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**TALMUDIC METHODOLOGY**

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**Shiur #14: Cases of Successful *Tefisa***

Typically, monetary litigations that cannot be resolved through classic forensic proof are awarded to the defendant. This principle of *ha-motzi mei-chaveiro alav ha-ra’aya* is the baseline of all *mammanot* litigations. The *gemara* in *Bava Metzia* (6b) describes a dispute between a *Kohen* and the non-*Kohen* owner of a newly born animal. The *Kohen* claims – without supporting evidence – that the animal is a firstborn and therefore rightfully belongs to him. Since he cannot garner evidence, however, the animal is awarded to the non-*Kohen* defendant based upon the principle of *ha-motzi mei-chaveiro alav ha-ra’aya*. Even if the *Kohen* were to unilaterally seize the disputed animal (*tefisa*), it would be removed from his possession and returned to the defendant – *takfo Kohen motzi’in mimenu*.

Despite the apparent rejection of *tefisa* as an effective option for a plaintiff, several *gemarot* throughout Shas imply that there can be successful seizures. While some of the cases of successful *tefissa* can be attributed to unique and mitigating local circumstances, the preponderance of cases of successful *tefisa* suggests that CERTAIN scenarios allow successful *tefisa*. In this *shiur*, we will explore the conditions necessary for this success and the reasons that *tefisa* – which normally fails – is not overturned.

One case of successful *tefisa* is found in a *beraita* in *Ketuvot* (19b) in which a contract is being checked and notarized. Two witnesses testify that the contract is authentic, while two others question its validity. This situation of “*trei u-trei*” yields a stalemate, which suspends the *shetar*. Since the *shetar* has been suspended, the *tovei’a* no longer has evidence of the debt, and the disputed money remains with the *nitva*. Rashi (*Ketuvot* (20a) rules, however, that the *tovei’a* may still seize the disputed funds. The Ramban (and others) question the success of this situation of *tefisa*. The Ramban explains that although *tefisa* generally fails, unilateral seizures in situations of *trei u-trei* are successful. He does not articulate the unique dynamic of *trei u-trei* that allows successful *tefissa*.

Possibly, the success of *tefisa* in *trei u-teri* situations can be explained by probing the reason that *tefisa* usually fails. Typically, the victory of the defendant based upon *ha-motzi mei-chaveiro* is due to two complementary factors. The *muchzak*/defendant possesses an implicit PROOF that the disputed item is his. Most people aren’t thieves; we can assume that an item in their possession entered their possession legally – through purchase or manufacture. Of course, if the *tovei’a* presents a more compelling PROOF, we ignore this implicit assumption, but in the absence of proof, this unconvincing but exclusive PROOF yields victory for the *muchzak*. A second component of the defendant’s victory is not the proof that his possession yields, but the STATE of his possession. Until compelling proof is presented, *Beit Din* will retain the status quo and will not redistribute disputed monies. This victory is not based on providing proof; rather, it is a LEGAL PROCEDURE that maintains the status quo until persuasive proof has been supplied. As the *gemara* in *Bava Kama* (46b) asserts, one who is ill should visit the apothecary. In other words, the current defendant is perfectly happy retaining the status quo; the plaintiff, who seeks to create change, is tasked with providing legal impetus for that proposed change.

To summarize, it is likely that the *ha-motzi mei-chaveiro alav* *ha-ra’aya* victory of the defendant is a product of two complementary components. The defendant possesses a weak but utilizable PROOF, as well as a STATE OF AFFAIRS that is not tampered with unless convincing evidence is proffered. It is precisely the dual nature of *ha-motzi mei-chaveiro* that renders it so powerful and ubiquitous.

Unilateral seizure of the item from the defendant would succeed in switching the beneficiary of the status quo, but it would not alter the PROOF that the original possessor enjoys. If the efficacy of *ha-motzi mei-chaveiro* in general were purely procedural – to preserve the status quo – perhaps the *tovei’a* would be awarded the seized/disputed item, as he is in CURRENT possession. However, *ha-motzi mei-chaveiro* also includes a PROOF of ownership; how did the item enter “possession” if it was not owned by the possessor? Even after seizure, the *tovei’a* does not enjoy this proof since we KNOW how the item entered his possession – through extralegal seizure! The proof of the original *nitva* is stronger than the status quo of the *tovei’a* and the seizure fails.

Presumably, in a scenario in which the PROOF component of *hamotzi* *mei-chaveiro* is rendered useless, the seizure would succeed, as there is no factor overriding the STATUS QUO that the “seizer” now enjoys. Perhaps a situation of *trei u-trei* is one such scenario. Since *eidim* have supported each legal claim, *Beit Din* will no longer accept “secondary” proofs. Whereas they can rule based upon procedural issues (such as preserving the status quo), they CANNOT rely on sub-level proofs, since they have exhausted all avenues of evidence by accepting testimony. In this context, seizure would succeed because the *tovei’a* now enjoys the status quo of physical possession unopposed by any proof of possession.

A second exception discussed by the Ramban may be based on similar logic. The *gemara* in *Bava Metzia* (110a) discusses a dispute regarding a contract whose language was unclear. As in all disputes, the disputed monies are awarded to the *nitva* and he pays the minimal option rather than the maximal. However, the *gemara* surprisingly allows the *tovei’a* to seize the disputed monies. Explaining this anomaly, the Ramban claims that the unclear language of the contract will ultimately be resolved when some new evidence will surface. Cases of *avida* *li-gluyei* (in which the uncertainty will likely be settled) allow *tefissa*.

In theory, the same logic may explain this additional example of successful *tefisa*. *Beit Din* may be less eager to rely on the PROOF of possession if they anticipate stronger evidence emerging in the future. Typical litigations reach a “dead-end;” no evidence has been offered and none is expected. In this situation, *Beit Din* will rely on the weak proof of possession and award the *nitva*. However, if better evidence is expected tomorrow, *Beit Din* is unwilling to rule based on the weaker proof of possession; they MIGHT retain the status quo and award the plaintiff. Once the *tovei’a* grabs the item, HE now enjoys status quo, uncontested by PROOF of purchase, and his seizure is successful.

These two situations are complementary in that each provides a scenario in which the PROOF of purchase has been neutralized and seizure (which awards the status quo position to the *tovei’a*) may succeed. In an instance of *trei u-trei*, TOO MUCH testimony has surfaced, rendering any further evidence irrelevant. In a situation of *avida li-glulei*, the promise of more compelling evidence renders current evidence irrelevant.

These two instances represent a paradigm – situations in which the PROOF of possession is no longer relevant and successful *tefisa* may occur. Many additional successful *tefisot* are built on this model.

A second paradigm is suggested by the Shach in his Sefer Takfo Kohen (chapter 87). The Shach advances an ambitious claim. Although *tefisa* will generally fail in disputes chronicled by the *gemara*, it will succeed if the dispute results from a difference of opinion between later rabbinic discussions. This is based on a statement of the Mordechai regarding a dispute between Rashi and the Rabbenu Tam about disputed dowries. Although the father of the bride is awarded the disputed monies by the court, the husband may unilaterally seize the dowry and claim that he follows the position of Rashi that – in this instance – the husband acquired the dowry.

The Shach provides three reasons for this atypically successful *tefisa*; one of these reasons implies a new model of successful *tefissa*. The Shach reasons that since this litigation dispute involves a debate between *Rishonim*, there is significant judicial flexibility. Typically, if a judge errs and rules in a halakhically incorrect fashion, the verdict is rescinded. However, if a judge rules incorrectly regarding a debate between *Rishonim*, his erroneous verdict remains intact. Additionally, the a *gemara* in *Bava Kama* (27) allows litigants to unilaterally execute verdicts (“*ovid inish*”) that *Beit Din* cannot or will not implement, provided that they are confident of the compelling nature of the verdict (s[ee here for shiur on this subject)](http://etzion.org.il/en/avid-inish-dina-le-nafshei).

Combining these two principles, the *tovei’a* can seize the disputed item by deputizing himself as a judge through the power of “*ovid inish*” and implementing a verdict that HE believes to be correct but which the halakhic system rejected. Even though the verdict is based on a rejected opinion, the verdict is valid since it has been implemented by a self-appointed judge and legal verdicts based incorrectly upon debates between *Rishonim* are valid verdicts. This paradigm of *tefisa* is NOT based upon the *tovei’a* seizing an item and manipulating the components of *ha-motzi mei-chaveiro* (as described earlier). Instead, he is conducting the proceedings as a “*dayan”* through the self-deputizing technique known as *ovid inish*. In certain scenarios, any *dayan* – even a self-appointed one – has greater latitude to issue incorrect but binding verdicts.

A third model for successful *tefisa* emerges from an interesting comment of the Rashba (*Teshuva* 1:301). The *gemara* in *Bava Batra* provides a model for the withdrawal of *Beit Din* known as *kol de-alim gavar*. The dispute involves a boat “parked” in a river. Since neither party is *muchzak*, neither has “prior cause” (*derara de-mammona*), and one is definitely lying. In this case, *Beit Din* retreats and allows the two parties to resolve the dispute independently. Explaining the Rambam’s minority opinion that *tefisa* will operate regarding a disputed firstborn animal, the Rashba applies this principle. Neither the *Kohen* nor the non-*Kohen* possess “prior cause” since the animal was born “into a *safek*.” Most disputed items clearly belonged to someone, after which their ownership was thrown into doubt. These instances clearly invite the application of *ha-motzi mei-chaveiro* and award the defendant, even after the *tovei’a* has grabbed the item. However, a *safek bekhor* has no certain “first owner” and, like the boat, does not invite *ha-motzi mei-chaveiro*. Instead, *Beit Din* RETREATS and allows the two parties to resolve independently. In fact, the initial awarding to the non-*Kohen* owner was based upon *ha-motzi mei-chaveiro*, but upon *kol de-alim gavar*. Consequently, if the *tovei’a* grabs, he can maintain possession, since *Beit Din* has withdrawn from adjudicating this situation.

This represents a third model of successful *tefisa* – situations that disallow application of *ha-motzi mei-chaveiro* entirely and mandate withdrawal and *kol* *de-alim gavar*. Unilateral *tefisa* would succeed since *Beit Din* has not applied *ha-motzi mei-chaveiro*.