Retaining the Proceeds of Secular Court Judgments

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PART I

The *Shulchan Aruch* rules that it is prohibited to have monetary disputes between two Jews decided in non-Jewish courts, even by mutual consent.[1] Rabbi Akiva Eiger adds that if one is awarded money that he is not entitled to by Jewish law, he is guilty of theft.[2]

Nevertheless, there are instances where a party is permitted to resort to secular court. For example, if a defendant is summoned to *beit din* and refuses to appear, a *beit din* may grant permission to the plaintiff to pursue his claim in secular court.[3] *Rama* discusses a plaintiff who loses in secular court and asks a *beit din* to retry the case. He cites two views and concludes that the *beit din* should not accede to his request.[4]

The *Shulchan Aruch* and *Rama* present these two cases without any comment regarding whether the prevailing party may retain his secular court winnings. This suggests that, at least in some instances, Jewish law permits a party to retain money awarded to him in secular court, even if he would not have been entitled to that award had Jewish law been applied to the case. Especially in light of the view of Rabbi Akiva Eiger cited above, this is a surprising result. How can the ruling of the secular court govern the case? If it differs from Jewish law, one of the parties is guilty of theft!

Netivot ha-Mishpat preempts this question by ruling that a *beit din* may not grant permission to a plaintiff to pursue a claim in secular court, even if the defendant refuses to appear in *beit din*, without first ascertaining that the plaintiff's claim is viable as a matter of Jewish law.[5] Similarly, *Netivot ha-Mishpat* rules that although a prevailing party may be immune from being summoned to *beit din*, as a *halachic* matter he is personally prohibited from retaining any portion of a secular court judgment to which he is not entitled under Jewish law.[6]

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1 *Shulchan Aruch*, *Choshen Mishpat*, 26:1.
2 R. Akiva Eiger (1761-1837), Glosses to *Shulchan Aruch*, *Choshen Mishpat*, 26:1.
3 *Shulchan Aruch*, *Choshen Mishpat*, 26:2.
4 Rama, *Shulchan Aruch*, *Choshen Mishpat*, 26:1.
5 *Netivot ha-Mishpat*, *Biurim*, *Choshen Mishpat*, 26:3.
6 *Netivot ha-Mishpat*, *Biurim*, *Choshen Mishpat*, 26:2.

In common practice, however, these rulings of the *Netivot ha-Mishpat* are not observed. In fact, the *Erech Shai* expressly disagrees with the *Netivot ha-Mishpat* and holds that a *beit din* may give permission to a plaintiff to resort to secular court when the defendant refuses to appear before a *beit din*, even without actual knowledge of the validity of the claim.[7] *Erech Shai* bases this on a statement of the *Maharshal* that a defendant who refused to appear before a *beit din*, and then lost in secular court, has forfeited his right to insist that his case be heard in *beit din*.[8] Presumably, a defendant who wishes for his case to be reheard in *beit din* is of the view, perceived or real, that a *beit din* applying Jewish law to the facts of his case will conclude that the plaintiff is not entitled to the money that was awarded in secular court. The effect of the Maharshal's ruling, then, is that the plaintiff who prevailed in secular court will be entitled to retain amounts to which Jewish law does not entitle him. But why?

Part II

The prohibition to resort to secular courts is derived from the verse "*ve-eileh ha-mishpatim asher tasim lifneihem*" ("and these are the statutes that you shall place before them").[9] The Talmud derives from the word "*lifneihem*" ("before them") that disputes are to be brought before Jewish courts, and may not be litigated before heathen courts.[10] The *Ohr Zarua* explains that were it not for this derivation, it would be permitted to force a defendant to adjudicate in secular court, since Noachides are commanded to establish and abide by laws.[11] Moreover, if both parties agreed to be judged in secular court, and the court decided in accordance with Jewish law, the decision is binding. Even though the parties violated the prohibition of "*lifneihem*", post facto the decision stands, since the law of the land is law (*dina demalchuta dina)*.[12] This ruling of the Ohr Zarua establishes an important principle: the judgment of a secular court can, in limited respects, achieve *halachic* legitimacy. To be sure, Jews are ordinarily prohibited from litigating in secular courts. But those same courts play a Torah-mandated role in society, and

7 R. Shlomo Yehuda Tabak (1832-1907), *Erech Shai*, *Choshen Mishpat*, 26:2.
8 *Yam Shel Shlomo*, *Gittin*, Chapter 1, no. 22.
9 Exodus 21:1.
10 *Gittin* 88b.
11 *Ohr Zaruah*, *Baba Kama*, 1-4.
12 *Gittin* 10b.

halacha does not necessarily disregard the outcomes of secular court proceedings. According to the *Ohr Zarua*, secular courts would have jurisdiction even over a case between two Jews, were it not for "*lifneihem*".

Litigating a case in secular court usually involves the transgression of two separate prohibitions. First, as discussed above, it is prohibited to utilize secular court as a venue for resolving disputes. In agreeing to litigate in secular court, the parties are also tacitly agreeing to accept secular law as the system that will determine the outcome of their dispute. This constitutes an additional violation of the prohibition against litigating in secular court.[13] This additional violation can be corrected if the parties retry the case in *beit din*, so that Torah law will prevail. Therefore, the parties must submit to *beit din*, and *beit din* must rule according to Torah law. If the secular court ruled according to Torah law, this additional violation does not occur. A retrial would not achieve anything, since the initial violation of appearing before secular court is not corrected by a retrial in *beit din*, and the secular court's decision according to Torah law stands.[14]

Where both parties sought to litigate in secular court, they are both culpable for this double violation of Jewish law, and neither side may rely on the outcome. But a party who only resorted to secular court because his adversary declined to appear before a *beit din* cannot be said to have violated either element of the prohibition. He did not violate "*lifneihem*", as he preferred not to utilize the secular courts. And he did not violate the accompanying prohibition of accepting the secular legal system, because he never willingly accepted secular law. He is the passive beneficiary of his adversary's transgression. Since "the law of the land is law", there is no violation of theft and he may keep the award.

Part III

As noted above, a party who will only allow his case to be adjudicated in secular court may thereby give up certain *halachic* monetary rights. There are times when a party indicates a preference to litigate in secular court, but then changes

[13] *Beit Yosef*, *Choshen Mishpat*, 26:1, citing *Shu"t Rashba* 6:254. On the other hand, parties who agree outside the context of secular court litigation for their disputes to be governed by secular law or prevailing commercial custom do not thereby violate the prohibition of litigating in secular court. See Section 3(d) and (e) of the Rules and Procedures of the Beth Din of America.

[14] *Tumim, Choshen Mishpat,* 22:6.

his mind and wishes to go to *beit din*. It is up to a *beit din* to determine when the party's preference for secular court "locks in" and bars him from making claims under Jewish law. As a general rule, if a plaintiff has filed in secular court, and then wishes to compel the defendant to submit the case before *beit din*, the Beth Din of America will not insist that the defendant appear before *beit din*. A defendant's request to remove the case to *beit din*, however, is generally honored so long as no substantive proceedings have begun. After that point, we do not attribute the defendant's change of heart to repentance, but rather to a sense that he is losing in secular court, and hopes to do better in *beit din*.[15]

If one is summoned by a fellow Jew to secular court, he may have no choice but to appear. However, he should summon the plaintiff as early in the process as possible, requesting that the case be removed from secular court and heard in *beit din*. If he did not, his continued participation in secular court proceedings can be construed as an agreement to be bound by secular law in secular court. This can result in a later inability to assert claims under Jewish law in a *beit din*.

Of course, in any given case, a *beit din* is empowered to consider other views, such as that of the *Netivot ha-Mishpat*, as well as additional considerations, in arriving at a *pesharah ha-kerovah la-din*. This overview reflects the general policy of the Beth Din of America. The final decision is made by the *dayanim* in each case.

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[15] See *Imrei Yosher* 1:36.