



Debts, Defaults, and Halachah

A Practical Guide to Hilchos G'vias Chov

By: Rabbi Ari Marburger

Table of Contents

INTRODUCTION	2
Obligations of the Debtor	3
The Mitzvah of Repaying Debts	3
Protected Assets	3
Forcing a debtor to refinance	4
Working off debts	4
Debtors prison	5
A Creditor's Obligations	6
Seizing Collateral.....	7
The <i>Mesadrin</i> Process	8
Modern Day Debt Collection	8
Forcing a settlement	9
Collection Agency	10
Multiple creditors	10
Old debt.....	11
Foreclosing on a Mortgage	11

INTRODUCTION

Collecting debt has become one of the most common issues litigated in Bais Din. It is also one of the most unpleasant: Typically, the validity of the debt is unchallenged; the debtor acknowledges his responsibility to pay but simply claims that he does not have the funds available to do so. The debtor may feel that paying off his debt must wait until after his family's immediate needs are satisfied. Unsurprisingly, creditors tend to have a different perspective on the matter. They tend to focus only on the fact that they are owed money that needs to be repaid immediately. This creates a sensitive confrontation, and raises many complex questions: What are the creditor's rights and what are the debtor's obligations? May one strip a debtor of every asset that he owns, or does Halachah protect personal assets? How do we balance the rights of the creditor while allowing the debtor to survive?

While these issues are difficult on their own, the proceedings are often emotionally charged as well. The debtor is often deeply embarrassed about the situation and resents the pressure being applied. All too often, the creditor himself is under financial strain as well, making it more difficult for him to be sympathetic to the debtor's plight.

Adding to the complexity are two competing Halachic concepts: There is an important Mitzvah of lending money to a person in need; indeed, extending an interest-free loan is considered a greater Mitzvah than an outright charitable gift¹. Because of the importance of this Mitzvah, Chazal enacted numerous laws and rules to protect creditors². Chazal understood that loans would only be extended if creditors have full confidence that Bais Din will enforce their rights. Any restrictions on a creditor's ability to collect his debts would have an adverse effect on people's willingness to extend loans in the first place. Therefore, Halacha places a strong emphasis on ensuring that creditors' rights will be protected in an efficient and effective manner.

On the other hand, Halacha provides protections for a debtor who is truly unable to satisfy his creditors. A debtor who is unable to repay his debts is still entitled to his dignity, and, as long as he is fulfilling his Halachic obligations, he is protected from pressure and embarrassment.

Negotiating between the parties and balancing the competing Halachic concepts can be a difficult challenge.

This work is divided into the following section:

- 1) The Obligations of a Debtor
- 2) The Obligations of Creditors
- 3) *Mesadrin* Collection Process
- 4) Mortgages and Foreclosures

¹ Shabbos 63a.

² כדי שלא תגזול דלת לפני לווין

Obligations of the Debtor

The Mitzvah of Repaying Debts

There is an important Mitzvah to repay one's debts on time³, and one who fails to do so is considered a Rasha.⁴ Bais Din may use force to compel a person to pay his debts⁵.

Protected Assets

Halachah has very severe rules about repaying debts. The debtor must give up almost all of his assets to satisfy his creditors. He is entitled to keep only a bed, chair⁶, basic personal utensils, food enough to last for thirty days, clothing enough for twelve months⁷, *Teffilin*⁸, and the basic tools⁹ necessary for his job. All other assets¹⁰, including his personal residence, must be sold to satisfy his creditors¹¹. These limitations apply to the debtor only. The debtor may not keep money or food¹² to provide for his wife or children¹³. Although a person is obligated to provide for his family, his obligations to creditors come first. Otherwise, he is essentially using other people's money to fulfill his personal obligation to his family.

³ פריעת בעל חוב מצוה

Taz Choshen Mishpat 74:4, Radvaz 3:210, Pischey Teshuva 97:4 quoting Aruch Drabanan, Choshen Aharon state that it is a Biblical mitzvah.

See also Rashi Kesubos 86a, Ramban Bava Basra 175, Radvaz 3:210 for differing sources for the Mitzvah. However, Mordechai Bava Metzia 403, Yeraim 278 quote Smag that it is a Rabbinical mitzvah.

⁴ לזה רשע ולא ישלם. See Pirkey Avos 2:9.

⁵ Kesubos 86a.

⁶ Aruch Hashulchan 97:26

⁷ He is entitled to weekday clothing only, and may not keep special clothing for Shabbos. Chinuch 350, Mabit 3:114, Kneses Hagedola 97 tur 24, Paamoney Zahav 97.

⁸ 97:23.

See Pischey Teshuva quoting Rishmey Shaila 53 that he may not keep his *tallis*. However, Aruch Hashulchan 97:26 argues.

⁹ The debtor may keep two of each type of tool that he needs.

This exclusion is for tools only. Assets must be sold even if the debtor needs them for his livelihood (Choshen Mishpat 97:23). Presumably, a car would need to be sold as well.

¹⁰ Aruch Hashulchan 97:26 maintains that we do not take away belongings that would cause extreme embarrassment.

¹¹ Rashba 1:1143, Rabbeinu Yeruchem 6:3, Ramuh 103:5, Toras Emes 216, Shach 97 (14), Kneses Hagedola 97 (52) quoting Maharam Lublin, Shulchan Aruch Harav Halvah 5.

See Maharit 113 (also quoted by Rav Akiva Eiger) that the debtor may remain in his house for twelve months.

¹² 97:23.

¹³ However, personal items belonging to his wife or children may not be seized. For example, a creditor may not seize weekday clothing belonging to the debtor's wife. There is a dispute whether this applies to his wife's and children's Shabbos clothing as well. Choshen Mishpat 97:26.

These limited exclusions apply to loan debts. There is a dispute among the Poskim whether debts incurred on account of wages owed, guarantees made, or leases entered into are subject to these exclusions as well.¹⁴

Forcing a debtor to refinance

The debtor cannot be pressured to refinance his debts with a credit card or bank that will charge him interest¹⁵. However, if he can obtain an interest-free loan from a Jew, many Poskim require one to do so¹⁶. Other Poskim maintain that a debtor never has an obligation to borrow funds to repay a creditor¹⁷.

The above discussion applies only when the debtor has a responsible plan to repay the new debt. If, however, the debtor has no way to repay the new creditor, he certainly may not refinance. Doing so is a tremendous disservice to the new creditor. The original loan was probably borrowed in good faith with the assumption that it would be repaid. However, once the debtor finds himself unable to meet his obligations, borrowing further with the knowledge that he may never be able to repay the new creditor is completely unjustified¹⁸.

Working off debts

A debtor cannot be forced to work for the creditor in lieu of his debt.¹⁹ Although Bais Din cannot force a debtor to work, some Poskim maintain that the debtor has

¹⁴ Choshen Mishpat 97:29.

¹⁵ Rambam 2 halvah 4, Sefer Haterumos 2:1:4, Tur 99, Mechaber 99:4.

According to many Poskim, this applies to an interest-free loan from an Akum as well. (Sefer Haterumos, Rambam, and Mechaber maintain that pressuring a debtor to refinance with a non-Jew violates לא תהיה לו כנשה. [This implies that pressuring him to borrow from a Jew is permissible.]

However, other Poskim maintain that there is an obligation to refinance with an Akum if he will extend an interest-free loan. (Tur 99, and some versions of Rambam 2:4, write that it is prohibited to pressure the debtor to borrow from a non-Jew with interest; Prisha 99 (15) infers from this that if an interest-free loan is available, one may pressure the debtor to borrow. While the discussion is about the prohibition against pressuring the debtor, presumably Prisha would hold that the debtor is obligated to obtain such loans to avoid defaulting; otherwise pressuring him to do so would be prohibited. (although see Derech Sicha quoted in footnote 17)

¹⁶ The implication of the Poskim in the previous footnote that discuss cases involving non-Jews or interest is that if an interest-free loan is available from a Jew, one must refinance to avoid defaulting.

See also Rav Zalmen Nechemia Goldberg, Kuntris Hayashar V'hatov volume 2 pg 33, Shevet Hakehusee 6:430 that a debtor is obligated to refinance.

See also previous footnote.

¹⁷ Rabbeinu Tam, quoted by Hagoias Maymanee Ishus 12 (8). See also Tasahbetz tur 3:17, Bier Moshe 8:27(9), Rishimas Shiurim Bava Kama 89A.

See also Derech Sicha Parshas Mishpatim pg 302 that there is no obligation to borrow to repay a debt. Nevertheless, pressuring a debtor to refinance would not violate לא תהיה לו כנשה.

¹⁸ Chut Shani Shabbos Vol. 1 page 46 based on Rabbeinu Yonah Avos 2:9. Chut Shani specifically prohibits borrowing with the intent to repay the debt by borrowing from another G'mach and perpetually kiting the money.

¹⁹ Choshen Mishpat 97:16, Teshuvos Harosh 78:2.

a personal obligation to do so in order to fulfill his Mitzvah of repaying his debts²⁰. In addition, some Poskim maintain that if the debtor had been employed and now refuses to work simply to deprive the creditors, Bais Din can force him to continue working as he did in the past²¹.

Debtors prison

Although the concept of debtor's prison does not exist in Halachah, Ramuh writes that if Bais Din suspects that the debtor is hiding assets, they may jail him until he confesses²². Tumim adds that the custom in his time was to jail debtors immediately; Bais Din apparently operated on the assumption that there were probably hidden assets (although Tumim himself objects to this practice)²³.

See also Igros Moshe Choshen Mishpat 3:19 that a thief may not be forced to work to repay his victims.

²⁰ Shaar Mishpat 97 (3) according to some Rishonim. However, Shar Mishpat concludes that the Halacha follows the opinions that one is not obligated to work.

See also Shulchan Aruch Harav Halvah 5 that implies that although one is not obligated to take a job in order to repay debt, he is considered לווה רשע ולא ישלם if he declines to do so.

²¹ Mateh Shimon 97 notes on Bais Yosef 9 quoting Erech Lechem 97:15 and Radvaz 1:60, Aruch Hashulchan 97:25. However, Teshuvos Harosh 78:2 seems to disagree.

²² Choshen Mishpat 97:15, Rashdam 390 explains that only people who were trying to hide their assets were jailed. Jail was not a punishment for owing money; rather, it was a method used to force debtors to pay with the assets they were hiding.

²³ 97 (13). This custom is recorded in Rivash 484 and Mateh Shimon 5 as well.

A Creditor's Obligations

Halachah places strict limits on collecting debt. Provided that the debtor is complying with his obligations (discussed above), there is a Biblical prohibition against the creditor²⁴ oppressing him²⁵. It is forbidden to 'act like a creditor', which includes demanding repayment when the creditor knows that the debtor does not have the funds available. Even walking by the debtor so that he will be reminded about the outstanding debt is forbidden²⁶. However, these restrictions apply only when it is clear that the debtor has absolutely no funds or assets that he is Halachically obligated to relinquish. In such situations, demanding repayment is unnecessarily causing the debtor pain. If, however, the debtor has assets or funds that can be used for repayment, the creditor has every right to collect such assets.

This leads to a vital point: The reality is that virtually everyone has some liable assets. As explained above, the assets which a debtor is Halachically permitted to keep for himself are extremely limited. He is obligated to sell off virtually all of his assets in order to satisfy his creditors. Therefore, because the prohibition against demanding repayment applies only when the debtor has absolutely no assets that he is Halachically liable to relinquish, in practice it is highly unusual for a collection attempt to violate the prohibition, as it is perfectly legitimate to pressure the debtor to honor his Halachic responsibilities²⁷. If, however, the creditor knows that the debtor can only afford to make partial payments, demanding the entire balance due would violate the prohibition.

The prohibition against pressuring the debtor applies only when the creditor knows that the debtor does not have funds or assets available to repay the debt²⁸. If the

²⁴ Kesef Hakadashim 97:1 limits the prohibition to a debt created through a loan, but writes that it is appropriate for all creditors to abide by these restrictions. See also Derech Sicha Parshas Mishpatim that argues that the prohibition applies to all debts.

²⁵ לא תהיה לו כנושה. These Halachos are discussed in Choshen Mishpat 97.

²⁶ Sefer Chassidim 327 writes that a creditor should cross the street to avoid meeting his debtor if the latter does not have funds available to pay. Aruch HaShulchan and Maharam Shif Bava Metzia 75b also imply that the prohibition applies even if the creditor is not intentionally causing pain to the debtor.

See Lechem Mishna Halvuh 1:2 that this prohibition is Rabbinic.

²⁷ Shulchan Aruch Harav Halvah 2, 13

²⁸ Mechaber 97:5, Rambam Halvuh 1:2, Kesef Hakadashim.

See also Minchas Chinuch Mitzvah 67 that raises a question based on the rule 'safek deoraysa lchumruh'; when there is a doubt concerning a Biblical commandment, we are stringent to avoid any violation. Therefore, if one is unsure whether the debtor has money, should it not be forbidden to attempt collection, as this represents a doubt regarding a Biblical prohibition? Kesef HaKadashim answers that the prohibition is against oppressing עני עמך 'the pauper by you'. He interprets the prohibition to be limited to oppressing one who is 'by you', i.e. in your eyes, a pauper. If you are unsure whether he truly is unable to pay, he is not classified as 'a pauper by you', and you may attempt to collect without any fear of violating the issur. Thus, the prohibition cannot apply in cases of doubt.

creditor is unsure whether the debtor has the means to pay, he is permitted to ask for repayment.

Seizing Collateral

A creditor may not take matters into his own hands and seize collateral²⁹ from the debtor³⁰. He must sue the debtor in Bais Din to force him to repay. Even a Bais Din is typically precluded from forcefully entering the debtor's house to seize collateral. However, if Bais Din suspects that the debtor is hiding assets, this restriction may not apply.³¹

These limitations apply only to debtors and to certain types of guarantors. Other debts may not be subject to these restrictions³².

²⁹ See Nemukay Yosef Bava Metzia 113, Ktos 97:2, Choshen Mishpat 4:1.

³⁰ Sma 97(7) writes that the creditor may not unilaterally seize any assets from the debtor. In contrast, Bais Din may seize certain assets, but may not enter the debtor's house. Rabeinu Tam in Sefer Hayashar 602 permits Bais Din to enter the debtor's house in order to seize assets to repay the creditor. They may not, however, seize collateral; only assets that will be used for payment.

³¹ Ramah, Tur Choshen Mishpat 97:26, Teshuvos Harif, Bais Yosef Bedek Habayis 97.

See however Sefer Haterumos 1:3:2, Ktos 97:2 that permits this only in extenuating circumstances.

³² Choshen Mishpat 97: 14.

The Mesadrin Process

If a debtor does not repay his debts, Bais Din begins the process of *Mesadrin*. The debtor must physically bring all of his possessions to Bais Din³³. Bais Din returns to the debtor the limited personal belongings that he is entitled to retain, and sells all of his other belongings.

This asset sale is not a one-time event. Any monies or belongings that the debtor acquires in the future must be given to his creditors³⁴. The concept of a bankruptcy release does not exist in Halacha³⁵.

Rambam writes that as a matter of strict Halachah, Bais Din may accept the debtor's claim that he is unable to pay, and has no obligation to interrogate the debtor or to investigate whether the claim is true. Nevertheless, the Geonim, upon seeing that people were taking advantage of this leniency, obligated the debtor to take an oath that he has no hidden assets, and that he has not transferred any of his assets to avoid collection. Furthermore, the debtor must take an oath that he will fulfill the obligations of *Mesadrin* and will not retain any future income for himself or his family.³⁶ If he does not take this oath, the creditor may summon the debtor to Bais Din every thirty days to verify that he is in compliance with his obligations.³⁷

Rambam adds that if Bais Din determines that the debtor truly has no assets and the creditor is demanding an oath simply to pressure or embarrass the debtor, they may not impose the oath.

Modern Day Debt Collection

A typical contemporary Din Torah regarding debt collection bears little resemblance to the *Mesadrin* process described above³⁸. It is unheard of for Bais Din to demand that the debtor deliver all of his possessions to the Bais Din office. Furthermore, it is rare for a creditor to demand that the Bais Din sell off the debtor's personal belongings in a 'garage sale'³⁹. Instead, the contemporary procedure involves Bais Din demanding that the debtor provide all of his financial records. These may include tax returns, credit card and bank statements, and pay stubs. Bais Din will then review the debtor's lifestyle to determine if it is appropriate for his status as a debtor. For example, luxuries are not allowed, as a debtor has no right to splurge on anything more than

³³ Choshen Mishpat 97:23

³⁴ See Shulchan Aruch Harav Halvah 5 that whenever the debtor receives any funds, he is obligated to pay them to the creditor. However, he may keep the amounts needed for *Mesadrin* (30 days food, 12 months clothing) based on the time he received the funds.

³⁵ The Halachic ramifications of a civil bankruptcy is beyond the scope of this work.

³⁶ Choshen Mishpat 99:1.

³⁷ 99:1. Alternatively, the debtor may take an oath at the time of collection that he will comply with the guidelines of *Mesadrin* for all future income. See, however, Pamoney Zahav 99:1 that writes that the custom is not to allow such oaths, since debtors typically feed their wife and children or keep too much for themselves, thus violating their oaths.

³⁸ See Teshuvos Vhanhagos 4:306 and Rav Shaffran (Yosher Vtov 4 pg 22) for suggestions as to why Bais Din does not enforce these Halchos to the strict letter of the law today.

³⁹ See Rav Shaffran in Yosher Vtov 4 pg 21 that suggests that a debtor cannot be forced to sell off his personal belongings, since they would only fetch a fraction of their true value.

his own bare necessities⁴⁰ until his debts are repaid. Bais Din will then impose a payment plan based on the debtors' financial situation.

In practice, debtors are usually reluctant to open up their personal lives for review. When confronted with their obligations and the process they will be forced to endure, they are often willing to work out a reasonable payment plan that is acceptable to the creditors.

Creditors, for their part, often come to Bais Din convinced that the debtor is taking advantage of them and maintaining an inappropriately high lifestyle while refusing to pay back his debts. If the debtor cooperates with the *Mesadrin* process and openly discusses his bleak financial situations, creditors generally become more understanding. Thus, it is rare for a creditor to actually insist that the strict rules of *Mesadrin* be followed to the letter of the law⁴¹.

However, this holds true only if the debtor works in good faith to repay his debts. If, however, the debtor withholds information or is not completely forthcoming, the Bais Din may insist on enforcing these Halachos in a stricter manner⁴².

Bais Din is obligated to enforce these laws strictly, and may not bend the rules out of pity for the debtor⁴³. Although there are situations where the creditor should be flexible and try to help the debtor, Bais Din is charged with enforcing the parties' strict Halachic rights, and must collect any assets to which the creditor is entitled.⁴⁴

Forcing a settlement

A debtor may not withhold payments from a creditor in order to force a settlement. A settlement reached by such illegitimate tactics may not be valid.⁴⁵ Even if the parties sign a release, the creditor may afterwards return to Bais Din to collect the balance

⁴⁰ As mentioned before, the debtor may not even support his family. The exclusions for food and basic needs apply only to the debtor himself. His family will be forced to accept public assistance.

⁴¹ See Pelah Yoetz 'Chov'.

⁴² See footnote 9

⁴³ Choshen Mishpat 97:5.

⁴⁴ There is a discussion in Choshen Mishpat 12 whether Bais Din may force a party to act לפנים משורת הדין Mordechai Bava Metzria 257, Agudah Bava Metzria 34, Bach 12.2, Shach 259 (3), Haishiv Moshe Yoreh Deah 48, Mishne Sachir Choshen Mishpat 4 maintain that Bais Din can force a party to act לפנים משורת הדין, while Bais Yosef 12 (mechudash 5) quotes Rosh (Bava Metzria 2:7) and Rabbeinu Yeruchem that Bais Din may not force one to act לפנים משורת הדין. Ramuh seems to follow this approach, as does Shev Yaakov Even Haezer 29. A third set of Poskim rule that while Bais Din may not force a party to act לפנים משורת הדין, they may exert verbal pressure on him to do so. (Shvus Yaakov 1:168, Pischey Teshuva Choshen Mishpat 12, Chachmas Shlomo, Aruch Hashulchan 12.2, Tumim 12.4, Tzemach Tzedek 89.).

Regardless of the above, with respect to collecting debt, the Mechaber clearly states that Bais Din must strictly enforce all of the creditor's rights, and may not be lenient on the debtor out of pity. Presumably, when a debtor owes money to which the creditor is entitled, there is no לפנים משורת הדין for the creditor *not* to demand what is due. However, the mitzvah of tzedaka would apply in many cases.

⁴⁵ Choshen Mishpat 12:6

See also Nesivos 12 (3), Aruch Hashulchan 12:5, Tumim 12 (5).

See also Ktzos and Nesivos 205:3.

that was 'forgiven'.⁴⁶ However, there is an important distinction between a legitimate settlement and extortion: If the debtor threatens to withhold assets to which the creditor is entitled, it is considered extortion and the settlement will be void. However, if the debtor truly has no assets and offers to refinance the debt with a credit card if the creditor will forgive a portion of the debt, the settlement is valid. Because the debtor is offering to do something he is not Halachically obligated to do—borrowing money from a third party with interest—he may negotiate with the creditor for a partial forgiveness of the debt in exchange.

Collection Agency

If a debtor is truly unable to pay off his debt, the creditor may not sell the loan to a collection agency. Doing so exposes the debtor to risks and expenses for which he may not have been Halachically liable, since the collection agency will not follow Halachah⁴⁷. If the creditor sells the debt, he may be liable for any extra expenses the debtor incurs above what should be Halachically imposed⁴⁸. If, however, the debtor has assets and simply refuses to cooperate with Bais Din, the creditor may sell the debt to a collection agency⁴⁹.

Multiple creditors

If a debtor has some assets, but not enough to satisfy all of his debts, and all of the creditors have the same level of priority⁵⁰, there is a dispute among the Rishonim

⁴⁶ Teshuvos Harashba, quoted by Bais Yosef 205.

⁴⁷ Nesivos 61 (6), Mishpat Shalom 175:53, Kesef HaKadashim 50.

The concern is that a non-Jewish company will not follow Halacha, and may consequently cause the debtor to incur expenses for which he should not be Halachically liable. The implication is that if it is clear that the collection agency will follow appropriate Halachic guidelines and not cause the debtor any additional expenses, it would be permitted.

See also Shut Ritvah 14, Mechaber Choshen Mishpat 26:4.

⁴⁸ Mechaber 26:4.

⁴⁹ Ramuh 26:4 based on Teshuvos Ritvah 14, quoted by Bais Yosef 65mechudash 16,18.

See also Bier Hagolah 26 (40) that the creditor needs permission from Bais Din before selling to an Akum. See also Erech Shey 26 that disagrees.

⁵⁰ If the debtor owes money to a number of creditors and does not have enough assets to satisfy all of his debts, the earlier creditors have priority over later creditors, provided: 1) they are collecting real property (See, however, K'tzos), and 2) the real property was purchased before the second debt was created. However, when the assets being seized are Mitaltilin, or if they were purchased by the debtor after he incurred the other debts, no creditor would have priority over the others.

Regardless of the above, current wages are paid before creditors, since wages are subject to the prohibition against Bal Talin. This applies only to current wages. However, wages that are past due would be treated like any other debt.

See also Maharsham 3:259 quoting Birkey Yosef Y.D. 284 quoting P'nay Moshe who maintains that an indigent creditor has priority over wealthy creditors. However, Divrey Malkiel 5:278 and Chofetz Chaim Ahavas Chesed Chelek 1 Chapter 10 Nesiv Hacheshed 19 presume that no priority exists.

whether the assets are divided pro-rated based on the total debt⁵¹, or whether each creditor receives the same amount regardless of the amount owed⁵².

Old debt

There is no statute of limitations in Halachah. Accordingly, a creditor may collect debt regardless of how old it is. Nevertheless, if the debt is old and there were no previous attempts to collect it, Bais Din is obligated to carefully research the matter to determine if the debt is legitimate⁵³. Nesivos adds that if there is no legitimate justification why the debt was not collected earlier⁵⁴, the debtor is believed if he claims he repaid the debt, even if the creditor has a valid promissory note. For these purposes, a loan is considered old if it three years past its due date, while an Iska would be considered stale six years after its due date.⁵⁵

Foreclosing on a Mortgage

Creditors often have legal mortgages that can be enforced in civil courts. When the debtor defaults, the creditor often wants to use the legal documents to foreclose on the mortgaged property. The question arises whether this is permissible, or whether the parties are obligated to go to Bais Din.

Typically, any issue between two Jewish parties must first be adjudicated in a Bais Din. There are two reasons why a Bais Din is required. Firstly, if the parties litigate in secular court, the verdict will be based on civil law as opposed to Halachah. If the award is greater than what they are entitled to according to Halachah, the excess monies are considered stolen. The only way to ensure that the verdict reflects Halachah is by presenting their claims to a qualified Bais Din. The second issue is the prohibition against Arkaos. Even if a civil court will rule in accordance with Halachah, the very act of litigating in a secular court is prohibited and causes a Chilul Hashem.

⁵¹ Rabeinu Chananel quoted by Tur 104.

Maharsham quotes Shem Aryeh Choshen Mishpat 66 that the Minhag is to follow this opinion. HaRav Mendel Shaffran Shlita follows this ruling as well. (Tevunas Ari volume 3 pg 167)

⁵² Choshen Mishpat 104:10.

For example, if there are three creditors, owed \$100, \$200, and \$300 respectively, and the debtor has only \$300 worth of assets, each creditor would get \$100. If the payments were prorated, the payments would be \$50, \$100, and \$150 respectively. If the debtor had \$360, a pro-rated division would be \$60, \$120, and \$180. The per-creditor calculation would be \$100, \$130, and \$130.

Aruch Hashulchan 104:15 rules that the halachah is to divide the assets equally among creditors. Nevertheless, the common practice is to pro-rate the assets. Aruch Hashulchan recommends that the parties reach a compromise.

⁵³ Rashdam 367, quoted by Kneses Hagedola 61 (13), writes that if Bais Din sees a legitimate reason why the debt was not collected, the debt is valid. If, however, there is no plausible explanation, Bais Din should make a P'shara Karov L'din. The custom described by Nesivos and Ateres Tzvi is not to collect a debt if there is no clear justification for the delay.

⁵⁴ Ateres Tzvi 61 (16).

⁵⁵ Choshen Mishpat 61:9.

There is an important dispute between the Maharsham⁵⁶ and Maharash Engil⁵⁷ whether the prohibition against Arkaos applies to collecting a debt. Maharsham writes that a *Chov Borur*, an undisputed debt, may be collected by foreclosing in civil court, and there is no need to go to Bais Din first. (It should be noted that even the Maharsham concedes that it would be a *Middas Chasidus* to get permission from Bais Din before initiating the civil foreclosure process). Maharsham explains that the prohibition of Arkaos, litigating in secular court, does not apply since this is not what Halachah considers litigation; it is viewed simply as a formality necessary to take possession of the property to which the creditor is entitled. In addition, Bais Din today does not have the ability to physically take possession of a property. Accordingly, under this view one may foreclose through a secular court system.

Orchos Hamishpatim⁵⁸ and Maharash Engil object to this leniency and point out that there are many Halachos regarding collecting debts, including how much time a debtor is given to raise the funds he needs, the type of assets he is obligated to sell, and how the assets are sold—and these are all matters that may be treated differently in civil court than in Halachah⁵⁹. Furthermore, civil courts may impose additional fees such as interest charges, court costs, or other fees that may not be Halachically appropriate. Additionally, if a *Heter Iska* was executed between the parties, other Halachic concerns may be raised. As such, a Bais Din is still necessary to determine the creditor's rights and the correct way to collect the debt. Even if the prohibition of Arkaos does not apply, there remains a necessity for a Halachic determination of the creditor's exact rights. Therefore, one must first bring the matter to a Bais Din before initiating a civil foreclosure process. Orchos Hamishpatim adds that the only valid application of the Maharsham's leniency would be when the debtor admits that he owes the money and that he has the necessary assets, but nevertheless refuses to pay.

The foregoing dispute assumes that the debtor admitted to the validity of the debt. However, if the debtor challenges the validity of the debt, then there is real litigation between the parties, in which case the litigation would require a Bais Din according to all opinions, even if the creditor is completely convinced that he is correct.

⁵⁶ 1:88.

See also Emes L'Yaakov Bava Kama 27 that suggests (although does not issue a definitive ruling) that using the courts to recover an item that is clearly yours and does not require a verdict would not violate Arkaos.

⁵⁷ 7:133:2

⁵⁸ 46:26

⁵⁹ It should be noted that today, virtually all of the civil laws regarding debt collection are more lenient on the debtor than Halachah, in which case this argument would not apply. However, one needs to be very familiar with both the civil laws and Halachah before relying on this presumption.

In conclusion, in some cases there is basis to use the civil court system to collect an undisputed debt. However, one should certainly consult with a Rav or Bais Din to ensure that that the specific instance does not implicate any corollary Halachic issues.

Letters of Approbation/הסכמות ודברי ברכה

REPORT

THE

OF

AND

BY

OF

אשר זעליג ווייס

כגן 8

פעיה"ק ירושלים ת"ו

כס"ד

תאריך י"ג כסלו ס"ו

היין באיז איר ספרו הנפלא אל ערב גליון הג'וין ציין אומתה היורב אומתה
אל באנה הרב זכרי מאכונלך אילא"ו. היינטיג וקומת זיל לוי, אגניי צה וסער צורק ושרה קטל,
לכאזי בארמא פטוקמא כסוליות בקלות לקמקן אפס כלטה דינרה ונדמה קלטה האומלית
האומלית. ויטה עזי האמכר אילא"ו דומת געיון, בג אירנת, דס צי נכיון וקאז
טעם נקזת.

נכדי אומתמא לקרא וקומת אגניי זיר לעלו דחורה גמיותו יולד אטני
דקית געיון גיחולמז ציה"ק, ניהוישו ענקר בריג וטמאן צה ככג נאמז גלענאז
טעם באנון.

ברומי אגרה"ק אילא"ו קיחקלנו עכיוו ציליון געגניי אל היינטיג העצה,
ווצכה אגנעניל יעררה נאגיסנדיה קלימחג ואלוי ונחת.

דיאגכה רב

דקיניסו געוויימא



נושא יפוצי הרב האוון הר' אר"י מרקדאר שיטא נשא לקו
 אצוה אה הרקום וצוק מתוק אה עזיזה שחן מאה טוב
 קצניני מקה וממכר אלא צרכי תורה נעוצוג אלהוג
 אלו אשר הנפיקוג ככה. וואשר מציג אריש' קינ' אמוני
 הוצוסקום קצ"ה וירב אצומקא של הלהוג. קכשן יק צפג
 אהקבור ולסבר אה יצקרים מסוברים וצרוכים. אשר
 נתיקנו מתוק פאפא וצוק הרקום, וואס כי צ"ה צמוקים כים
 וקא שני קלי ישנה הפין אמנם כפאלי הלהוג והמסע
 ימצאו המציינים יצוק מוכן אפניקו

הכות אפוקו התורה
 עומדי וצמלי
 והושע קיפוע

בס"ד

ב"ה

יום 5 אדר תשס"ז

בחפץ לב הנני בא בשבחו של הרה"ג הנעלה, ברוך הכשרון, אברך כפשוטו וכמדרשו, הרב ר' ארי מרבורגר שליט"א מחשובי הלומדים בעי"ת לייקווד יע"א ודיין מצויין בבית דין מישרים דשם, וספרו שחיבר על עניני חושן משפט.

להגיד נחיצות ספרו היקר על עניני חושן משפט למעשה, הוא אך למותר, אכן ייחודיות הספר הוא שמדריך את הלומד להתנהג על פי דין תורה בסוגי המסחר הנהוגים היום. כדי להקל הקורא כתב הרב הנ"ל את ספרו בלשון המדוברת בסדר נפלא וכדי שלא יהיה כספר החתום, כתב בהערות המקורות לכל דין בקיצור נמרץ ומדויק.

וכדי שלא יחסר המזג, דרוש דרש במקומות הנחוצים, את חוקי ומנהג המדינה, לדוגמא בדינים הנוגעים לכתיבת חוזים (קאנטראקט) כתב את הדברים הצריכים תיקון שיהיה נעשה כדין תורה. ובה בודאי עשה מצוה גדולה, כי מלבד שיש בספר תועלת בלימוד המביא לידי מעשה, עוד יותר נעשה בזה מצות השבת אבדה למנוע הפסד ממון ועגמת נפש.

ואינני בא בזה כשר המסכים, כאשר משרה זו ממני והלאה, אלא הנני נמנה להיות שותף לדבר מצוה, לחזק את ידי הרב הנ"ל שיצליח בפעלו להרבות הלימוד והידיעה במקצוע שאדם אוכל פירותיהם בעולם הזה והקרן קיימת לו לעולם הבא.

הדיין מקרה ב"ד
ח"מ קאהן



בס"ד

כ"ז יום לחדש שבט תשס"ז לפ"ק

ענוותו של ידידי היקר והנכבד הרב הגאון מוה"ר ארי שמעון מארבורגר שליט"א תרבני, בדרישתו כי אבוא בדברי הסכמה על ספרו הנוכחי "משפטיו לישראל". ובכן, לא אמנע הטוב מבעליו, ומקצת שבחו ייאמר בפניו, כי ביודעי ומכירי קאמינא, אשר במשך השנים שעשינו יחד בלימוד מילי דנזיקין, וביותר בתקופה הנכבדה מאז, כד הוי יתיבנא בצוותא במותב תלתא זימנין טובא, אנא סהדא דאיתמחי גברא עד מאוד במשנתו הסדורה בהאי הילכתא רבתא, ונפלאתי לחזות מקרוב במומחיותו המיוחדת לרדת לעומקא דדינא, לאסוקי שמעתתא ולהגיע לחקר דין אמת לאמיתו מתוך כשרון של התמצאות מושלמת בפרטי הדו"ד המובאים בפני הבי"ד.

ואכן, מתוך עסקו התדיר בדיני דמונא שבני"א דשים עליהם בעקבם באין-יודעין, נתעורר הרב הנ"ל שליט"א בכוונה טהורה לחבר ספר כללי בלשון קלה וצחה, על-מנת להעיר תשומת לב הרבים להילכתא גבירתא והררי-הררים של מכשולות חמורות התלויים לפעמים אף בשערה אחת של עסקי משא-ומתן. ואם בכל דבר הלכה תמיד יש להעיר לעורר, לפקוח עין ולהזהיר הגדולים על הקטנים – וכפי שנהגו גדולי עולם וצ"ל לעמוד על המשמר ולהודיע לעם חוקי האלוקים ותורותיו – כמה יותר נחוץ בן בכל הנוגע לחלק חו"מ שבשו"ע, שבו אין ביד כל אדם "מסורת-אבות" של מנהג והנהגה, דרך ואורח-מישרים, ושלא כבהלכות שבחלקי או"ח ווי"ד שהרבה מהם כבר מושרשים בקרב הציבור ע"פ מה שראו בקודמיהם.

ואנא סהדא גם אהא דאיתמחי קמינא, באשר בעוברי על חלק נכבד מספרו נוכחתי על עריכתו בטוטו"ד, כי מיד ה' על המחבר השכיל לפרוס ביריעתו המצומצמת מערכה נכבדה של ידיעות נרחבות בתחומים הנוגעים ביותר לחיי המעשה, באופן שהקורא ילמד להבחין ולדקדק בשאלות ובספיקות ההלכתיות השונות הכרוכות במצבים ועסקים שונים – מה שלא עלה על דעתו עד האידינא. וא"כ מה נשגב פעלו של המחבר הדגול לסקל המסילה ולהרים מכשול מדרך הרבים אשר ייאותו לאורו, ואשר בזכותם לא יבוא חטא על ידו, כמאמרם ז"ל (יומא פז).

ועל כגון דא שנינו (תנחומא משפטים ה וכע"ז במ"ד): "רבי אליעזר אומר, אם יש דין למטן אין דין למעלן, אם אין דין למטן יש דין למעלן. כיצד, אם יעשו התחתונים את הדין מלמטה, אין הדין נעשה מלמעלן. לפיכך אמר הקב"ה, שמרו את המשפט, שלא תגרמו לי לעשות משפט מלמעלן, שנאמר ואלה המשפטים". ובכן נחיל נא למרום, כי חלקו של הספר דין יהא שמור בהפיכת מידת הדין לרחמים, עד כי יגולו רחמי ית' עלינו לגאלנו בדבר ישועה ורחמים, בב"א.

בברכה אהבה ואחוה למחבר הדגול שליט"א, שיוכה להוסיף אומץ ולהרבות חיל באסוקי שמעתתא אליבא דהלכתא, להקים עדות ביעקב ולהשים תורה בישראל, מתוך בריות גופא ונהורא מעליא, הנני ידו השמח בגדולתו באמת ובתמים,

יששכר דוב הכהן כהנא

יששכר דוב הכהן כהנא

אבי"ד בי"ד מישרים, ליקוואוד יצ"ו