

**YESHIVAT HAR ETZION**  
**ISRAEL KOSCHITZKY VIRTUAL BEIT MIDRASH (VBM)**  
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**TALMUDIC METHODOLOGY**  
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**SHIUR #11: BARI VE-SHEMA - PART II**

Having addressed Rav Huna's position – that bari ve-shema is sufficient and independent grounds to override the chezkat mammon (physical possession) and facilitate collection, we might turn our attention to the dissenting opinion of Rav Nachman and Rav Yochanan. They claim that bari ve-shema is not a tool which can extract money and that in fact the chezkat mammon prevents the claimant from collecting despite his bari ve-shema. Did Rav Nachman and Rav Yochanan entirely reject the notion of bari ve-shema? Do they maintain that we do not compare strength of claims and do not infer any evidence from a relative disparity between them? Or do they believe that bari ve-shema does, indeed, constitute some form of evidence to the benefit of the bari, but such insubstantial evidence is insufficient to override the prevailing assumptions of chezkat mammon - that the possessor is considered the owner until proven otherwise?

This question strikes at the heart of Rav Nachman and Rav Yochanan's position and yields several interesting consequences.

Would Rav Nachman admit to bari ve-shema's effectiveness if it does not face opposition by chezkat mammon? What would happen, for example, if bari and shema claims were lodged about an animal wandering freely in reshut harabim – presumably an animal upon which no chezkat mammon is exerted? Would bari ve-shema provide sufficient evidence to award the animal to the bari despite the fact that someone else is designated the mara kama (last known owner, though not the person currently in physical possession of the disputed item)? This issue is debated by the Ra'avad (cited in the shitta mekubezet to Bava Metzia 100), who holds that Rav Nachman would concede the success of bari ve-shema, and the Ramban (in his comments to Bava Batra 34b), who claims that even under these circumstances bari ve-shema would be ineffective. Conceivably, the Ra'avad interpreted Rav Nachman's position as a qualification of bari ve-shema.

Indeed the comparative strengths are telling, but not telling enough to overpower *chezkat mammon*. They are, however, powerful enough to defeat the weaker force of *mara kama* and award the item to the *bari* claimant. By contrast, the Ramban might have read Rav Nachman's view as an utter rejection of *bari ve-shema*, granting it no role whatsoever in extracting moneys.

A second question pertains to a very particular form of *bari ve-shema*. Classically, the *shema* is expressed about the original debt. The claimant demands money based upon a particular event (an alleged loan or deposit of an item,) to which the defendant responds that he is unsure whether the event in question ever took place. What would happen if the defendant concedes the original event but expresses uncertainty over whether payment or return of item ever occurred? This situation, known as *'eini yodei'a im peratikha*" (I don't know whether I paid back), is discussed by the Mishna in *Bava Kama* (118a). The mishna claims that everyone (including Rav Nachman) would concur that *bari ve-shema* is effective, since the defendant admits a *chezkat chiyuv*. He agrees that he, at some point, owed the money. Given this agreement, the comparative strengths of the claims – which favors the *tovei'a* - would be effective. This might prove an additional instance in which Rav Nachman concedes effectiveness for *bari ve-shema*.

This is the basic understanding of the halakha of *eini yodei'a im peratikha*. The Ri"f, however, offers a completely different reading of the *gemara*, one which prevents any conclusions from being drawn about the nature of *bari ve-shema* according to Rav Nachman.

A third application of this question pertains to our *gemara*. The mishna describes a dispute between the husband and wife about her physical status at the point of marriage with the consequences being the amount of *ketuba* owed. Rabban Gamliel trusts the woman to testify about her status and ultimately awards her the full *ketuba*. By contrast, Rebbi Yehoshua does not rely upon the woman and in protecting the *chezkat mammon* of the husband (who is in current possession of his money), forces the woman to muster more convincing proof to her claims. Initially, the *gemara* wanted to link Rav Gamliel's *shitta* with Rav Huna, and Rebbi Yehoshua's position with Rav Nachman's. Inasmuch as the woman can testify with certainty to her physical status at the time of engagement and the husband can only speculate, this serves as a classic case of *bari ve-shema* to the advantage of the woman.

Rabban Gamliel, who favors the woman, must accept Rav Huna's position that bari ve-shema is sufficient to override chezkat mammon, and hence the woman triumphs, whereas Rebbi Yehoshua must agree to Rav Nachman that bari ve-shema does not defeat chezkat mammon; hence, the husband, in possession of his funds, triumphs. The gemara rebuffs this approach by claiming that Rabban Gamliel could even adopt Rav Nachman's stance. Even though in general Rav Nachman does not endorse bari ve-shema, our situation is different in that there are other factors working in favor of the woman. The gemara lists both migu and chezkat ha-guf (an assumed physical status) as factors supporting the woman's claim that she was a betula at the point of engagement.

One way to read this gemara is to assume that Rabban Gamliel's position ends up being based solely upon migu or solely upon chezkat ha-guf, and in no way supported by the bari ve-shema. As the gemara is attempting to analyze Rabban Gamliel through the lenses of Rav Nachman, no support can be expected from bari ve-shema – a concept Rav Nachman denies. This approach invites certain problems. Can these forces which the gemara introduces independently overcome chezkat mammon? Migu in particular is a force which, at least according to several Tosafotim in shas (Bava Metzia 2a, Bava Batra 32b), is insufficient to independently overcome chezkat mammon. Similar reservations can be raised regarding chezkat ha-guf's ability to overcome chezkat mammon.

In response to these concerns, a different approach might be taken: Though Rav Nachman claims that bari ve-shema cannot independently overcome chezkat mammon when coupled with additional/accessory forces, it does possess sufficient strength to defeat a chezkat mammon. Migu alone cannot defeat chezkat mammon, nor, for that matter, can bari ve-shema, but taken together they possess sufficient strength to overcome the chezkat mammon. This view would be consistent with the aforementioned position that Rav Nachman does not outright reject the concept of bari ve-shema. Rather, he views it as inadequate when facing off against chezkat mammon. Applying it in the absence of chezkat mammon, or teaming it with other forces, would each yield a situation in which even Rav Nachman accepts bari ve-shema.