אלא בספינה סתם ויין זה אם לא נתן אמאי לא יתן לימא ליה הב לי חמרא ואנא מייתינא ספינה – Rather by an unspecified boat and this wine; if he did not give, why should he not give; let him say, 'give me wine and I will bring a boat

Overview[1]

The גמרא asked, in the case of the sunken ship and wine, where the משכיר said ספינה סתם and the שוכר said יין זה, why is the ruling that if he did not pay the rental, he is not obligated to pay, seemingly he should be obligated to pay since the משכיר can argue, 'bring me the wine (which the שוכר cannot, since it sunk [and he said יין זה]), and I will bring a boat' (which the משכיר can, since he said ספינה סתם).

לא מבעיא אם כבר נתן שלא יטול אלא אפילו לא נתן יש לו לתת כל השכירות -

There is no doubt (in this case) that **if** the שוכר **already paid** the rental, **that he cannot take** it back, **rather** the גמרא is asking **even if he did not pay** the rental yet, the שוכר **should be obligated to pay the entire rental** (for the whole way) -

שהרי קנה המשכיר כל השכירות במשיכת[2] השוכר את הספינה -

for the משכיר is owed the entire rental payment **when the שוכר pulled the boat -**

כיון שמזומן המשכיר לקיים תנאו -

Since the משכיר is ready to fulfill his stipulation to transport the wine to the designated destination.

תוספות offers an alternate explanation[3] why the שוכר is obligated to pay the entire rental:

או אפילו בלא משיכה כיון שמשכיר יכול לקיים תנאו ושוכר אינו יכול לקיים -

Alternately, the שוכר is obligated to pay the rent **even without משיכה, since the משכיר can fulfill his obligation** (to provide a boat) **and the שוכר cannot fulfill** his obligation (to provide the stipulated wine since it sunk), so -

אם כן מזלו[4] גרם והוי כחוזר בו ויתן לו מחצי הדרך שלא הלך כפועל בטל[5] -

Therefore it is **the מזל** of the שוכר **which caused** this mishap, **so it is like** an

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[1] See 'Overview' to תוס' ד"ה אילימא.

[2] One acquires a movable object (including a ספינה), by pulling the object – קנין משיכה. This קנין is valid for rentals as well as for purchases. Once the שוכר made the משיכה, he becomes the שוכר and is obligated to pay the entire שכירות.

[3] This explanation assumes that we dismiss the idea of משיכת הספינה (perhaps because there was no משיכה).

[4] מזל literally means constellation; referring to the astrological signs. In the vernacular it means 'luck'.

[5] כפועל בטל literally, 'like an idle worker' is the amount of money a worker would be willing to accept and not have to work. If for instance he receives ten זוזים a day for work; he would be willing to accept eight זוזים (for instance) and not have to work. Here too the בעל הספינה does not have to work for the second half of the trip (they are not taking it), therefore he is compensated כפועל בטל. Presumably the משכיר is the captain of the ship and he sails with it.

employer **who retracted** from hiring an employee,[6] in which case the שוכר should be required **to pay him כפועל בטל for the half way**, which he did not go.

תוספות asks:

וקשה דאמאי יתן לו כלל מחצי הדרך שלא הלך אפילו כפועל בטל כיון שאירעו אונס[7] -

And there is a difficulty; for why should the שוכר **pay him anything, even כפועל בטל, for the half way which he did not go, since it was an** unavoidable **accident -**

הא אמרינן לעיל (דף עז,א) **היכא דהשוכר אנוס דאתא מיטרא[8] דאין צריך להשקותה -**

For we said previously in a case **where the employer was an אנוס, for the rain came so it was not necessary to irrigate** the field, the rule is -

דהוי פסידא דפועלים -

That it is the loss of the workers, and the employer is exempt from paying anything -

ומשמע לעיל[9] דכל אונס שאירע לבעל הבית שלא היה לו לידע יותר מן הפועלים -

And it seems previously in the גמרא **that any אונס which happened to the employer that he could not know any more than the workers** that it would happen (as in the case of rain, where everyone was equally aware that it may rain) -

הוי פסידא דפועלים -

It is the loss of the workers, so why is the שוכר obligated for the second half of the trip, since it is an אונס (he was no more aware than the בעל הספינה that it may sink)?!

תוספות responds to an anticipated resolution to his question:[10]

והכא נמי על כרחך פריך שיתן אפילו שכר חצי הדרך שלא הלך

And also here, perforce the גמרא **is asking that he should pay the rental, even** for **the half way that he did not go.** תוספות proves his contention -

מדניחא ליה הא דקתני אם נתן לא יטול דמשמע[11] אם נתן כל שכרו לא יטול כלל[12] -

Since the גמרא is **satisfied with what is stated that if he paid, he cannot take** it

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[6] The employer who reneges on his employee and cannot give him the work that he promised, must pay the worker כפועל בטל. See previously ב,עו. Here the בעל היין is considered the employer (he is hiring the בעל הספינה to transport his wine); since the בעל היין cannot give his worker (the בעל הספינה) work (the יין זה sunk) he must pay him כפועל בטל.

[7] An employer must pay כפועל בטל, only if he reneged or was at fault for not informing the workers, but not if he is an אונס, on par equally with the employees.

[8] He hired workers to irrigate his field and during the night it rained, so there was no need for the workers to irrigate. The employer and the employees were both aware that it may rain and their work will not be necessary. The בעה"ב is an אונס; he knew what the פועלים knew.

[9] See תוס' עז,א סוד"ה ואתא.

[10] Perhaps when the גמרא asked, 'אם לא נתן אמאי לא יתן', the גמרא was discussing the first half of the way, not the second half, therefore תוספות has no question, for he took him the first half the way.

[11] See (the end of) the previous תוס' ד"ה אילימא [TIE after footnote # 9]. See 'Thinking it over'.

[12] If we assume (as mentioned in footnote # 10) that we are discussing the first half only, so why did not the גמרא ask, why is the rule אם נתן לא יטול כלל; he should receive back the payment for the second half!

back, **which indicates that if he paid the entire rental, he cannot take anything back** (even for the half that he did not go). The question remains why does he have to pay for the second half, since it was an אונס.

תוספות answers by distinguishing between the workers and the ספינה:

ותירץ רבי יהודה בר נתן[13] דלעיל שהפועלים לא אבדו כלום[14] רק שנתבטלו אין נותן להם כלום -

And the ריב"ן answered, that previously where the workers did not lose anything, they were merely idle from work, therefore the employer **pays them nothing** since it was an אונס (that they were both equally (un)aware of) -

אבל הכא שהמשכיר הפסיד ספינתו[15] כפועל בטל מיהא איתליה כיון שמזומן לקיים תנאו:

However here where the משכיר lost his boat, he deserves to receive at least כפועל בטל, since he is ready to fulfill his obligation.

Summary

Where the employer and employee were both equally aware of a possible calamity, the employer need not pay, unless the employee suffered an actual loss, where he is paid כפועל בטל.

Thinking it over

It seems from תוספות than when the גמרא asked אם לא נתן אמאי לא יתן, it can be construed to mean that he should pay for the first half only;[16] however when the ברייתא stated אם נתן לא יטול it means that even if he paid for everything he receives nothing back.[17] Why, therefore does תוספות not ask his question directly on the רישא of the ברייתא; 'why is it that אם נתן לא יטול כלל, why should he not receive back the rental for the second half' (instead of asking on the סיפא and need to prove from the רישא that he is required to pay for the second half)?![18]

[13] The ריב"ן was s'רש"י son-in-law. (See נוסחת הריב"ן on the margin to מסכת נזיר.)

[14] They lost their anticipated wages but they did not lose anything which was theirs. This is called מניעת הריוח.

[15] The בעל הספינה lost the ספינה on account of the שוכר (he was transporting his wine); however the בעל היין lost his wine because he wanted to transport it not because the בעל הספינה asked him to transport it.

[16] See footnote # 10.

[17] See footnote # 11.

[18] See אוצר מפרשי התלמוד and מהרש"א # 69-70.