He has money; but no improvements – מעות יש לו שבח אין לו

Overview

The גמרא cites a מחלוקת between רב and שמואל in a case where the buyer was aware that he is purchasing a stolen field, which he then improved; after the נגזל retakes his field does the buyer have any recourse? According to רב the buyer can collect his money that he paid but cannot collect his improvements while שמואל maintains he cannot collect anything. תוספות cites a conflicting גמרא and reconciles the difference.

תוספות asks:

תימה בהגוזל קמא (בבא קמא דף צה,א ושם,ב דיבור המתחיל דלמא) תנא -

It is astounding! For **in הגוזל קמא** פרק the גמרא cites a ברייתא which **teaches;**

ה' גובין מן המחוררין שבח –

'Five creditors may **collect from the unencumbered** properties,[1] for the **improvements'** that were made in the field. One of the five is (as was mentioned in the ברייתא previously[2]) one who purchases from a גזלן, where the purchaser collects from the seller (his initial payment and) the value of the improvements that he made in the field which the נגזל took away from him.

ומוקי לה[3] בתלמיד חכם דידע דקרקע אינה נגזלת אלמא אפילו בהכיר בה יש לו שבח -

And the גמרא there **established** this ברייתא **by a תלמיד חכם who knows that קרקע cannot be stolen; indicating that even when** the purchaser **was aware** that **this** property does not belong to the seller, nevertheless the buyer

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[1] They cannot collect however מנכסים משועבדים.

[2] ב,יד.

[3] The ברייתא there states that according to ר"מ if someone steals a cow and it gave birth, the גזלן must return the cow and the calf. And even though generally the rule is that if there was change in the stolen article it belongs to the גזלן, nevertheless ר"מ punishes the גזלן, and the נגזל collects the שבח (the calf). The גמרא there queried whether ר"מ imposes this קנס even by a שוגג; for instance if one bought the cow from a גזלן and then it gave birth, does the נגזל collect the שבח. The גמרא there attempted initially to prove from this ברייתא of חמשה גובין מן המחוררין (where the נגזל keeps the שבח) that we punish whoever changes the status of stolen property even if he did so inadvertently. The buyer (if he was not a ת"ח) assumes that if he changes the status of the property it will belong to him (for שינוי is קונה); he did not distinguish between מטלטלין (where שינוי is קונה) and קרקע (where the rule is that קרקע אינה נגזלת). The buyer mistakenly assumed that even if this is a stolen field, my improvements will be considered a שינוי and therefore the (field and the) שבח cannot be taken away from me. The גמרא concludes that we are discussing a buyer who is a ת"ח who knows that קרקע אינה נגזלת (where it is always considered in the רשות of the נגזל) and it was a stolen field (for if he did not know that it was stolen then he is still a שוגג) and therefore the change that he made is considered a מזיד and not a שוגג, and by מזיד there is a קנס that שינוי is not קונה and therefore the נגזל collects the שבח. What is relevant to us is that the case there is where the buyer is aware that it was a stolen property and nevertheless he collects the (principle and the) שבח from the גזלן (from his בני חורין).

(the ת"ח) **collects the שבח** from the גזלן! This contradicts the ruling of רב [and שמואל]!

תוספות answers:

ויש לומר דהתם מיירי כשקיבל עליו אחריות:[4]

And one can say; that there the ברייתא **is discussing** a case **where** the seller **accepted responsibility** to compensate the buyer for whatever loss he will incur. Therefore he can collect the שבח (and the קרן). The case of רב ושמואל, however, is where the seller did not accept אחריות.[5]

Summary

In a case of הכיר בה שאינו שלו there is a difference whether there was אחריות [in which case the buyer is compensated for the שבח], or there was no אחריות [in which case the buyer is not compensated for the שבח (and not even the קרן according to שמואל)].

Thinking it over

1. It seems that תוספות question is on רב who maintains שבח אין לו. Why is there no question on שמואל who maintains מעות אין לו (and שבח אין לו)?!

2. How can we reconcile the גמרא in ב"ק with the view of שמואל who maintains[6] that by a לוקח מן הגזל even if there was אחריות, the buyer cannot be compensated for the שבח since it is מחזי כרבית?[7]

3. תוספות differentiates between the גמרא in ב"ק (where there was אחריות) and the גמרא here (where there was no אחריות).[8] However תוספות taught us previously that by גזילה the rule is אחריות טעות סופר, so seemingly there is no difference whether it was sold באחריות or not![9]

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[4] Therefore since there was a stipulation of אחריות we cannot assume that it was either a פקדון or a מתנה. Rather it is a 'regular case' of one who purchases (unknowingly) from a גזלן, where he is compensated (even) for the שבח (according to רב). See 'Thinking it over' # 2.

[5] See 'Thinking it over' # 3.

[6] יד,ב.

[7] See מהרש"א and מהר"ם שי"ף.

[8] See footnote # 5.

[9] See מהר"ם שי"ף.