אלא מהכא ערב היוצא כולי –

Rather from here; a guarantor who went forth, etc.

Overview

רבא attempted to resolve the query of רב"ח whether ידעה לאקנויי (אשה), from the case of a guarantor who guaranteed the loan after the שטר was signed and delivered to the מלוה. The only way that his guarantee is effective (and the ערב is obligated to pay) is if the מלוה gave the שטר to the ערב, was מקנה it to him, and then the ערב returned it after adding his acceptance as a guarantor. תוספות will be discussing two types of liability; one where a person admits to a prior obligation, and another where a person creates a new obligation.

תוספות asks:

קשה לרבינו יצחק דבריש הנושא (כתובות דף קב,א)[1] פליג רבי יוחנן וריש לקיש –

The ר"י has a difficulty for there is a dispute between ר"י ור"ל in the beginning of פרק **הנושא -**

בחייב אני לך מנה בשטר וקאמר התם כתנאי[2] מהך דערב –

Regarding the case where the לוה wrote **in a שטר, 'I owe you a מנה'; and** רבא **said there** that the מחלוקת between ר"י ור"ל **is like** the **תנאים** מחלוקת **in this case of ערב** היוצא לאחר חיתום שטרות -

ופירש בקונטרס[3] דפליגי אי חשיבא הודאה[4] –

And the קונטרס explained there **that** ר"י ור"ל **argue whether** writing חייב אני לך in a שטר **is considered an admission -**

אם כן משמע דערב מחייב ליה משום הודאה שמודה דנעשה ערב בשעת מתן מעות[5] –

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[1] The מחלוקת between ר"י ור"ל is on קב,א. The תנאי is on א,קב.

[2] ר' ישמעאל maintains that the מלוה can collect from the נכסים בני חורין of the ערב and בן ננס maintains he cannot collect at all from the ערב. Therefore ר"י follows the view of ר' ישמעאל and the לוה is liable, while ר"ל follows בן ננס and the לוה is פטור.

[3] See there ד"ה דאמר that קא,ב תוס' (!) דאלימא מילתא דשטרא לרבי יוחנן וחשיבא הודאה.

[4] Generally for an admission to be considered a valid admission it must be said in the presence of two witnesses and the מודה has to tell them 'אתם עדי' you are my witnesses for this admission. The power of the שטר (according to ר"י) is also sufficient to consider it a proper הודאה.

[5] An ערב בשעת מתן מעות is an effective ערב for his obligation to pay is caused by the fact that the מלוה lent the money based on his guarantee. However an ערב לאחר מתן מעות would not be considered an ערב since the מלוה did not lend any money based on the guarantee of the ערב; he had already lent the money without the ערב. The reason ר' ישמעאל maintains that there is a חיוב for the ערב היוצא לאחר חיתום שטרות is because we consider adding his name on the שטר as an admission that he became an ערב בשעת מתן מעות. Similarly ר"י maintains that when he wrote in a שטר that חייב אני לך מנה he is admitting that he borrowed money sometime in the past (but not that this שטר is creating a new obligation).

If this is **indeed so** that the מחלוקת between ר"י ור"ל is whether a הודאה בשטר is considered a proper הודאה, **it would seem that the ערב is liable to the** מלוה **because of admission, that the** ערב **admits that he became an ערב when the money was given** to the לוה. We need to assume this -

מדמייתי לה עלה –

Since רבא **cites** the case of ערב as a corollary **to the** dispute between ר"י ור"ל, so just like ר"י ור"ל argue whether a הודאה בשטר is a הודאה similarly ר' ישמעאל and בן ננס argue whether the notification of the ערב after חיתום שטרות is a proper admission that he actually became an ערב previously when the loan became effective -

והכא משמע בההיא שטרא הוא משעבד נפשיה להתחייב מעתה[6] –

However, from our גמרא **here it seems that with this** writing in **the שטר** the ערב **is committing himself to be liable from now on** (and it is not an admission that he already obligated himself previously בשעת מתן מעות).

תוספות cites an alternate interpretation:

ולפירש רבינו תם דהתם[7] דלא מפרש משום הודאה ניחא –

However, it is understood according to the explanation of the ר"ת there where he does not explain the reason of ר"י **is because of admission,** but rather the writing חייב אני לך מנה in a שטר creates a new obligation. However there is still a difficulty according to the פי' הקונטרס that he is liable because of admission.

תוספות answers:

ויש לומר דבתרתי פליגי[8] בן ננס ורבי ישמעאל –

And one can say; that ר"י and ב"נ argue in two cases -

בין שכתב בשטר ואני מודה שאני ערב בין שכתב בו ואני נעשה ערב מעכשיו –

Whether he wrote in the שטר, 'and I admit that I am an ערב from before' or **whether he wrote in** the שטר, **'and I am becoming an ערב as of now'** לאחר חיתום שטרות; in both cases ר"י maintains you may collect from the ערב (מנכסים בני חורין), while ב"נ maintains you cannot collect at all from the ערב –

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[6] The גמרא here cited the case of ערב היוצא לאחר חיתום שטרות to prove that ידע לאקנויי; if the obligation of the ערב is being created now לאחר חיתום שטרות, then it is understood that the מלוה needs to be מקנה the שטר to the ערב, so that there should be a binding obligation; however if it is merely an admission that he was משעבד himself previously בשעת מתן מעות, there is no need for any קנין now; it is merely an admission. The obligation is from בשעת מתן מעות.

[7] קב,א תוד"ה אליבא. The ר"ת there maintains that ר"י ור"ל are not arguing about הודאה, but rather that the לוה is writing a שטר to obligate him to pay as of now. Therefore it is comparable to ערב היוצא וכו' since in both cases we are creating a new obligation, which requires a קנין.

[8] ר"י maintains that an ערב היוצא לאחר חיתום שטרות is obligated to pay whether he admits that he was an ערב earlier בשעת מתן מעות, or whether he is creating now an obligation to guarantee the loan by writing it now in the שטר. The גמרא in כתובות which discusses הודאה (according to the פי' הקונטרס) compares it to the הודאה of the ערב. Our גמרא here compares it to the creating of a new obligation by the ערב, which requires a קנין.

תוספות justifies that the מחלוקת is in both of the aforementioned cases:

דרישא דקתני ערב היוצא אחר חיתום שטרות משמע דפליגי בהודאה –

For the רישא of the משנה which states ערב היוצא לאחר חיתום שטרות, indicates that their argument is regarding admission whether it is a valid admission that he was an ערב previously, or not. It is indicated that the מחלוקת is in הודאה -

מדלא נקט בהאי לישנא ערב שלא בשעת מתן מעות חייב[9] –

Since the משנה did not use the expression, 'ערב שלא בשעת מתן מעות is חייב'.

There is also an indication that they argue in creating an obligation (not admitting to one):

ומדמהדר ליה בסיפא הרי שהיה חונק חבירו[10] משמע דפליגי נמי בחנוק –

For since בן ננס **replied in the סיפא to** ר"י**, 'if he was chocking his friend,** etc,' **this indicates that they are also arguing in** a case of '**chocking'.**

Now that we know the argument between ר"י and ב"נ is both regarding admission and creating an obligation, we can understand our גמרא:

ומייתי הכא מחנוק דמשתעבד[11] אף על פי שלא היה השטר שלו[12] –

And the גמרא **here brings** its proof **from** the case of **חנוק where** the ערב **is משתעבד even though the שטר was not his;** it must be because the מלוה is ידע לאקנויי.

תוספות responds to an anticipated difficulty:

ולפירוש הקונטרס דפליגי בהודאה אף על גב דתנן[13] הוציא עליו כתב ידו גובה כולי[14] –

And according to פי' הקונטרס that ר"י ור"ל (and ר"י ובי"נ) **argue regarding הודאה, even though the משנה teaches,** if the מלוה **presented the handwriting** of the לוה that he owes him money, the מלוה **can collect** מנכסים בני חורין. How can there be an argument whether חייב אני לך בשטר is a valid admission when the משנה clearly states that the מלוה may collect –

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[9] If their מחלוקת is only regarding the ability of the ערב to create a new obligation after מתן מעות, it should have clearly stated that ערב שלא בשעת מתן מעות is חייב (because he has the ability to create a new חיוב). However since the משנה writes 'ערב היוצא לאחר חיתום שטרות וכו, that חיוב can be interpreted that it is a result of his הודאה, but not a new חיוב.

[10] The משנה there states that בן ננס argued with ר"י saying: הרי שהיה חונק את חבירו בשוק ומצאו חבירו ואמר לו הנח לו ואני אתן לך פטור שלא על אמונתו הלוהו. If a מלוה was choking the לוה in the marketplace and the potential ערב said to the מלוה, 'leave him alone and I will pay you', the ערב is obviously פטור, since the מלוה did not lend the money to the לוה on account of the ערב.

[11] This שעבוד can only take effect if there was a קנין בשטר.

[12] The גמרא in כתובות according to פי' הקונטרס, says כתנאי because ר"י and ב"נ also argue in a case of הודאה, just like ר"י ור"ל.

[13] ב"ב קעה,ב.

[14] The ר"ת will differentiate that the משנה is discussing where the לוה admitted to borrowing money, while ר"י ור"ל are arguing where the לוה intends to create a new obligation. See 'Thinking it over'.

תוספות responds:

התם בכתב וחתם תחתיו ופלוגתייהו שלא חתם[15] **–**

There in the משנה we are discussing a case where the לוה **wrote and signed underneath it** (therefore he is חייב)**, however the dispute** between ר"י ור"ל is **where he did not sign;** he merely wrote חייב אני לך.

וערב נמי איירי כשלא חתם[16] **אלא שכתב אני ערב [ומסר לו השטר בפני עדים]:**

And regarding the **ערב** it will be necessary to say **that** the ערב **did not sign, but rather he wrote, 'I am the ערב' [and he gave the שטר** to the מלוה **in the presence of witnesses].**

Summary

The מחלוקת between ר' ישמעאל בן ננס and regarding a ערב היוצא אחר חיתום שטרות is both when the ערב admits that he was obligated previously בשעת מתן מעות or whether the ערב intends to create a new obligation as of now.

Thinking it over

Where is there more reason to obligate the לוה, when he is admitting to a previous loan, or when he intends to create a new obligation by writing אני חייב לך מנה in a שטר?[17]

[15] See also רש"י כתובות קא,ב ד"ה (ה"ג) לעולם.

[16] If the ערב signed it would be the same as הוציא עליו כתב ידו and he would be obligated to pay.

[17] See מהר"ם שי"ף and נח"מ.