

Only because there is a מיגו

אלא דאיכא מיגו -

OVERVIEW

The גמרא cited the מחלוקת between ר"נ ור' יוחנן and רב יהודה ור"ה concerning ברי ושמא. It also stated that rules like שמואל that the woman is believed and receives the entire כתובה from the בעל. The גמרא originally maintained that a) שמאול agrees with ר"י ור"ה that ב"ש ברי עדיף¹ and b) the מחלוקת between ר"י ור"ה and ר"נ ור"י parallels the מחלוקת in our משנה between ר"י and ר"ג ור"ה. The גמרא then rejects this idea, and maintains that the דין of our משנה is not (so) dependent on ב"ש. Even those who maintain ב"ש לאו can nevertheless, agree with ר"ג ור"ה of our משנה. The גמרא offers two reasons why even ר"נ ור' יוחנן (and שמואל) will agree that the woman receives her כתובה. It is either because she has a מיגו, or because she is supported by a חזקה.²

האי שנויא לא אתיא אלא לרב נחמן -

This answer, that since the אשה has a מיגו, therefore even those who usually maintain that a ברי cannot be מוציא from a שמא who is a מוחזק, nevertheless they may agree with רבן גמליאל ורבי אליעזר of our משנה, that the אשה could collect her entire כתובה from the בעל, for in the משנה the woman has a מיגו; this answer is **not valid** for all those who maintain that ב"ש לאו ברי עדיף, it is valid **only** according to ר"נ –

דלרבי יוחנן בהיא³ דמוכת⁴ עץ⁵ ליכא מיגו⁶ כדמוכח לקמן -

¹ That is why he rules like ר"ג ור"ה of our משניות.

² In the case of שמא, there is no מיגו or חזקה to support the מלוה. However by our משניות the claim of the אשה (who is a ברי) is (also) supported by either a מיגו or a חזקה.

³ בעולה עץ. She claims she was merely a מוכת עץ. He claims that (perhaps) you are a בעולה.

⁴ A מוכת עץ is a woman who lost her בתולים due to physical trauma; but she is not a בעולה. The literal translation is 'struck (by) wood'.

⁵ There is a מחלוקת between ר"מ and the חכמים (in a משנה on יא,א), concerning the כתובה of a מוכת עץ. The חכמים maintain that her כתובה is (only) a מנה, while ר"מ maintains that her כתובה is the full מאתיים. There is an additional מחלוקת (of אמוראים on יב,ב) what the דין is in a case where the husband assumed that his betrothed is a בעולה and it turned out she was a בעולה before the אירוסין. Some maintain that she loses the entire כתובה; while ר' יוחנן maintains that she receives a מנה (see following footnote # 6).

⁶ ר"י maintains that כתובה מנה, כנסה בחזקת בתולה ונמצאת בעולה, she has a כתובה מנה. Therefore he interprets the following משנה, מוכת עץ, that she is claiming a כתובה מאתיים (following the opinion of ר"מ), while he claims that he owes her only a מנה. According to ר"י, this woman has no מיגו; there is no other claim she can present, where she would be either more believed or receive more money. Those who maintain that in a case of כנסה she receives no כתובה at all; they can interpret the משנה of מוכת עץ according to the

for according to ר"י who also maintains לאו ברי עדיף, this answer is not appropriate, for in that case (in the following משנה) concerning a מוכת עץ there is no מיגו for the woman as is evident later in the גמרא;⁷ and nevertheless ר"ג and ר"א maintain that the woman is believed (without a מיגו). The current answer, that she has a מיגו, will not explain how ר' יוחנן can agree with ר"ג and ר"א in the case of מוכת עץ; for she has no מיגו.⁸

Tosfos presents a difficulty:

הקשה הרב רבי יעקב מקורבי"ל אכתי על כרוחך הא דרב יהודה דשמואל היא -
The ר"י of קורבי"ל asked, we still must maintain that the ruling of ר"י
 concerning ברי עדיף, is identical to the ruling of שמואל that the הלכה is ב"ש ב"ע; not necessarily because he rules like ר"ג,⁹ but rather for another reason which Tosfos continues to explain:

דאי לשמואל פטור תקשי ליה ממתניתין דהשואל (בבא מציעא דף צז, א ושם: -)
For if שמואל maintains that by ב"ש, the פטור is שמא, then שמואל
will be contradicted from the משנה in השואל, which states¹⁰ that if -
המשאל אומר שאולה מתה והלה אומר איני יודע חייב -

The lender claimed that the borrowed animal died (and therefore, as a borrower, the שואל is חייב באונסין) **and the borrower says I do not know** if it was the borrowed animal that died; it could be that it was the rented animal that died (in which case a renter is חייב באונסין), the דין is that **he is חייב** to pay. It is evident from that משנה that ברי עדיף; which would be a קשיא on שמואל if he would maintain that לאו ברי עדיף.

Tosfos anticipates an obvious answer and rejects it. There are those (ר"נ ור' יוחנן) who clearly maintain לאו ברי עדיף; they interpreted that משנה in the שואל so that it would not contradict their opinion. Let us interpret that משנה in the same manner according to שמואל as well. Tosfos will explain that this is not possible.

דלשמואל ליכא לשנויי כדמשני לרב נחמן ולרבי יוחנן כגון שיש עסק שבועה ביניהן -
For according to שמואל we cannot answer this question from the משנה in
בו"ש לאו ברי עדיף for ר"נ ור"י who maintain that השואל as we answered it for

רבנן, where she is claiming (merely) a מנה. According to them, the woman has a מיגו for she could have claimed I became a מוכת עץ after the אירוסין; in which case she would be owed מאתיים. However according to ר"י there is no מיגו (even) as a מוכת עץ before אירוסין she is entitled to receive מאתיים.

⁷ [it would be advisable to peruse that סוגיא for a better understanding of this תוספות]. דף יג, א.

⁸ This may be why the גמרא gives an additional answer that in these משניות the woman is believed because she has a חזקה. This answer applies to ר' יוחנן as well; that he may agree to ר"ג and ר"א, even in the case of מו"ע.

⁹ That can be explained on account of מיגו or חזקה.

¹⁰ See previous footnote # 21.

Our Tosfos mentioned the answer for ר"נ ור"י, and explains why it is not suitable for שמואל. The answer was that the משנה in השואל in discussing a case where **for instance, there was an entanglement of an oath between them**; the שואל was obligated to take on oath for a different claim which the משאיל had against him. There is a rule of גלגול שבועה; once a defendant is obligated to swear, the plaintiff may 'roll' on the defendant an obligation to take additional oaths for other issues between them. In our case, the שואל had to swear for the משאיל for another case. The משאיל can then make him swear in this case of the borrowed/rented animal (that the rented animal died). The שואל however, cannot take the oath that it was the rented animal that died, for he himself agrees that he is not sure which animal died. Therefore, in such a case the ruling is –

ומתוך שאינו יכול לישבע משלם -

And since he cannot swear, he must pay. The משנה obligates the שואל to pay not because he is a שמא. A ברי cannot be מוציא from a שמא. The reason the שואל has to pay because there was a חיוב שבועה on him which he could not discharge. If one cannot take the oath, he suffers the consequences and must pay up.

This is the explanation of the משנה according to ר"נ ור"י. However this explanation is not valid for שמואל –

דשמואל אית ליה בהדיא בפרק כל הנשבעין (שבועות דף מז,א ושם) -

For שמואל clearly maintains¹¹ in פרק כל הנשבעין that if the oath cannot be taken for any reason, then (we do not say מתוך שאינו יכול לישבע משלם, but rather) –

דחזרה שבועה לסיני ולא משלם -

That the oath returns to סיני; Hashem will deal with it **and** the defendant **does not pay**. Therefore we cannot answer that the משנה in השואל is discussing a case of גלגול שבועה. Even if the שומר is obligated to swear on account of the גלגול, however, since he cannot swear, he is not obligated to pay (according to שמואל). The question remains that how can we possibly say that שמואל disagrees with ר"י ור"ה and maintains that ברי לאו ברי עדיף; how will he then explain the משנה in השואל where the ברי is עדיף and the שמא is required to pay.

Tosfos answers:

ויש לומר דאיכא למימר דלעולם מנה לי בידך והלה אומר איני יודע לשמואל פטור -
and one can say that it can be said, that in truth¹² in a case where the מלוה claims you have my מנה in your possession; you owe me a מנה and the לוה

¹¹ See previous Tosfos ד"ה רב הונא footnote # 1.

¹² What follows is not something that we must say (that שמואל maintains ברי עדיף), but rather what ברי עדיף שמואל can possibly maintain. In reality though, שמואל can just as well maintain that ברי עדיף.

claims I do not know if I owe you a מנה, that according to שמואל the לוח is from paying; and concerning the משנה in השואל –

ומוקי שמואל מתניתין דהשואל כשיש עסק שבועה -

שמואל will establish that the משנה in השואל is discussing a case that there is an entanglement of a שבועה between the משאיל and the שואל; the same answer that ר"נ ור"י give. The reason the שואל has to pay, even though שמואל does not maintain ממשאיל, is because שמואל will insist that the משנה in השואל follows the opinion –

וכהווא תנא דאית ליה מתוך שאינו יכול לישבע משלם והוא סבר כאידך תנא -

of that תנא who does maintain that ממשאיל; and שמואל himself maintains like the other תנא; that we do not say ממשאיל, but rather לסיני חזרה שבועה לסיני –

דפלוגתא דתנאי היא בפרק כל השנבעין (שם).

For it is a dispute among תנאים in תנאים,¹³ whether we say ממשאיל or חזרה. Therefore the משנה in השואל follows the opinion of the תנא who maintains ממשאיל, while שמואל follows the opinion of the other תנא that we say חזרה שבועה. According to שמואל by a שמא, even if the שמא is מחוייב a שבועה, nevertheless he may be פטור; for שמואל may maintain that ברי עדיף and by אשכנח we say חזרה שבועה לסיני and he does not pay.

[ועיין ביתר ביאור תוספות בבא מציעא צז,ב סוף דיבור המתחיל רב הונא]:

SUMMARY

In the case of a מוכת עץ, ר"ג ור"א cannot agree with ר"י based on the explanation of מיגו (alone).

שמואל can disagree with the משנה in השואל that requires the שמא to pay (on account of גלגול שבועה and ממשאיל); for שמואל will follow the opinion of those תנאים that maintain לסיני חזרה שבועה.

THINKING IT OVER

1. Is there any connection between the first part of תוספות (concerning ר"י) and the subsequent question and answer (concerning שמואל)?

2. The בור"ש ברי עדיף שמואל must maintain ר"י מקורבי"ל. What difficulty is there if we accept that assumption?¹⁴

¹³ The גמרא there states that ר"א derives the דין of ממשאיל from a ברייתא which teaches the דרשה on the פסוק ולא בין הירשמים and not בין הירושין (see previous תוספות ד"ה רב הונא footnote # 3). Others (who disagree with ר"א) cite another ברייתא that the פסוק בין שניהם teaches us something else and not בין הירושמים. Therefore, there is no source for the דין of ממשאיל. It is these ברייתות that תוספות may be referring to when he says that ממשאיל is a מחלוקת תנאים.

¹⁴ See חידושי בתרא אות קכח.

3. When תוספות asked the question on שמואל, was he not aware that there is a מחלוקת תנאים concerning משאיל"מ?¹⁵

4. How can the גמרא have originally assumed that ר"ה ור' יהודה (who maintain בו"ש the משנה) follow the opinion of ר"ג ור"א in the משנה? In the משנה the בו"ש is a ברי גרוע ושמא טוב. We have learnt in the previous תוספות that by a בגוש"ט, that ר"י rules that המע"ה!!¹⁶

¹⁵ See ח"ב מ"ת אות קמ.

¹⁶ This question is (more) relevant to the previous תוספות וכפשוט!