NEHENE V'YORED PART II

Rav Yosef Greenwald, Dayan at the Bais Havaad

A TRANSCRIPTION OF THE YORUCHA CURRICULUM WEEKLY SHIUR VIDEO

ZEH NEHENEH V'ZEH LO CHASER

In the previous shiur, we discussed the definition of *neheneh* and how it is similar to *mazik* and *geneivah* in that both involve taking something, but different from *mazik* and *geneivah* in that there is no wrongdoing on the part of the *neheneh*. In this overview, we will analyze the definition and guidelines of *neheneh* and whether it includes cases where no loss is incurred on the part of the owner.

The Gemara (Bava Kamma 20b) has a lengthy discussion concerning the status of *zeh neheneh v'zeh lo chaser* (one benefits and the other does not lose anything). For instance, a homeowner (Reuven) at a bungalow colony, hotel suite, or private home goes away for a few days and the neighbor (Shimon) decides to allow his guests to use the empty property. Is Shimon *chayav* to pay for the *hanaah* of its use? The Gemara clarifies that if the property was normally used for renting and now cannot be used due to Shimon's presence, and Shimon would have otherwise paid to rent out the property, then Shimon is certainly liable to pay for the *hanaah* received. However, the Gemara concludes that if the property is not usually rented out, then he is *patur* from any payment. The reason for this, as explained by the Acharonim, is that as discussed previously, *neheneh* is defined as taking, but if the owner did not incur any loss, then by definition, nothing is considered to have been taken.

MIDAS SODOM

Tosafos (Bava Kamma 20b and Bava Basra 12b) explains the reason for this halacha as stemming from the principle of *kofin al midas sedom*, we compel a person to do something where such refusal would be defined as a trait of Sodom. This principle, as described in the Gemara Bava Basra, refers to a case where, for example, two brothers or partners divide real estate and one of them wishes to take the north side because he has an adjacent field. In such a case, assuming all else is equal, we compel the second brother or partner to allow him to do so, since *kofin al midas sedom*, it does not cost the second party any money or other loss to allow the first to take the north side. In other words, *Sodom* was a place where the owner views the benefit of another person as his own loss even if he does not actually suffer any tangible loss. In the Torah's view, this approach is unacceptable.

In the case above about dividing up a property, the Gemara indicates that this principle is not a strict halachic one related to Choshen Mishpat, but rather one relating to ethics and conducting oneself in an upright manner. The Rosh phrases this even more clearly that it is "inappropriate" for one party to prevent the other from taking the portion he desires for no good reason. However, Tosafos suggest that in our context of *zeh neheneh v'zeh lo chaser*, there is a halachic Choshen Mishpat rule as well, i.e., where Shimon does not cause any loss to Reuven he need not pay for his stay since Reuven may not demand payment when he did not suffer any loss himself.

IS ZEH NEHENEH V'ZEH LO CHASER PERMITTED LECHATCHILA?

It is important to stress that according to Tosafos, *kofin al midas sodom* is employed only to exempt the *neheneh* from payment *b'dieved* if he already used the property. However, Tosafos emphasizes that *lechatchila*, no one may use the property without prior permission from the owner. One reason given by the poskim for this is that *"ein lecha hefsed gadol mizeh"* (there is no greater loss than this), as forcing the owner to grant permission would remove his *ba'alus* from the property entirely, which is certainly not permitted. Consequently, *kofin al midas sedom* does not permit Shimon (the neighbor) to demand that Reuven (the homeowner) allow him to house guests in his home if Shimon goes away for a few days.

The Rema (C.M. 363:6) gives a different explanation for why *kofin al midas sedom* does not allow Shimon to use Reuven's empty house *lechatchilah*. According to the Rema (citing the Mordechai), the reason is that the property could have been rented out by Reuven to earn a profit. Even if he chooses not to do so for whatever reason, the fact that he had the potential to rent it allows him the right to refuse any requests to use it for free.

According to this approach, one might argue that if someone wishes to use space that cannot be rented out, such as a storage area, without incurring any costs, the owner would be compelled to agree. However, the Pischei Teshuvah writes

that most Acharonim accept the first approach that forcing the owner to grant permission to use his property is always defined as taking due to his loss of *ba'alus* and the ability to make his own decisions about the property.

A SMALL LOSS

Returning to the case where Shimon already housed his guests in Reuven's house without permission, does *zeh neheneh v'zeh lo chaser* apply practically today in such a case? Although in principle, as mentioned, Shimon would be exempt from any payment, the fact that the guests use the bathroom and electricity certainly is defined as taking something, at least in small quantities, as both services cost money.

The Tur cites the opinion of the Ramah who holds that in such a case, Shimon is responsible only to pay the value of the loss to the owner, which would presumably not amount to more than a few dollars for the water used in the bathroom and the electricity, if no other utilities are used. However, the Shulchan Aruch (C.M. 363:7) *paskens* that if the owner is *chaser* even a minute amount due to the guests, *"megalgelin alav es hakol,"* they must pay the entire value of the *hanaah*. Accordingly, even if the guests only cause the owner the loss of a few dollars for water and electricity, they must nevertheless pay the full price of a comparable rental, which is a far greater sum of money.

The halacha may be different in this regard with respect to unused storage space. For example, if Shimon (the neighbor) decides to use a porch belonging to Reuven (the homeowner) to store some boxes while Reuven is away, or one neighbor wishes to use another neighbor's *machsan* (storage area in an apartment building in Israel), absolutely no expenses would be incurred. In such a case, Shimon would not be liable to pay Reuven any costs after the fact.

SHO'EL SHELO MIDAAS

The Pischei Choshen raises an additional question concerning *zeh neheneh v'zeh lo chaser*. How could there be a discussion as to whether *kofin al midas sedom* allows Shimon to use Reuven's house in a case of no loss (which, as we saw, Rishonim and Acharonim offered different explanations for) - shouldn't this be similar to the principle of *sho'el shelo midaas gazlan hu* (one who borrows without permission is considered a thief)? Why would one who enters another's property without permission not be considered a *gazlan* the same way he would be if he borrows someone else's car without permission?

The answer is that a distinction exists between movable goods and real estate. With respect to movable items, one can physically take and use the item, while real estate cannot be moved. Therefore, just as we say *"karka eina nigzeles"* (land cannot be stolen), so too, we do not automatically treat using another's property as borrowing without permission. Having said that, the Chasam Sofer and Minchas Yitzchok develop the point that many indeed feel that their privacy has been invaded when others use their home, even if no financial expenses were incurred. This may very well qualify as *sho'el shelo midaas* and be subject to the category of *gezeilah*, at least *l'chatchila*. If so, the classic cases in the Gemara subject to *zeh neheneh v'zeh lo chaser* may be more similar to those of storage space, where the owner is not bothered if a squatter used his storage space to sleep, and therefore the only discussion relates to whether *hanaah* was derived or not.

IN SUMMARY

To summarize, the halacha is that in a *b'dieved case of zeh neheneh v'zeh lo chaser*, where Shimon uses Reuven's property without permission but without causing any loss, he is not liable to pay anything. Even *lechatchila*, the Rema implies that if the property is not marketable (e.g., storage space), one would be compelled to allow its use. Nevertheless, the poskim rule *lemaaseh* that even in such a case, one may not use the property *lechatchila* because it is still defined as taking.

In a case where a small amount of expenses is incurred, Rishonim disagree whether Shimon must pay only for the value of the loss or for the full value of the *hanaah*, and the halacha is in accordance with the latter opinion. Consequently, if one invites friends to stay in an unused hotel suite, they would have to pay for the full normal value of the rental if they use any electricity, water, or the like.