון (which belongs to the benefactor) is in the possession of the נפקד, and the נפקד is willing to transfer the ownership to the recipient, therefore all the benefactor needs to do is to tell the נפקד ([even] without the presence of the recipient) acquire the פקדון on behalf of the recipient! This is the rule of זכין לאדם שלא בפניו.

[3] This refutation assumes that מעמ"ש is effective only if the נפקד (or לוה) agrees; however we cannot always rely on זכי therefore it is necessary to be מתקן מעמ"ש.

the possession of others, in which case -

דלא יועיל אם יאמר זכי -

It would not be effective if he would merely **tell** the נפקד, **'acquire it** for him', and therefore they instituted מעמ"ש for such a case.[4]

תוספות offers an additional reason for rejecting the previous refutation:

ועוד אף כשאין הפקדון ביד הנפקד יקנה באודיתא[5] -

And furthermore even when the פקדון is not in the possession of the נפקד there is still no need for מעמ"ש because the benefactor **can transfer ownership through 'admitting'** (if the נפקד is willing to transfer the פקדון to the third party) **-**

כדאמר התם (בבא בתרא דף קמט,א) אדהכי נפקא אודיתא מבי איסור גיורא[6] -

As the גמרא **stated there; 'in the meantime an admission issued forth from the house of איסור גיורא';** proving that admitting is effective. If מעמ"ש is effective only ברצון, then there is no need to enact it since we can use זכי (if it is in the possession of the נפקד) or אודיתא (if it is not in his possession) **-**

אלא נראה להם דאפילו בעל כרחו של נפקד קני -

But rather it seems to them (the ריב"א ור"ת) **that** מעמ"ש **is קונה even against the will of the נפקד** where זכי is ineffective; only מעמ"ש can accomplish the transfer**.**

תוספות offers (an additional) proof that מעמ"ש is קונה even בע"כ:

וכן גבי איסור גיורא דקאמר רבא היכי ליקנינהו רב מרי להני זוזי אי במעמד ג' לא אזלינא -

And similarly by איסור גיורא where רבא said, 'how will רב מרי acquire these זוזי; if he intends to acquire them **through מעמ"ש I will not go** to them' -

משמע דאם היה הולך היה קונה בעל כרחו[7] -

It seems that if he would have gone to איסור and ר"מ, then ר"מ **would acquire** the זוזי even **against the will** of רבא –

תוספות rejects an anticipated refutation of this proof:

ואין לומר אם היה הולך שם היה מתרצה לפי שהיה מתבייש בפני איסור לומר אין רצוני[8] -

And we cannot say that if רבא **would go there he would have agreed** to the

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[4] תוספות הרא"ש explains why this refutation is 'אין נראה'; because it is unusual that the נפקד is not in possession of the פקדון, and the חכמים would not institute מעמ"ש (which is a הילכתא בלא טעמא) for a מילתא דלא שכיחא.

[5] The benefactor can state that this פקדון (which is now ביד אחרים) really belongs to the recipient (and I deposited it by the נפקד on his behalf). This will resolve the issue in a case where the פקדון is ביד אחרים. See previous footnote # 4. Others however omit the word 'ועוד' and have the text read 'דאף כשאין וכו'.

[6] See previously תוס' יג,א ד"ה והא footnote # 18. This merely proves that אודיתא is effective. See 'Thinking it over'.

[7] If מעמ"ש is not קונה בע"כ, why did רבא say he will not go; he could just as easily said, 'I will not agree to the transfer'; proving that not agreeing is no option.

[8] The proposed refutation maintains that indeed מעמ"ש cannot be effective בע"כ; the reason רבא said I will not go, instead of I will go but not agree, because he would be embarrassed to say so.

transfer, **because he would be embarrassed to say in the presence of איסור, 'I do not want** this transfer'.תוספות rejects this reasoning -

דאם כן בלא מעמד שלשתן הוה ליה למימר לא אזילנא שלא יאמר לו זכה -

For if indeed that is the reason for he is embarrassed, then רבא **should have said, 'I will not go', even without מעמ"ש in order that** איסור **should not tell him זכה,** and רבא will be embarrassed to refuse his request -

כי מסתמא היה הפקדון ביד רבא[9] -

for presumably the פקדון was in s'רבא possession.[10]

תוספות cautions:

ומיהו להההוא טעמא דמפרש בסמוך[11] בההיא הנאה דקא משתניא ליה ממלוה כולי[12] –

However according to the reason which רב אשי **shortly offers, that on account of this benefit** to the לוה **that** the מעמ"ש **changes it from an old loan, etc.,** this -

משמע דלא קני אלא מדעתו -

Indicates that מעמ"ש is **effective only with the consent** of the לוה, which contradicts what תוספות taught.

תוספות is not concerned, however:

אלא דבלאו הכי מפיק ליה מההוא טעמא:

for anyways the גמרא **negates this explanation for other** reasons. So there is no contradiction to תוספות position.

Summary

מעמ"ש is effective even against the will of the לוה or the נפקד.

Thinking it over

תוספות writes that it is not necessary to institute מעמ"ש in a case where the פקדון is not ביד הנפקד, for he can transfer it through אודיתא[13]. Why in general was there a need to institute מעמ"ש if it is possible to transfer it through אודיתא?![14]

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[9] We cannot say that רבא was not concerned about זכה since he was not in possession of the זוזי, since presumably he was in possession of the money, because he intended to acquire it as soon as איסור passed on.

[10] The fact that רבא did not say I will not go because I'm afraid איסור will say זכה, proves that רבא was not embarrassed to refuse transferring the money to מרי ר'; it is only regarding מעמ"ש where רבא said that he will not go, for מעמ"ש is קונה even בע"כ (of רבא).

[11] See (top of) א,יד.

[12] Presumably the לוה owed this money to the מלוה for a period of time (and the loan was due and payable), now that he owes the money to a new person (a new מלוה), the לוה assumes he will be able to delay payment.

[13] See footnote # 6.

[14] See מהרש"א, מהרש"ל, etc.