

Can a Bais Din's Peshara Take Away The Power of "Hamotzi M'Chavero Alav Haraya"?

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Question: Typically, if one party has the money under dispute in his possession, he has the upper hand because of the rule of "*hamotzi m'chavero alav haraya*." This means that the other party has to prove that it deserves to be rewarded the money, and if they can't do this, the party holding the money gets to keep it. If the sides grant *bais din* the right to rule according to *pshara*, does the one holding the money lose this advantage?

Answer: If there is a dispute amongst the Poskim regarding a halacha, the party that is holding the money – the "*muchzik*" – usually can retain it in his possession as long as he has any halachic support for his claim, even if it is the minority opinion.

If one agrees to allow *bais din* to offer a *pshara*, however, Rav Zalman Nechemiah Goldberg says that he may not be able to keep the money in his possession by relying on the minority opinion in the Poskim.

It seems that common practice is that the one holding the money is given the upper hand in a more even dispute amongst the Poskim, and he is permitted to rely on a minority opinion in order to keep the money.

However, if there are many Poskim against him and only one on his side, the common view is that it is appropriate to make a *pshara*.

An example of a case where *dayanim* may urge a *muchzik* to make a *pshara* is a recent story where a *talmid chochom* reserved a slot to bake matzohs at a certain bakery and indirectly caused the bakery a loss by canceling the job. In such a case, most Poskim rule that the man would be obligated to pay the workers. One reason why he is liable is because the Poskim look at this as a case of *garmi*, the type of indirect damage that one is liable for. However, there is a minority opinion – that of the Ketzos Hachoshen in the name of the Maharam Rottenberg – that this type of case should fall under the category of "*grama*", the type of indirect damage that one is exempt from paying for.

When this *talmid chochom* asked a *shailoh* whether he should pay or not, the Rov told him that he can exempt himself from paying by saying that he relies on the opinion of the Ketzos. However, I would tell him that because he is a Torah scholar who often goes beyond the letter of the law, it would be proper for him to make a *pshara* to pay the bakery something and not to rely on the minority opinion that would exempt him.