משכון דאחרים וכדרבי יצחק –

It is another's משכון; and according to ר' יצחק

Overview

ר' יצחק maintains that in a case where a loan was due and the לוה could not pay, so the מלוה was given a משכון from which to collect his loan[1]; if this משכון was lost or stolen[2] from the מלוה, he is held liable[3]. However if the משכון was taken at the time of the loan[4], then the מלוה is treated as a שומר חנם and is not liable for גניבה ואבידה. The גמרא taught that a מלוה who is in possession of a משכון (from his לוה) and gives it to a woman for קידושין, she will become מקודשת according to ר' יצחק. Our תוספות will discuss whether the rule of משכנו שלא בשעת הלואתו is only by במשכון דאחרים מקודשת (where the ruling of ר' יצחק applies) or is she מקדושת even by משכנו בשעת הלואתו.

תוספות clarifies:

אף על גב דרבי יצחק איירי במשכון[5] שלא בשעת הלואתו[6] –

Even though that ר' יצחק is discussing a משכון שלא בשעת הלואתו, when he ruled that בע"ח קונה משכון, nevertheless

מצינו למימר כיון דבעל חוב קונה משכון שלא בשעת הלואה קנין גמור עד שיפדה –

We may assume that since a מלוה completely acquires a משכון שלא בשעת הלואה[7] until the משכון **is redeemed** by the לוה, therefore the מלוה -

בשעת הלואה[8] נמי אלים שיעבודיה לחשב ממון –

also has a sufficient lien on a משכון **בשעת הלואה that it should be considered** his **money**[9] in regards -

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[1] This is referred to as משכנו שלא בשעת הלואתו. The משכון was taken [from the לוה by a שליח בי"ד] as a form of payment. If the לוה does not redeem it within thirty days it belongs to the מלוה.

[2] See following תוספות ד"ה מנין (that according to תוספות he is liable for גניבה ואבידה [only] but not for אונסין). [According to רש"י that the בע"ח is חייב even באונסין; the concept of בע"ח קונה משכון is more clearly evident.]

[3] The value of the משכון is deducted from the loan. If the משכון is valued more than the loan, the מלוה is required to pay the לוה the excess value of the משכון.

[4] This is referred to as משכנו בשעת הלואתו. The משכון is then viewed (merely) as a security for the loan; not as a form of payment (since the loan is not due yet). The מלוה cannot collect from this משכון unless authorized by בי"ד (after the due date).

[5] Others amend this to read במשכנו.

[6] The פסוק of (דברים כד,יג [תצא]) 'ולך תהיה צדקה' from where ר' יצחק derives his ruling is discussing a משכון שלא בשעת הלואה (see the previous פסוקים there). By משכנו בשעת הלואתו he is (surely) required to return the משכון to the לוה (at night, etc.); however he does not have the מצוה of צדקה (since the משכון is not his).

[7] The ownership of an article is proportional to the loss suffered by the absence of the article. (One suffers no loss when a stranger loses their article.) The fact that the מלוה suffers from the loss of the משכון (שלא בשעת הלואה) indicates that he owns it to a certain extent. His ownership in the משכון results from the fact that he may retain it if he is not paid. (However, he does not own it completely as if it is his own, for the לוה may redeem it [and the מלוה is also פטור מאונסין]).

[8] תוספות assumes that 'קידשה במשכון מקודשת' refers (also) to a משכון בשעת הלואה.

לקדש בו האשה ולקנות בו עבדים וקרקעות[10] –

to be מקדש a woman and to acquire slaves and property with this משכון.

תוספות offers additional examples that משכנו בשעת הלואה is considered that it belongs to the מלוה to a certain extent:

וכן צריך לפרש בפרק השולח (גיטין דף לז,א ושם) בההיא דאמר –

And it is also necessary to similarly explain the גמרא **in פרק השולח concerning that which is stated** there that -

המלוה על המשכון אינו משמט[11] ומפרש התם משום דקני ליה כרבי יצחק[12] –

One who lends with the security of **a משכן is not** subject to the laws **of שמיטה, and** the גמרא **explains** the reason **there, because he acquired** the משכון **as ר' יצחק** rules. This concludes the גמרא there.

תוספות asks:

ורבי יצחק הוי שלא בשעת הלואתו והמלוה משמע בשעת הלואתו –

But ר' יצחק rules that he is קונה the משכון **when it was שלא בשעת הלואתו and** the expression **המלוה indicates** that it was **בשעת הלואתו -**

כדמשמע סוף פרק האומנים[13] (בבא מציעא פא,ב ושם) –

as it seems in the end of פרק האומנים; that the term המלוה על המשכון means a משכון. How can the גמרא explain that משכנו בשעת הלואתו is not משמט because ר' יצחק maintains that the מלוה is קונה the משכון if it was משכנו שלא בשעת הלואתו?!

תוספות responds:

אלא הכי פירושו התם כיון דקני ליה שלא בשעת הלואתו לגמרי –

But rather this is the explanation of the גמרא **there; since** he **completely** acquires **the משכון** when it was given **שלא בשעת הלואתו -**

סברא הוא דיקנה הוא בשעת הלואתו שלא ישמט דחשיב של אחיך בידך –

It is logical that the מלוה **should acquire a בשעת הלואתו** משכון to the extent

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[9] Even though a משכון בשעת הלואה is not considered as belonging to the מלוה to the extent that he is liable for גניבה ואבידה, nevertheless he has a similar type of lien against this משכון as a משכון שלא בשעת הלואה in that he may hold it as collateral for his loan against the wishes of the לוה (as long as the לוה did not pay) and will eventually be able to satisfy his loan from this משכון. This right in the משכון is considered a monetary right. When he transfers the משכון to the woman (for קידושין) he is giving her this monetary right, which has value, and therefore she is מקודשת (albeit that it does not belong to her (or him) in the true sense of the word).

[10] This is true, notwithstanding that the לוה certainly has the right to redeem the משכון from the אשה or the sellers of the עבדים וקרקעות, because he must repay them the loan to retrieve the משכון.

[11] This is a משנה in מסכת שביעית פ"י מ"ב cited in מסכת גיטין. The מלוה may collect his debt after שמיטה.

[12] One is not permitted to collect a loan after שמיטה, however (since) the מלוה already owns the משכון; the loan was already 'collected' before שמיטה.

[13] The גמרא there wanted to distinguish between two statements, that one was a משכון בשעת הלואתו and the other a משכון שלא בשעת הלואתו. The גמרא rejected this distinction and said that by both instances the expression המלוה על המשכון is used (indicating that it is בשעת הלואתו [see רש"י there על פב,א ד"ה]).

that שמיטה **should not be משמט for it is considered של אחיך בידך -**

ודרשינן בספרי[14] (פרשת ראה) את אחיך תשמט ידך ולא של אחיך בידך –

For we interpret in ספרי 'your hand should relinquish your brother, but not your brother which is in your hand'.

תוספות offers an additional example:

וכן יש לפרש פרק כל שעה (פסחים דף לא,ב ושם) –

And so too can we explain the גמרא in **פרק כל שעה -**

בההיא דישראל שהלוה את העובד כוכבים על חמצו אחר הפסח עובר לרבי מאיר –

Concerning a ישראל who lent money **to an עכו"ם** and it was secured **by** the **חמץ** of the עכו"ם, the ישראל **will transgress** if he derives any benefit from this חמץ **after פסח, according to ר"מ -**

ומפרש התם משום דקנה ליה כרבי יצחק –

And the גמרא **there explains because** the ישראל **acquired** the חמץ **as ר' יצחק rules.** The case of ר"מ was משכנו בשעת הלואה -

וכיון דקני ליה כרבי יצחק שלא בשעת הלואתו –

And since he would acquire the משכון of חמץ **according to ר' יצחק** when it was **שלא בשעת הלואה -**

בשעת הלואתו קני ליה נמי לענין דקרינן ליה שלך אי אתה רואה:

He also acquires the חמץ even **בשעת הלואה in regards that we refer to it as שלך אי אתה רואה;** it is sufficiently his that he transgresses the לאו that one may not 'see' חמץ which belongs to him.

Summary

The rule of משכון קונה בע"ח (regarding גניבה ואבידה) is by a משכון שלא בשעת הלואה, nevertheless even by a משכון בשעת הלואה the מלוה has a sufficient lien on it that he may use it for לקדש אשה (and other קנינים), and it exempts him from שמיטה, and makes him liable for בל יראה.

Thinking it over

תוספות offers three examples that even by משכנו בשעת הלואתו it is considered as if it belongs to the מלוה; by קידושין (and קנינים), by שמיטה, and by חמץ בפסח. Is there a certain צריכותא to be made differentiating between these three applications (that we would not be able to derive one from the other if they were not all explicitly stated)?

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[14] The תורה writes (דברים [ראה] טז, ג) concerning שמיטה that ואשר יהיה לך את אחיך תשמט ידיך (that whatever you have by your brother, your hand should relinquish). We derive from this that your hand must relinquish that which is in your brother's possession; however של אחיך בידך, that which already in your hand (like a משכון) you are not required to relinquish. The מלוה (even in the case of בשעת הלואה) has no need to collect the loan (which is forbidden), since he already collected the loan by virtue of having the משכון in his possession.