

טעמא דניקה הא מקיף פטור –

The reason is for it is the ניקה; however if it was the מקיף he is פטור

OVERVIEW

The גמרא cites the view of ר' יוסי (who argues on the רבנן), to resolve the query regarding זנוול"ה. Our תוספות first explains how we can derive a ruling from ר' יוסי if the רבנן disagree with him, and then continues to explain the ramification of this proof.

תוספות responds to an anticipated difficulty:¹

ואפילו רבנן לא פליגי אלא משום דאמר ליה את גרמת לי הקיפא יתירא -

And even the רבנן (who maintain that the ניקה is חייב if the מקיף made all four walls) **do not argue** (in principle with ר' יוסי that זנוול"ה is פטור), **but rather** in this case they maintain that the ניקה is חייב, **since** the מקיף **says to the ניקה**, 'you caused me a יתירא' (so the מקיף is a חסר), but otherwise they agree with ר' יוסי that זנוול"ה is פטור).

תוספות asks:

ואם תאמר ואי זה נהנה וזה לא חסר פטור אפילו עמד ניקה נמי² -

And if you will say; and if זנוול"ה is פטור, the ניקה should be פטור **even if the ניקה arose** and made the fourth wall; why does ר' יוסי distinguish whether it was עמד מקיף or עמד ניקה; in both cases it is זנוול"ה.

תוספות answers:

ויש לומר שאני עמד ניקה דגלי אדעתיה דניחא ליה בהוצאה -

And one can say; the case of עמד ניקה is different, since the ניקה revealed his intention **that he is pleased to spend** money for a fence -

ולא דמי לדר בחצר חבירו דלא גלי אדעתיה³ אלא⁴ בחנם:

So it is not similar to the case where one lives in the חצר of his friend, where he

¹ See 'Overview'. See 'Thinking it over' # 1.

² When the מקיף made all four walls (which afforded the ניקה proper protection, nevertheless) the ניקה is exempt from paying, since it is זנוול"ה; the same should apply where the מקיף made only three walls (which is insufficient protection). Why does the making of the fourth wall by the ניקה exclude him from זנוול"ה?

³ See 'Thinking it over' # 3.

⁴ The query of זנוול"ה is only in a case where the נהנה does not wish to pay (anything) for the benefit he receives (as in the case of מדעתו שלא מדעתו); can the בעל החצר obligate the דר to pay since the דר was נהנה, or not since the בעל החצר is a חסר. However in a case where the נהנה is willing to pay (like here where the ניקה paid for the fourth wall), he is then obligated to pay for the entire הנהגה of four walls. See 'Thinking it over' # 2.

did not reveal any intention of willingness to pay, but rather he only wants to live there **for free**.

SUMMARY

The query regarding זנוזל"ה is only where there is no indication that the נהנה is willing to pay; otherwise the נהנה must pay the full amount of the benefit.

THINKING IT OVER

1. תוספות (in his explanation how can we bring proof from ר' יוסי if the רבנן argue) states that the (only) reason the רבנן argue is because of יתירא לי הקיפא.⁵ However, perhaps the רבנן argue because they maintain זנוזל"ה is חייב and argue with ר' יוסי. How does תוספות resolve the difficulty?⁶

2. תוספות explains that the case of מקיף וניקף is different than חבירו בחצר, since גלי דעתיה דניחא ליה בהוצאה was ניקף.⁷ However this גלי דעתיה was only regarding a fourth wall (but he was never מגלה דעת regarding the previous walls), why do we obligate him to pay (his share) for all the walls?⁸

3. תוספות writes that by חבירו בחצר he was not גלי דעתיה to pay, but rather he wants to live there בחנם.⁹ However the גמרא said previously that we are discussing a גברא דעביד למיגר, meaning that he is willing to pay rent, so how can תוספות write that גלי דעתיה אלא בחנם?!

⁵ See footnote # 1.

⁶ See נחלת משה.

⁷ See footnote # 4.

⁸ חי' ר' נחום אות קא and ואילך # 71 אוצר מפרשי התלמוד.

⁹ See footnote # 3.