

He shall pay; indicates with his consent

– ישלם מדעתו משמע

OVERVIEW

אביי maintains that the word 'ישלם' refers to a consensual payment (one who pays without being coerced). תוספות challenges this assumption.

תוספות asks:

ואם תאמר דבפרק הזרוע (חולין ד' קל,ב ושם ד"ה תנא) ישלם בעל כרחו משמע -

And if you will say; that in פרק הזרוע it seems that the word 'ישלם' indicates that he is paying against his will, not מדעתו as the גמרא would have it here –

דקאמר¹ תנא תני ישלם דברי רבי אליעזר ואת אמרת מדת חסידות שנו כאן -

For the גמרא states there; the תנא taught us that the view of ר"א is 'ישלם', and you venture to say that when it says ישלם, 'they taught us here the trait of 'חסידות' (that there is no legal obligation)! It cannot be so! This concludes the citation from the גמרא. It is apparent from that גמרא that the word 'ישלם' is used to indicate an obligation binding by law; even if he does not want to pay, he is required to pay בעל כרחו. That is why ר"א cannot mean that when it says ישלם, 'they taught us here the trait of 'חסידות', since he uses the word ישלם.² This would seem to contradict that which we state here that ישלם refers to a 'consensual' payment (not a payment בעל כרחו).

תוספות answers:

ויש לומר דהתם לא קאמר אלא דלא הוי מדת חסידות אלא בדין חייב -

And one can say; that there the גמרא does not say that ישלם means בעל כרחו (that he is paying against his will), but rather that the word ישלם does not refer to a מדת חסידות (a voluntary payment), rather it means that he is lawfully obligated to pay; however the payment can be consensual, without coercion from the ב"ד.³

תוספות offers another answer:

ועוד אמר רבינו תם דהכי קאמר תנא תני ישלם דברי רבי אליעזר ופליגי רבנן עליה -

¹ The גמרא there cites a משנה which states the view of ר' אליעזר if a homeowner (not a עני) was traveling, he may take לקט וכו' (he pays back the לקט וכו' to the עני) if he needs it, and when he returns home ישלם (he pays back the לקט וכו' to the עני). This seemingly proves that מתנות עניים and מתנות כהונה have claimants (for otherwise he can forestall his payments by claiming I will give it to other עניים). מדת רב חסדא refuted this proof arguing that ר"א is teaching us a מדת חסידות, if the homeowner is a pious man he should return it to the עניים; but not that he is obligated to do so. The גמרא responded that it cannot be as רב חסדא suggests, for תנא תני ישלם וכו' ואת אמרת מדת חסידות שנו כאן -!

² Perhaps תוספות maintains (in this ה"א and according to the ר"ת) that if ישלם מדעתו משמע then it can also refer to a מדת חסידות payment. There can be no proof that ישלם negates a מדת חסידות payment.

³ There are three levels: a) where the payment is voluntary (מדת חסידות), b) where the מחויב agrees to pay without coercion (ישלם מדעתו משמע), and c) where the מחויב refuses to pay and ב"ד forces him (בעל כרחו). The גמרא argues that we cannot confuse מדעתו with מדת חסידות; one is consensual, the other voluntary.

And the ר"ת said, furthermore that this is how the גמרא **inferred** that it cannot be מדת חסידות, but rather an obligatory payment. It is not because the word 'ישלם' was used, since ישלם מדעתו משמע (as assumed in the question), but rather the גמרא derived it in this manner; since the תנא **stated that ר"א maintains ישלם and the רבנן argue⁴ with ר"א**, and claim that he is exempt from paying, so how –

ואת אמרת וכולי ועל מדת חסידות לא הוּו פליגי רבנן -

Can you say, etc. (that ר"א means (only) a מדת חסידות) **for if it was just a מדת חסידות the רבנן would not argue** to say that if he is a חסיד he need not pay back what he took. The proof that it is not a מדת חסידות is not from the word ישלם, but rather from the fact that there is an argument whether payment has to be made; there can be no argument whether it is a מדת חסידות to repay what he took. Therefore ישלם can mean מדעתו and there is no contradiction from that גמרא.

concludes: תוספות

ובלאו הכי צריך לפרש התם כן:

And without this contradiction from our גמרא, **it is necessary to explain** the גמרא there **in this manner;**⁵ that the proof that it is not מדת חסידות is from the fact that there is a מחלוקת and not from the word 'ישלם'.

SUMMARY

The term ישלם מדעתו means that he pays when is obligated to do so, without coercion. It therefore cannot refer to a payment of מדת חסידות. Alternately since ישלם מדעתו refers to a consensual payment it may include a מדת חסידות payment. There can be no argument concerning a מדת חסידות payment.

THINKING IT OVER

Why does תוספות (seemingly) maintain in the question (and ר"ת as well even למסקנא) that מדת חסידות can be negated only if ישלם means בעל כרחו (and it cannot be negated if ישלם means ע"פ דין מחוייב), and in the (first) answer תוספות maintains that מדת חסידות can be negated (even) if ישלם merely means ע"פ דין מחוייב?

⁴ This explains why the question is phrased 'תנא תני ישלם דברי ר"א', and not merely תנא תנא ישלם (if the proof was from the word ישלם alone). The proof is from the fact that this is an opinion of ר"א but others disagree with him.

⁵ For an explanation, see תוספות there תנא ד"ה תנא.