בעבד של שני שותפין ודברי הכל –

By a slave of two partners and according to everyone

Overview

The גמרא explained that the case of a חצי עבד וחצי בן חורין is where the slave belonged to two partners, where everyone agrees that each one of them can free his share of the slave, so if one of them frees his part, the עבד is a חצי עבד וחצי בן חורין.

תוספות asks:

ואם תאמר והא לרבי אליעזר דבפרק החובל[1] (בבא קמא דף צ,א) אינו יכול לשחרר חלקו[2] -

And if you will say; but according to ר''א in פרק החובל, a partner in an עבד **cannot free his share -**

כמו שאינו יוצא בשן ועין[3] דבעינן עבדו המיוחד לו -

Just like this עבד who has two masters **cannot go free** if his **tooth or eye** are destroyed, **for we require** that it should be '**his slave'** one who is **designated specifically** for him, but not that it is designated for others as well -

ומוקי התם אליביה הא דאמר אמימר איש ואשה שמכרו בנכסי מלוג[4] לא עשו ולא כלום[5] -

And the גמרא there **established this which אמימר ruled, 'a man and his wife who sold the נכסי מלוג they did not accomplish anything',** this ruling **is according** to the teaching of ר"א –

תוספות concludes his question[6]

---

[1] The case there is where one sold his slave to another, but they agreed that for the next thirty days the slave would work exclusively for his previous master (the one who sold him). There is a rule that if the master hits his slave and the slave dies after a twenty-four hour period, the master is פטור, as the פסוקים in כא,כ-כא שמות (משפטים) state; וְכִי יַכֶּה אִישׁ אֶת עַבְדּוֹ אוֹ אֶת אֲמָתוֹ בַּשֵּׁבֶט וּמֵת **תַּחַת** יָדוֹ נָקֹם יִנָּקֵם. כא. אַךְ אִם יוֹם אוֹ יוֹמַיִם יַעֲמֹד לֹא יֻקַּם כִּי **כַסְפּוֹ הוּא**. In the previous case where the slave has two masters, there is a dispute who is considered the master to be exempt under the יום או יומים rule. ר"א maintains that neither is exempt under the יום או יומים rule, since neither can say that this עבד is his כספו המיוחד לו (since there is another master).

[2] This is תוספות assumption as תוספות will continue to explain.

[3] The תורה rules in כא,כו-ז שמות (משפטים) that if **עבדו** שן or **עבדו** עין is destroyed, the עבד כנעני is freed. However if the עבד has two masters he is not freed (according to ר"א) since we require עבדו המיוחד לו, just as we require כספו המיוחד לו.

[4] נכסי מלוג are the assets, which the wife brings into the marriage; they belong to her, however during their marriage the husband has the right to eat the fruits of these assets (if it is a field he eats the fruits, if it is an עבד, the עבד works for him, etc.) The status of the נכסי מלוג vis-a vis the husband and wife is similar to the status of the עבד mentioned in footnote # 1, where one person (the wife) owns the גוף of the נכסי מלוג and the other (the husband) owns the פירות.

[5] The sale is invalid, since one owns only the גוף and the other only the פירות, it is not מיוחד to any of them, So it is just like by the עבד (in footnote # 1) where there is no rule of יום או יומים and he is not יוצא בשן ועין, since one (the buyer) has only a קנין הגוף, and the other (the seller) has only קנין פירות, it is not מיוחד to either of them according to ר"א. Therefore by the נכסי מלוג, when either the husband or the wife dies, the remaining spouse may take back the נכסי מלוג, which they sold, from the buyers. See 'Thinking it over' # 2.

וקאמר התם חציו עבד וחציו בן חורין -

And the גמרא there cites a ברייתא, which **states, 'a חצי עבד וחצי בן חורין -**

וכן עבד של שני שותפין [פירוש אליביה דרבי אלעזר] אין יוצאין בראשי איברים[7] -

And similarly an עבד of two partners do not go out if the tips of their limbs' were cut off, as it is by a regular עבד, **and** רבא there explained **that this** ברייתא **is according to ר"א,** so just as he cannot go out בראשי אברים since he is not עבדו המיוחד לו, he also cannot free him, so how can the גמרא here say that a חציו עבד וחציו בן חורין is possible by an עבד של ב' שותפין according to everyone, when we see from the גמרא in ב"ק that by an עבד של ב' שותפין neither one can free him (on their own).

תוספות answers:

ויש לומר דשותפין דהתם היינו לזה גוף ולזה פירות[8] -

And one can say that the term שותפין **there** in the ברייתא **means that one** owns the **גוף and the other** owns **the פירות -**

כמו מוכר עבדו[9] לאחר ופסק עמו על מנת שישמשנו ל' יום דהוי דומיא דאיש ואשה[10] -

It is like the case of one who **sold his slave to another with the stipulation that he should** still **service him** (the seller) **for thirty days, which** that case is also **similar to a man and his wife** regarding their ownership of נכסי מלוג; it is only in these cases where there is the issue of המיוחד לו and therefore neither owner is considered his total owner, and he will not be able to free him either -

אבל כשיש לו גוף ופירות יכול לשחרר חציו -

However, when each of the partners **owns** half **the גוף and** half **the פירות,** either one **can free his half** of the עבד –

תוספות responds to an anticipated difficulty:

והא דקאמר התם חציו עבד וחציו בן חורין[11] היינו למשנה אחרונה[12] -

---

[6] At this point there is no question yet, because we can distinguish between the case of ר"א where one owns the גוף and the other owns the פירות, so we can say that neither can free him (because it is not מיוחד לו), however in the case of two partners where the both have קנין הגוף וקנין פירות in this עבד, perhaps ר"א agrees that each one can be משחרר his half (see רש"י there ד"ה לא עשו). The question however is from what תוספות cites now. (See footnote # 7.)

[7] תוספות is assuming now that עבד של ב' שותפים in this ברייתא means that they were equal partners (בגוף ובפירות), not like the case in footnote # 1, and as the simple meaning of עבד של ב' שותפין indicates, therefore the question is how can our גמרא say that if two partners own an עבד, he can become a ח"ע וחב"ח, and it is אליבא דכו"ע, when it certainly cannot follow the view of ר"א who requires עבדו המיוחד לו, even in a case of two complete partners (see footnote # 6). See 'Thinking it over' # 1.

[8] תוספות is retracting from what he assumed in the question; see footnote # 7.

[9] See footnote # 1.

[10] See footnote # 4.

[11] תוספות concluded that only when both partners have קנין הגוף וקנין פירות that each one is able to free his half. Therefore we must conclude that when that ברייתא mentions a ח"ע וחב"ח (that he does not go out בראשי אברים) we are discussing a case where the remaining half-owner had a קנין הגוף וקנין פירות in this עבד just as the previous partner had

And this which the ברייתא **states there** that **a חצי עבד וחצי ב"ח** does not go out בראשי אברים, **that it** (only) **according to the latter משנה** that ב"ה agreed to ב"ש that we force the remaining master to free the slave –

תוספות asks:

ואם תאמר והא אמימר גופיה אית ליה לעיל[13] לחד לישנא דמפקיר עבדו יש לו תקנה בשטר -

And if you will say; but אמימר himself maintained previously according to one version, that one who frees his slave there is recourse for this slave to gain his complete freedom if the owner gives him a **שטר** שחרור -

תוספות answers:

ויש לומר דשטר ודאי מפקיע האיסור כדאמרינן לעיל[14] מה אשה איסורא[15] ולא ממונא:

And one can say that a שטר can certainly remove the prohibition, as the גמרא **states previously, just like a woman** the גט removes only **the prohibition** aspect, **but not any monetary** obligation, the same is with a שטר שחרור of an עבד.

Summary

The restriction of ר"א regarding 'המיוחד לו', is only if one owns קנין הגוף and the other קנין פירות, but not if they are שותפין in both. A שטר שחרור, however is effective to remove איסור but not ממון.

Thinking it over

(otherwise how could he have been freed); The question is, since the remaining owner has both קנין הגוף וקנין פירות why does this ח"ע וחב"ח not go out בראשי אברים. In this case it is עבדו המיוחד לו; so just as he can be משחרר half, he should also be able to go out בראשי אברים!

[12] The משנה אחרונה is that ב"ה agreed to ב"ש that we force the remaining master to free him; so even before he frees him, he cannot have the עבד work for him, therefore he only has a קנין הגוף in this עבד but no קנין פירות, so it is not עבדו המיוחד לו anymore, and therefore he does not go out בראשי אברים.

[13] א,מ, according to the איכא דאמרי only by מת אין לו תקנה but not if the master is alive. The question is that when one is מפקיר the עבד he loses his קנין פירות, but retains the קנין הגוף and nevertheless אמימר maintains that he can be freed, indicating that קנין הגוף is sufficient and we have no problem with עבדו המיוחד לו, so why does אמימר rule that איש ואשה שמכרו בנכסי מלוג לא עשו ולא כלום, since one has קנין פירות (the husband) and one has קנין הגוף (the wife), and we see by עבד that even if he only has קנין הגוף he can still free him, so here too the wife who has קנין הגוף should be able to sell her נכסי מלוג! See 'Thinking it over' # 3.

[14] ב,לט.

[15] תוספות is answering that we cannot compare the two cases of עבד and נכסי מלוג. Regarding an ח"ע וחב"ח where the master only has a קנין הגוף in this עבד, which practically means that this עבד is prohibited from marrying a בת ישראל, therefore he can write him a שטר שחרור to free him completely and remove this איסור, for we derive עבד from אשה, that just like by a woman the גט removed the prohibition on the woman to marry anyone else, but it does not affect any monetary issues, similarly the שטר שחרור is effective only for איסור but not for ממון. However by נכסי מלוג we are discussing a monetary transaction, so אמימר maintains that since she only has a קנין הגוף but no קנין פירות she cannot complete the transaction (even together with her husband).

1. תוספות asks how can it be אליבא דכו"ע, when ר"א (seemingly) disagrees.[16] Why cannot we answer that when the גמרא states 'ואליבא דכו"ע' it means according to both רבי ורבנן who we were discussing previously, however we did not mean כו"ע literally (especially since ר"א שמותי הוא he follows ב"ש which is אינה משנה במקום ב"ה); so what is תוספות question?![17]

2. תוספות writes that the ruling of אמימר regarding נכסי מלוג is according to ר"א (as part of the question).[18] Seemingly why was it necessary at all for תוספות to cite the ruling of אמימר, why is the question from the ברייתא (of שותפין) insufficient?![19]

3. תוספות asks a contradiction from אמימר.[20] Seemingly the same question can be asked directly on our משנה; how can we say that we force him to be משחרר the עבד, but he only has a קנין הגוף on the עבד?![21]

[16] See footnote # 7.
[17] See מהרש"א.
[18] See footnote # 5.
[19] See פני יהושע and נחלת משה.
[20] See footnote # 13.
[21] See מהרש"א, מהרש"ל and נחלת משה.