But you derived benefit – הא איתהנית

Overview

The גמרא presented a query in the case where someone lived in another's חצר without his knowledge (where it was זה נהנה [for he was a גברא דעביד למיגר] and זה לא חסר [since it was a חצר דלא קיימא לאגרא]), is the squatter obligated to pay the landlord rent. On one hand the landlord suffered no loss, but on the other hand, the landlord can claim to the squatter, but you derived benefit from me, so therefore you are obligated to pay me. תוספות discusses the claim of the landlord in light of the fact that he was לא חסר, and differentiates between this query and a dispute elsewhere.

אפילו למאן דאמר בפרק קמא דבבא בתרא[1] (דף יב,ב) -

Even according to the one (רבה) **who maintains in the first פרק of ב"ב** מסכת -

כופין אותו על מדת סדום[2] ויהבינן[3] ליה אחד מצרא[4] –

We force him (שמעון) not to act **in the manner of סדום and we give him** (ראובן) his inheritance **on one boundary,** nevertheless -

שאני הכא שהיה יכול למונעו מתחילה מלדור בביתו[5] –

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[1] The case there is where one of the sons (ראובן) bought a property adjacent to one of his father's properties. After the father passed on, ראובן asked that his share of the inheritance should include the (father's) field which is adjacent to his field. [The brothers (שמעון) claim that we have the right to divide the estate by a lottery; if you wish we can relinquish this right by assessing the adjoining estate at a higher value (it is certainly worth more to that brother).] There is a dispute there between רבה who maintains that we give him the field (since כופין על מדת סדום [see footnote # 2]), and רב יוסף who maintains that they can raise the assessment of that field (for מעלינן ליה כנכסי דבי בר מוריון [see footnote # 6]) and refuse to give him that field at the regular market assessment (and insist on a lottery).

[2] In makes no difference to the brothers (שמעון) where ראובן receives his inheritance, they will neither lose nor gain if he inherits the adjacent field. However they feel they can pressure ראובן, by (unrealistically) raising the assessment of that field, causing a loss to ראובן. This type of conduct, of not allowing someone else to benefit from your assets, even though it causes you no loss is מדת סדום, as the משנה states in אבות פ"ה מ"ו, that he who says שלי שלי ושלך שלך וכו' זוהי מדת סדום.

[3] The question here is (according to רבה), why do we not say here as well that כופין על מדת סדום and the squatter is פטור, since the landlord is not losing anything; why should he care if someone else is gaining. This is a מדת סדום!

[4] We give him his inheritance (according to the market value) adjacent to the property he purchased so that the borders coincide אחד מצרא.

[5] The discussion of זה נהנה וזה לא חסר is only post facto, whether the squatter needs to pay when the landlord realized that he lived on his property without permission; however initially (or at any time), the landlord can evict the squatter from his property. No one has a right to use someone else's property without his permission. Therefore in our case it may not be considered a מדת סדום, for since the landlord has the right to prevent him, he also has the right to collect rent if he lived there without his permission. However there ראובן is not asking them to use their property (it does not belong [exclusively] to them; it is part of the estate), ראובן only wants to take his portion where it is beneficial to him and not detrimental to them, therefore we are כופין על מדת סדום.

Here it is different from there**, since** the landlord **could have initially prevented** the squatter **from living in his house -**

ולמאן דאמר התם מעלינן ליה כנכסי דבר מוריון[6] -

And according to the one (רב יוסף) **who maintains there**, that the brothers can say **we assess that** property as if they were **the assets of בר מוריון,** nevertheless it does not prove that רב יוסף maintains here that the squatter must pay -

משום דדמי למונע חבירו מתחילה[7] לדור בביתו אבל הכא כבר דר -

Because there they can prevent him from receiving his desired property for the market value, **since it is similar** to the case of a landlord who **can initially prevent** a squatter from **living in his house, however here** the squatter **already lived there;** the question is if he has to pay, perhaps רב יוסף agrees that he is not required to pay.

In summation: On one hand, there ראובן is asking of them only to relinquish their <u>right</u> of a lottery in the inheritance (but not their ownership), since they do not own it (so we say כופין על מדת סדום); however here he is using the property which <u>belongs</u> to the landlord (therefore he has to pay). On the other hand, there he is asking them to initially give up their rights (they may be not required to do so); however here it is post facto (therefore he need not pay).

תוספות asks:

ואם תאמר ההוא דתחב לו חבירו בבית הבליעה[8] דריש אלו נערות (כתובות דף ל,ב) -

And if you will say; that case **in the beginning of אלו נערות** פרק, **where a friend stuck something down his throat,** where the rule is that he is חייב if he ate it. But -

אמאי חייב האוכל זה נהנה וזה לא חסר הוא שאם היה מחזיר היתה נמאסת[9] ואין שוה כלום -

Why is the eater (שמעון) **חייב;** it is a case of **זה נהנה וזה לא חסר; for if** the eater (שמעון) **would have thrown it up** and not eaten it, **it would be nauseating and worthless,** so why should שמעון be חייב if we assume that זנוזל"ח is פטור?!

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[6] See תוס' ב"ב יב,ב ד"ה מעלינן ליה who writes that the מר מריון (בני) were wealthy and they would not sell their fields for the market value, but rather would demand a very high price. Similarly the brothers (שמעון) are saying to ראובן if you want this adjacent field you can have it only for a high price (above the market value).

[7] The brother (ראובן) did not as of yet receive the adjoining property (he wants to receive it), therefore since he did not inherit it yet, they may be justified in preventing him (just as a landlord is justified in not allowing anyone to live on his property and it is not מדת סדום), however once someone lived there already, the landlord has no right to demand payment, since he did not lose anything.

[8] The case there is where ראובן stuck food (which belonged to לוי) down the throat of שמעון. The rule is that if שמעון swallowed it (and did not throw it up); שמעון is חייב to pay לוי for the food.

[9] שמעון did not take anything from לוי (it was ראובן who took it and put it down his throat), the only reason to hold שמעון liable is because he swallowed it and did not return it. However even if שמעון would have returned it, it would be worthless, so לוי did not lose anything by שמעון swallowing it, therefore even though שמעון was נהנה, but לוי was לא חסר from s'שמעון benefit.

תוספות answers:

ויש לומר דלא דמי הואיל ונהנה מחמת החסרון[10] שהיה מתחילה -

And one can say that the גמרא in אלו נערות **is not similar** to זנוזל"ח, **since the benefit was derived on account of the initial loss.** This case -

מידי דהוי אהא דתנן[11] מתוך הרחבה[12] משלם מה שנהנית[13] -

Is similar to that which we learnt in a משנה; if the animal ate **from the square, he pays what she benefitted,** even though **-**

דאלעיסה לא מחייב[14] דהוי שן ברשות הרבים -

That she is not liable for chewing the food, **since it is שן in a רה"ר -**

אלא אהנאת מעיו מחייב[15] אף על פי שאם מחזירו אין שוה כלום:

But rather the liability is because of the benefit to its intestines, and seemingly the owner of the food is not a חסר for **even though if she would regurgitate it, it would be worthless**, nevertheless he is חייב for הנאת מעיו, since it came as a result of a חסר**.**

Summary

The query of זנוזל"ח is when one already used the property of another, but not when one is asked to initially relinquish his (potential) rights. זה נהנה וזה חסר is even if the חסר in not a direct result of the נהנה (but preceded it).

Thinking it over

In the case of מתוך הרחבה, the animal caused the חסרון, by eating it, it is exempt from paying for this חסרון since it is שן ברה"ר, but nevertheless it caused the חסרון, therefore it is understood why he pays for הנאת מעיו. However by תחב לו חבירו, the חסרון was caused by חברו, not by the one who ate it (for it was already worthless). How can תוספות compare these two cases?![16]

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[10] This is not case of זנוזל"ח, for the owner of the food is חסר (his food has been destroyed); it is merely that the אוכל did not cause the חסרון (his friend stuffed it down his throat). תוספות maintains that when there is a חסרון and a נהנה, even though the נהנה did not cause (or is not liable) for the חסרון, nevertheless since he is נהנה from a חסרון he is חייב. See footnote # 15.

[11] יט,ב.

[12] The רחבה is the town square which is a רה"ר.

[13] רבא considers this to be a case of זנוזל"ח (see immediately on this עמוד).

[14] While the animal was chewing the food (and making it inedible) he is not liable, since it is שן ברה"ר which is פטור.

[15] The payment is due for the benefit which the animal received; for it is satiated (it does not need to eat). However this הנאה was after the food was already worthless, so it is a זנוזל"ח, and nevertheless he is חייב. This proves what תוספות previously stated that if the הנאה comes on account of the חסרון he is חייב (even though he is not liable for the חסרון). See footnote # 10.

[16] See חי' ר' נחום אות צב בד"ה והנה.