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RESTORING THE PRIMACY OF CHOSHEN MISHPAT UNDER THE AUSPICES OF HARAV CHAIM KOHN, SHLITA

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CASE FILE

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לע"נ הרב אהרן בן הרב גדליהו ע"ה

'SUM TOTAL' REVISITED

Rabbi Dayan entered his class one day. "Sometimes fact is as fascinating as fiction, and raises interesting halachic considerations," he said.

His students perked up their ears.

"Things that you learn about in theory actually occur," continued Rabbi Dayan, "but sometimes a slight variation in the case makes a marked difference in the ruling."

"What was the case?" asked one of the students.

"I encountered a sales contract of a house," replied Rabbi Dayan. "A real, official, legal contract. The contract stated that the house was being sold for $750,000."

"So, what was the issue?" asked the student.

"The contract subsequently stated that the payment was to be made in three installments," continued Rabbi Dayan. "The down payment was $75,000; the second payment $360,00; the final, remainder, payment $325,000."

"Wait, that's a total of $760,000!" called out a second student.

"Exactly!" said Rabbi Dayan. "The question is: How much does the buyer have to pay for the final payment?"

"Perhaps there was just a typo?" suggested a third student. "The typist hit the wrong key…"

"That can't be," answered Rabbi Dayan. "The amounts were all spelled out in words, both the initial sum and the amounts of the three partial payments, so that there clearly is a contradiction or error, either in the total amount or in one of the partial payments."

"I guess the buyer would pay the lower sum," suggested another student. "He possesses the money, and the burden of proof is on the seller."

"That's not simple," replied Rabbi Dayan. "The seller is in possession of the house, and the burden of proof may be on the buyer who wants to take the house."

"Interesting question," the class agreed.

"We discussed a similar case years ago in 'Sum Total,'" said Rabbi Dayan, "but this case is ostensibly different."

"What did you rule?" asked the students.

"How much does the buyer have to pay?"

"In my opinion, he has to pay only $750,000 total," replied Rabbi Dayan, "despite the seeming implication of the Shulchan Aruch otherwise. Let me explain.

DID YOU KNOW?

A non-Jew doing work for you on Shabbos, even unsolicited, can be a Shabbos violation

Ask your Rav or email ask@businesshalacha.com for guidance and solutions.

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לע"נ ר' שלמה ב"ר ברוך וזוג' מרת רייכלה בת החבר יעקב הלוי ע"ה ווייל

COURT TESTIMONY

Q: Reuven sued Shimon in civil court, and asked me to come testify on his behalf, since I know that Shimon owes him money.

Am I allowed to testify – or perhaps the question should be whether I am *obligated* to testify – in civil court, since I know for a fact that Reuven's claim is valid?

A: You did not indicate whether you were subpoenaed to testify – in which case you must consult with a Rav who is well-versed in these *halachos* (see *Yoreh De'ah* 232:14 with *Atzei Levonah,* and *Erech Shai, C.M.* 28:4) – or if the plaintiff asked you to testify but won't subpoena you, which we can address in this forum.

Before we can determine whether you are permitted to testify, we must preface with the *halachos* pertaining to causing another person to sin.

Enabling someone to commit a sin – such as handing a cup of wine to a *nazir* (a person who vowed not to drink wine) – is forbidden, under the Torah prohibition (*Vayikra* 19:14) of "*V'lifnei iveir lo sitein michshol* – Do not place a stumbling block before the blind" (*Pesachim* 22b, *Yoreh De'ah* 151:5).

This Torah-level prohibition only applies, however, if the person could not have sinned without the enabler helping him. For instance, if a *nazir* is across a river from the wine and has no way to reach it, it is forbidden for someone to bring it to him. If the person could sin without anyone's help, there is no Torah-level prohibition of *lifnei iveir*, but there is still a Rabbinic prohibition against helping someone sin (*mesayei'a yedei ovrei aveirah*; *Yoreh Dei'ah* 151:1).

Based on this, the Rema (*Shu"t* 52, cited in *Chiddushei Rabbi Akiva Eiger, C.M.* 28:3) rules that if a Jew sues another Jew in civil court without receiving permission from *beis din*, witnesses are not allowed to testify *even if* the civil court's ruling will mirror that of *beis din*, because a Jew is not allowed to litigate in secular court, even if the courts will rule the same way as beis din (*C.M.* 26:1).

Even if there is no issue of *lifnei iveir*, because the

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"The *Mishnah* (*B.B.* 176b) addresses the case of a contradiction between the amount stated in the beginning of a document and the amount repeated at the end. The amount mentioned at the end is binding; we assume that there was a change or retraction from the beginning of the document till it was finalized at the end" (*C.M.* 42:5).

"Nonetheless, the *Tur*, cited by the *Shulchan Aruch*, writes that when there is a discrepancy between individual amounts listed at the beginning and the sum total at the end, we follow the individual amounts, whether more or less than the sum total listed. We presume that the individual amounts were listed accurately, and an error clearly occurred in computing the total.

"The ruling of the *Tur* is not based on a source in the *Gemara*, but rather on the logical presumption that people are prone to err in their computation. For this reason, we follow the individual amounts even if they come to more than the sum total listed, despite the general rule that the burden of the proof is on the plaintiff and that *yad ba'al hashtar al hatachtonah* (the document bearer has the weaker hand). Thus, seemingly, we should follow the partial payments listed.

"However, the *Tur's* case was of individual amounts, such as the various parts of a *kesubah*, that were subsequently combined, so that the presumed computation error was in the sum" (*Sma* 42:14).

"In our case, though, the total sale amount was listed first explicitly, and afterwards broken down into partial payments. Here, contrary to the *Tur's* case, the computation was calculating the remainder for the final payment!

"Thus, by applying the *Tur's* very logic," concluded Rabbi Dayan, "here we should attribute the error to the computation of the final payment, and accept the explicit, primary sum mentioned initially as the binding one."

Verdict: When a computation was done, and the parts contradict the sum total, we attribute the error to the computation.

MONEY MATTERS

BAR METZRA #28
(Bordering Property)
Opportune Property

Based on writings of Harav Chaim Kohn, shlita

לע"נ ר' יחיאל מיכל ב"ר חיים וזוג' חי' בת ר' שמואל חיים ע"ה

Q: I bought a property at a rare, opportune discount. Can the *bar-metzra* claim it?

A: We mentioned last week that the *bar-metzra* cannot claim rights that are based on doing what is "good and fair," to a *hefker* property, which is rare to encounter.

Mordechai (*Kiddushin* #524), cited by *Rama* (*C.M.* 237:1), implies that the restriction of *ani hamehapech b'charara* (intruding upon a pending sale), which is also based on fairness, does not apply to something sold at an opportune price, which is like *hefker* or a gift.

Based on this, Rav David Cohen (*Responsa Radach* 27:2) writes that *bar-metzra* rights do not apply to an opportune property bought at a discount. This might apply also to a property that is rare due to its location or size, when not possible to find a comparable property elsewhere (see *C.M.* 175:7, 56; *Sma* 175:107).

However, Ramban writes that *ani hamehapech* applies to any sale (*Shach* 237:3). Accordingly, *bar-metzra* rights would apply even if the property was opportune and the buyer cannot buy a comparable property elsewhere.

(See Rav Chaim Kohn, *Kol HaTorah*, vol. 40 (5756) pp. 104-108.)

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plaintiff could have sued in court even without the witness's involvement, it is still prohibited on a Rabbinic level because of *mesayei'a* (see *Mishnah Berurah* 247:7; *Imrei Yosher* 2:115; *Darkei Teshuvah* 151:18, all of whom disagree with *Dagul Merevavah, Y.D.* 151 regarding whether there is a prohibition of *mesayei'a* — if the person is sinning intentionally).

But *Acharonim* raised two objections to the Rema's ruling:

1. The witness is not *mesayei'a* in this case because, unlike the case of handing the wine to the *nazir*, in this case by the time witness is summoned to testify, the plaintiff has already violated the prohibition of suing in secular court, so the witnesses testifying on his behalf do not help him transgress the prohibition.
2. The witness should therefore be *obligated* to testify in this case, because if he doesn't, he might transgress *lo saamod al dam rei'echa* and *hashavas aveidah* (see BHI issue #370), and by refraining from testifying, he is enabling Shimon to deny that he owes the money to Reuven and to thereby steal it (*Shaar Mishpat* 26:1).

The *Acharonim* ultimately rule according to the Rema, however, for several reasons:

1. The issue with adjudicating matters in civil court is that it lends respectability to the non-Jewish court, and the witnesses lend that same respectability when they testify.
2. The witnesses *are* enabling the plaintiff to violate the prohibition, because it is only through their testimony that the court can issue a ruling.
3. We should not be participating in secular judicial proceedings because when others see that witnesses will not testify on their behalf in civil court, it will discourage them from suing outside of *beis din*.

Regarding the argument that the witnesses are obligated to testify because of *hashavas aveidah*, the *Acharonim* rule that there is no *mitzvah* in this case because the plaintiff had no right to try to extract his money in civil court, so we certainly don't instruct witnesses to help him do so.

We also do not have to be concerned that by failing to testify in civil court on behalf of the plaintiff we are enabling the defendant to lie and steal, because once the plaintiff chose to settle his dispute in civil court instead of *beis din*, if he decides to take the case to *beis din* after the court issued its ruling, we do not accept the case, as a penalty for his having sued in civil court (*C.M.* 26:3 and *Nesivos* 2). The reason we ignore the issue of allowing the defendant to walk off with money that doesn't belong to him is that the plaintiff caused this loss to himself by taking the matter to court (*ihu d'afsid anafshei*). Since *beis din* would not take up the plaintiff's cause and prevent the defendant from lying and stealing, we certainly won't instruct witnesses to do so (*Erech Shai, Imrei Binah, Dayanim* 27, *Ulam HaMishpat*, *Avnei HaChoshen,* and *Orach Mishpat*).

If the plaintiff received permission from *beis din* to sue in court, the witness is obligated, under the *mitzvah* of *hashavas aveidah*, to testify (*Shu"t Minchas Yitzchak* 4:51).

For questions on monetary matters, arbitrations, legal documents, wills, ribbis, & Shabbos, Please contact our confidential hotline at 877.845.8455 or ask@businesshalacha.com