והוא דכתב דלא כאסמכתא[1] –

Provided that he wrote, 'and that it is not like an *Asmachtoh*'

Overview

רב חסדא ruled that in the case where he made his מטלטלין an קרקע אגב אפותיקי; that it is a valid אפותיקי provided that the borrower writes in the שטר that he is מקנה the מטלטלי אגב קרקע sincerely, that it is not an אסמכתא (and not כטופסא דשטרי).[2] Our תוספות is unsure as to the intent of this ruling.

מספקא לן אי במטלטלי אגב מקרקעי דוקא[3] או אפילו במקרקעי[4] לחודיה:

We are doubtful whether this requirement of writing דלא כאסמכתא **is specifically** when the borrower is משעבד his **מטלטלין אגב קרקע** for an אפותיקי, **or even if** he is משעבד **just his קרקע** as an אפותיקי, he also is required to write דלא כאסמכתא.

Summary

תוספות is not certain whether one must write דלא כאסמכתא, only by מטלטלי אגב קרקע, or even by קרקע alone.

Thinking it over

How can תוספות even consider that one must write דלא כאסמכתא even for קרקע alone (and otherwise there is no שעבוד), when we know that the קרקע of the לוה is always משעובד to the מלוה and he can collect even מנכסים משועבדים?![5]

2. Why should there be a difference between קרקע and מטלטלי אגב קרקע; that one is an אסמכתא and the other is not?[6]

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[1] An אסמכתא is where one makes a stipulation, however he is depending (סומך) that it will never come to pass. For instance when negotiating a sale, the buyer says if I do not being the money within a week I will pay you ten times the amount we agreed on. The buyer has no intention of paying ten times the amount; he merely says this to assure the seller that he is sincere in buying the item. The buyer is סומך that he will surely bring the money, and he is not concerned that he will have to pay ten times the amount. Therefore even if he does not pay in time the stipulation is ineffective.

[2] Otherwise, if he does not write דלא כאסמכתא, we can assume that he has no intention of making his מטלטלין an אפותיקי (if he does not pay), he only says it to convince the מלוה to lend him the money. The לוה is sure he will pay him back and the מלוה will never collect the מטלטלין. Therefore he must write ודלא כאסמכתא (see רשב"ם ד"ה דלא). Otherwise there is no אפותיקי.

[3] We may assume this since רב חסדא issued this ruling in conjunction with s'רבה ruling that if he was מקנה מטלטלי אגב קרקע, it is effective, and on this רב חסדא ruled that he must write דלא כאסמכתא.

[4] See 'Thinking it over'

[5] See מהר"ם.

[6] See נחלת משה בגמ' בד"ה דלא.